

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
APPELLATE SIDE
CRIMINAL APPEAL NO. 388 OF 2003

(From Original Conviction and Sentence in Criminal Case No. 2457 of 2003 of the Resident Magistrate's Court at Kwale – L.N. MBATIA – SRM).

ABDI HIRABE.....APPELLANT
-VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

The appeal is only on the issue of sentence the appellant was given a term of imprisonment for 15 months. This is in excess of lawful punishment, which is a period not exceeding 12 months. Furthermore this is a first offender who pleaded guilty. The law provides punishment of payment of fine as an alternative to imprisonment. The main principle in sentencing is that an accused person who has pleaded guilty and is a first offender should be treated with leniency to facilitate reform. He has not wasted court's time therefore the court should wherever there is an option of fine opt for non-custodial sentence. In this case Trial Magistrate exceeded her jurisdiction in imposing a term of imprisonment not provided for in the law.

I therefore set aside the imprisonment term and substitute the same with a fine of Shs.10,000/= only. Regarding the repatriation order Section 26A of the Penal Code sets out what are the powers of the court. The court may by directions to the Commissioner of Police and Commissioner of Prisons Order that the accused be removed and be kept out of Kenya immediately. This was not the order issued and therefore the same is quashed. The Penal Code empowers an appellate court to issue such directions but in the present situation this court is not with full facts to enable it to make such directions.

The result therefore is that the sentence of imprisonment for 15 months is hereby set aside and substituted with a fine of Shs.10,000/=.

The appellant shall be set free upon the payment of the fine.

The order of repatriation is hereby quashed.

Dated this 2nd day of January, 2004

JOYCE KHAMINWA

J U D G E