



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 454 of 2006**

(From original conviction(s) and Sentence(s) in Criminal case No. 1232 of 2005 of the Chief Magistrate’s Court at Nairobi (A.O. Muchelule – CM))

**RIYADH ABDUL HAFEDH.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

**RIHADH ABDUL HAFEDH** a Yemeni National was convicted for two offences under the **Immigration Act** as follows: -

Count 1 - Possessing and using a passport with a forged endorsement contrary to **Section 13(1)** (d) of the Act.

Count 2 – Being unlawfully present in Kenya contrary to **Section 13(2) (c)** of the Act.

He pleaded guilty to both counts and was sentenced to 4 months imprisonment in each count with prison terms ordered to run concurrently. The learned trial magistrate also recommended repatriation of the Appellant after sentence.

When the case came up for the hearing of the appeal, **Mr. Otieno** argued only one ground of appeal which was that the sentence was excessive in the circumstances of the case. Counsel relied on two authorities **MITA vs. REPUBLIC [1969] EA 598** and **ABDUL KADIR AHMED HANSHI vs. REPUBLIC, MACHAKOS HCCRA NO. 133 OF 2002** (unreported). In both these cases, the courts held to the effect that where an option of a fine is given as one of the sentencing options to a charge, the court should impose a fine unless for some reason which should be stated.

**Mr. Otieno** also submitted that the Appellant was a young man of 21 years, was a first offender and a student. He submitted that there was nothing on record to preclude the imposition of a fine.

**Miss Wafula**, learned counsel for the State did not oppose the appeal. Counsel submitted that going by the cited cases the State conceded to the Appellant’s appeal and did not oppose the reduction of the sentence to a fine.

I have considered this appeal. The Appellant was not given an option of a fine and yet in both counts, the option of a fine is one of the sentencing options provided under the law in question. The learned trial

magistrate remarks before passing sentence were as follows: -

**“Sentence**

**1<sup>st</sup> offender,**

**Pleaded guilty,**

**I noted plea in mitigation,**

**4 months jail on each to be concurrent,**

**Recommended to be repatriated,**

**Right of Appeal 14 days,**

**A.O. MUCHELULE**

**CM**

**10/7/06”**

Looking at the court proceedings, no reasons were given why the court imposed a prison term and why a fine was thought to be inappropriate. While exercising its discretion in sentence, it is advisable that reasons be given on record to show what the trial court considered to determine the kind of sentence awarded. In this case having considered that the accused person had pleaded guilty, was a first offender and his mitigation to the effect he was misled by a friend to use the passport in question, these circumstances weighed more in favour of the award of a fine than of imprisonment unless reasons were given to indicate otherwise. None were given. In the circumstances the sentence of imprisonment without the option of a fine was harsh.

The Appellant was jailed for 4 months on 10<sup>th</sup> July 2006. He has served 2½ months of this sentence which means he has served a substantive part of the sentence. I will allow the appeal and reduce the sentence to the period already served. The order for repatriation however still stands.

Dated at Nairobi this 21<sup>st</sup> day of September 2006.

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**LESIT, J.**

**JUDGE**

Read, signed and delivered in the presence of;

Appellant

Mr. Otieno for the Appellant

Miss Wafula for State

CC: Tabitha

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**LESIT, J.**

**JUDGE**