REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 44 OF 2014

(From Original Conviction and Sentence in Tononoka Children's Case No. 24 of 2014 at Mombasa – **Hon. Koech Ag SRM**)

FAUZIA NASONGA KASSIM .....……..APPLICANT

VERSUS

REPUBLIC …….…….....…RESPONDENT

RULING

This revision application is brought by way of a letter dated 8th September, 2014 from the Advocate for Applicant.

It seeks review principally on two grounds;

(1) Whether there was a Conviction prior to the Sentence and whether the facts given disclosed an offence.

(2) Whether it was proper for the trial magistrate to impose the maximum Sentence on a first offender.

The Applicant was arraigned in Court for the charge of infridging a childs right to parental care contrary to Section 6(1) as read with Section 20 of the children's Act No. 8 of 2011.

Section 20 of the children's Act which is the punishment section provides,

> ***"Notwithstanding penalties contained in any other law, where any person willfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in Sections 5 – 19 such person shall be liable upon summary Conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine".***

In the present case the learned trial magistrate Sentenced the Applicant to one year imprisonment which is the maximum Sentence provided for by law.

In the case of **Otieno –Vs- Republic 1983 KLR page 295** porter cited with decision in the Court of Appeal decision in case of Josephine **Arrosal –Vs- Republic EALR page 447** it was held,

> ***"It is unusual to impose the maximum Sentence on a first offender and it would be wrong to deport from that rule, even if, on the evidence, the Accused person might have been Convicted of a graver offence".***

A perusal of the record of proceedings indicate that the Accused had been treated as a first offender and in her Sentencing notes the trial magistrate had appreciated the fact that the Accused was a first offender before Sentencing her to the maximum Sentence provided by law.

A further perusal of the records shows that after the facts were read over to the accused she did admit them to be correct. The trial magistrate did not at that stage proceed to find her guilty on plea and Convict her but she instead proceeded to call for her previous records. This was a fatal error as no Sentencing can lie where there is no Conviction.

Section 362 of the Criminal Procedure Code donates power to the High Court for revision in the following manner,

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, and as to the regularity of any proceedings of any such subordinate Court".***

Upon calling for and examining the record of proceedings from the subordinate Court I am satisfied that this is a fit case for revision.

In the first case there is no Conviction so there is nothing for this Court to quash. It follows that the Sentence must be set aside, as I hereby do. The Applicant is set at liberty unless otherwise lawfully held.

Ruling delivered dated and signed in open Court this **21st** day of **October, 2014.**

….....

M. MUYA

JUDGE

21ST OCTOBER, 2014

In the presence of:-

Learned Counsel for the Applicant Mr. Egunza holding brief Gakuhi Advocate

Learned Counsel for the Respondent Mr. Masika

Court clerk Musundi