



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 356 of 2006**

(From original conviction and sentence in Criminal Case No.3306 of 2006 of the Chief Magistrate's Court at Makadara – Mrs. Nzioka PM).

MARIA LALAWOLY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

MARIA TALAWOLY, the appellant, was charged in the subordinate court with the offence of possession of counterfeit papers contrary to section 367(a) of the Penal Code. The particulars of offence were that on 31st May 2006 at Hamza Estate Nairobi within Nairobi Area was knowingly found in possession of papers used for currency notes namely US Dollars. She was charged with a second count of being unlawfully present in Kenya contrary to section 13(2)(c) of the Immigration Act (Cap.172). The particulars of the offence were that on 31st May 2006 at Hamza Estate in Nairobi within Nairobi Area being a Liberian citizen was found unlawfully present in Kenya in that she had no passport or valid permit to enter Kenya.

On 14/6/2006 when the charges were first read to her, she pleaded not guilty. However, on 4/7/2006, she pleaded guilty to both counts. She was accordingly convicted and sentenced to serve 3 years imprisonment in respect of count 1, and 6 months imprisonment in respect of count 2. The sentences were to run concurrently. Being aggrieved, she appealed to this court against sentence.

At the hearing of the appeal, the appellant submitted that she had dependant children who were suffering. She submitted that her daughter was now moving from place to place without any fixed abode. She submitted that she was sorry and would not do any similar thing again.

The learned State Counsel, Mrs. Kagiri, submitted that the appellant pleaded guilty and did not waste the court's time. Though the sentence was legal, counsel urged this court to consider that the appellant was remorseful. Counsel urged me to consider the conditions and circumstances in the country origin of the appellant, Liberia.

In response the appellant submitted that she could not get a passport to his country because her country was at war.

This is an appeal against sentence. Sentence is essentially the discretion of the sentencing court. An appellate court will be slow to interfere with the exercise of that discretion unless it is shown that the sentencing court took into account an irrelevant factor or that it failed to take into account a relevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that an

error of principle must be interfered – see **SHADRACK KIPROTICH KOGO –VS- REPUBLIC – Criminal Appeal No.253 of 2004 Eldoret (CA).**

The maximum sentence for an offence under section 367(a) of the Penal Code (Cap.63) is 7 years imprisonment. On the other hand, the maximum sentence for an offence under section 13(2) (c) of the Immigration Act (Cap.172) is a fine of Kshs.20,000/= or imprisonment for 1 year or both. The appellant was a first offender. She pleaded guilty to the charges. The magistrate took into account that the appellant was a first offender. The magistrate also took into account the appellant's mitigation. However, the magistrate sentenced the appellant to serve approximately half of the maximum sentence for a first offender who pleaded guilty without any evidence of aggravating circumstances. It is also clear that the magistrate did not take into account the fact that the appellant pleaded guilty and did not waste the time of the court. The sentences are perfectly legal. However, in my view, had the magistrate taken into account the fact that the appellant pleaded guilty and did not waste the court's time, she would not have sentenced her to serve half of the maximum prison sentences provided by law, without even an option of a fine for the second count. For that reason, I find justification in interfering with the sentence imposed by the learned magistrate.

Consequently, I set aside the sentences for the two offences and order as follows ?

- 1. On the first count the appellant will serve 2 years imprisonment.**
- 2. On the 2nd count she will serve 3 months imprisonment.**
- 3. The sentences will be concurrent and will run from the date on which the appellant was sentenced by the subordinate court.**

It is so ordered.

Dated and delivered at Nairobi this 7th day of November, 2007.

George Dulu

Judge

In the presence of ?

Appellant in person

Mrs. Kagiri for State

Eric – court clerk