



REPUBLIC OF KENYA

IN THE HIGH COURT

AT  
MAC  
HAK  
OS

Crimi  
nal  
Revisi  
on 4  
of  
2011

1. BASHIR  
MOHAMMED  
SOMO

2. ALI HASSAN .....ACCUSED

VERSUS

REPUBLIC .....RESPONDENT

**RULING ON REVISION**

By a letter dated 8<sup>th</sup> February, 2011 **Messrs C.K. Nzili & Co. Advocates** acting on behalf of the accused in Mwingi Senior Resident Magistrate's Court, **Criminal Case number 107 of 2011 Republic vs Bashir Mohammed Somo and Ali Hassan Abdi** invited this court to invoke its revision jurisdiction and set aside the jail term of 3 months without an option of a fine imposed on the accused by **Hon. H.M. Nyaberi**, Senior Resident Magistrate at Mwingi on 7<sup>th</sup> February, 2011.

Briefly, the facts of the case were that the accused were arraigned before the said court on 7<sup>th</sup> February 2011 charged with harbouring foreigners contrary to section 13(2) of the Immigration of Persons act. It was alleged that the duo on 5<sup>th</sup> February 2011 at Ukasi Police Barrier along Garissa-Mwingi road within Mwingi East District of Kitui County, being a driver and co-driver respectively of motor vehicle registration number KAE 194W, Toyota Land Cruiser, harboured 19 Somali aliens who were unlawful present in Kenya. The accused pleaded guilty to the charge, were convicted and sentenced to 3 months imprisonment without an option of fine. The court also ordered that their vehicle aforesaid be detained at Ukasi Police Station until further orders of the court.

Being aggrieved by the sentence, the accused have now moved to this court beseeching it to exercise its jurisdiction in revision and reverse the sentence aforesaid on the ground that;-

- The learned trial magistrate did not consider their mitigation
- The learned trial magistrate did not consider that they were first offenders, and
- The learned trial magistrate did not consider that the accused were suffering from diabetes and asthma respectively.

The jurisdiction of this court in matters of revision is donated by section 362 of the Criminal Procedure Code. That jurisdiction can only be invoked where this court seeks to satisfy itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings before the subordinate court.

Looking at the complaints by the accused, they do not fall in any of the above grounds. They are not complaining that the proceedings in the subordinate court were incorrect, illegal or that there was impropriety. Neither are they saying that the sentence imposed was irregular or illegal. All they are complaining about is the harshness of sentence. Sentencing is a matter for the discretion of the trial court. The harshness of the sentence cannot be the subject of revision. Again the exercise of discretion cannot be the subject of revision unless it is demonstrated that the sentencing court exercised the discretion capriciously or whimsically. I do not discern such an outcome in the sentence imposed.

The harshness or excessiveness of a sentence is in any event, a matter for an appeal and not revision. Section 364(5) of the Criminal Procedure Code provides *inter-alia* that-

***“When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the insistence of a party who could have appealed...”***

This provision locks out completely this court from entertaining these proceedings. This is the 2<sup>nd</sup> ground upon which this request for revision ought to fail. It is so ordered.

**RULING DATED, SIGNED and DELIVERED at MACHAKOS this 15<sup>TH</sup> day of JUNE 2012.**

**ASIKE - MAKHANDIA  
JUDGE**