



**KJREPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CRIMINAL APPEAL NO. 138 OF 2016**

*(From the Original Judgment and Acquittal of the Respondent in Mombasa CMC Criminal Case No. 3058 of 2013 by Hon. I. Ruguru, SRM)*

REPUBLIC.....APPELLANT

VERSUS

RAEES AHMED KHAN.....RESPONDENT

**JUDGMENT**

1. By the Judgment of this court dated 29/1/2020 this court allowed an appeal by the prosecution with the result that the Respondent was found guilty of the offences as charged and convicted accordingly. The Court directed that the Respondent be given an opportunity to offer his mitigation before the sentence is pronounced.

2. The Respondent was tried of the offence of unlawful presence in the country contrary to Section 53 (1) as read with Section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. His guilt having been confirmed the Respondent mitigated on 30/1/2020.

3. **Mr. Fedha**, learned Counsel for the State submitted in mitigation that he has no prior evidence of any crimes previously committed and that the convict may be treated as a first offender. Counsel further submitted that the Respondent was charged under Section 53 (1) (J) as read with Section 53 (2) of Kenya Citizenship and Immigration Act. That offence has a fine sentence of not more than Kshs. 500,000/= or imprisonment of three years or both. Mr. Fedha submitted that the convict has been in Kenya for over 30 years and had time to regularize his papers but he did not do that. Counsel however noted that the Respondent is a married man and his wife was in court. They have five children as evidenced by the birth certificates. Mr. Fedha observed that the Respondent runs a lawful business but that every crime committed has consequences. Counsel prayed for a non-custodial sentence of one year on condition that the convict reports to the Immigration Office Mombasa once after every three months. During that time the convict should regularize his stay in Kenya.

4. Mr. Magolo, learned counsel for the Respondent submitted that the Respondent is remorseful and was acquitted in 2016. That acquittal is now overturned after five years. Counsel submitted that the Respondent is married to a Kenyan since 22/2/1991 and was able to get a work permit and a residence pass. Under the 2010 constitution the Respondent was expected to apply for Kenyan citizenship since he had married a Kenyan. He did not apply hence the situation he finds himself in. He has five children and is a businessman and contributing to this country's economy. He is also a sick man. Counsel further submitted that a convict does not have to be sent to prison upon conviction. He can also be set free on account of age, being 59 years old now. He does not need to be punished any further. His trial commenced in 2013 and is getting concluded in 2020. That is seven years of anxiety. Mr. Magolo submitted that the convict had already been punished, and he urged the court to exercise powers under Section 95 Penal Code and other provisions of the law to release the Respondent.

5. I have considered the above submissions. In my view this Court has already convicted the Respondent. I have considered the mitigation offered. It is clear that the Respondent committed the said offence due to ignorance which, as we do know, is not a defence in law. I will accept submissions by the State to jail the Respondent for a suspended term of one year. Therefore, I make Judgment as hereunder:

(a) The Respondent is hereby jailed to a suspended sentence of One (1) year from the date of conviction.

(b) The Respondent is to utilize this period to regularize his immigration status, and shall report to immigration office Mombasa every three (3) months.

Right of appeal in 14 days.

**Dated, Signed and Delivered in Mombasa this 7<sup>th</sup> day of May, 2020.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Magolo for Respondent

No appearance for DPP

