



REPUBLIC OF KENYA



**Bergicho & 2 others v Republic (Revision Case E166 of 2022)
[2023] KEHC 26 (KLR) (9 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 26 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
REVISION CASE E166 OF 2022
EM MURIITHI, J
JANUARY 9, 2023**

BETWEEN

FEDILU BERGICHO 1ST APPLICANT

ABENZER TUMDOLO 2ND APPLICANT

MAMUSH WOLDE 3RD APPLICANT

AND

REPUBLIC PROSECUTOR

RULING

1. The 3 accused persons were convicted on their own plea of guilty for the offence of being unlawfully present in Kenya contrary to section 53 (i) (j) as read with section 53(2) of *Kenya Citizenship and Immigration Act* 2011.

2. In sentencing the accused the trial court said:

“I have considered the 1st, 2nd and 3rd accused’s mitigation. They are first offenders. They were arrested within Kenya being Ethiopian citizens without any permit. For reasons of security and order, the offence committed is indeed serious. Each accused is fined Kshs 300,000 and in default each to serve 2 years imprisonment.

L Mutai- CM

January 12, 2022”

3. In opposing revision of the sentence, the DPP urged that it had not been demonstrated that the trial magistrate committed any illegality/impropriety or mistake in sentencing the applicants because of “the sentence provided for the offence of being illegally present in Kenya contrary to section 53 (i) (j) as read with section 53(2) of the *Kenya Citizenship and Immigration Act*, 2011 [is that] they shall be



liable upon conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding three years, or both.”

4. With respect, the sentence of the trial court on the fine of Kshs 300,000 was proper. The court could also have further imposed a sentence of imprisonment for upto three years or to both. If the court wished to impose a sentence of appropriate of 2 years in addition to the fine it could have done so properly.
5. What was not proper is the provision for the default sentence of 2 years. There is no provision that upon default of payment of a fine, an offender shall serve imprisonment for 2 years. In the absence of such provision, section 28(2) of the [Penal Code](#) applies providing that an amount exceeding Kshs 50,000 attracts a default sentence of imprisonment for 12 months.
6. Accordingly, the sentence of 2 years imprisonment in default of payment of the fine of Kshs 300,000 is illegal.

Orders

7. For the reasons set out above, the court in exercise its powers of revision under section 364 of the [Criminal Procedure Code](#) substitutes a sentence of 12 months as a default sentence for failure to pay the fine of Kshs 300,000 passed by the trial court.
8. As the accused persons have been in custody since January 12, 2022 when they were sentenced and they have, therefore, fully served default sentence of imprisonment for 12 months, there shall be an order for the immediate release of each of them from custody and for reparation to Ethiopia upon such release.

Order accordingly

DATED AND DELIVERED 9TH JANUARY, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances

Applicants in person

Mr. Masila Principal Prosecution Counsel for DPP

