



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL REVISION NO. 2 OF 2018

OMAR MOHAMED ALI Alias SHAIR.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a Notice of Motion filed on 11th Januray,2018 the applicant, OMAR MOHAMED ALI Alias SHAIR sought leave of his Honourable court to exercise its supervisory power of revision under section 362 of the Criminal Procedure Code and call for his file, CRIMINAL CASE NO 575 OF 2016, REPUBLIC VERSUS OMAR MOHAMED ALI Alias SHAIR, so as to satisfy itself as to the correctness, legality or propriety of the finding and sentence passed as well as the regularity of the proceedings herein.

2. The application is seeking to have the sentence meted against him revised so that he is given an option of a fine for the offence of being illegally in Kenya.

3. The application is anchored on section 362 of the Criminal Procedure Code and the grounds that have been deponed to in the supporting affidavit of the applicant.

4. The Applicant was charged with two counts in court, being the offence of cheating whereby he was alleged to have fraudulently tricked and obtaining Kshs Three Million three hundred thousand (Ksh 3,300,000/=) from Halima Yussuf Ali.

5. In count II, the applicant was charged with the offence of being unlawfully present in Kenya, since he had no permit authorizing him to reside in Kenya.

The applicant pleaded NOT GUILTY to the offences and the case proceeded to full hearing whereby the trial magistrate found him guilty of both offences, convicted and sentenced him to two (2) years imprisonment for the offence of cheating and 6 months for the offence of being unlawfully present in Kenya, on 23rd December, 2016. The sentences were to run concurrently.

6. The law on revision is provided for under section 362 of the Criminal Procedure Code; as follows

“ The High court may call for and exercise the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of proceedings of any subordinate court”.

7. According to the applicant’s counsel, the applicant has completed the sentence in respect of court. He is now seeking the sentence in count II, which was the sentence for 6 months.

8. According to the applicant, the trial magistrate sentenced him to serve a sentence of six (6) months without any option of a fine. His prayer is therefore that he be accorded an opportunity to pay a fine as an alternative of the six (6) months imprisonment.

9. In count II, the applicant was charged with the offence of being unlawfully present in Kenya contrary to section 53(1) of the Citizenship and Immigration Act 2012, which provides that;

“Any person who unlawfully enters or is unlawfully in Kenya in contravention of this Act, commits an offence”.

(2) any person convicted of an offence under this section shall be liable upon conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or both”

10. I have perused the record of proceedings before the lower court and find that they present nothing incorrect, illegal or irregular in the manner in which they were conducted.

11. However, I note that although the sentence which was meted against the applicant was legal and within the confines of the law. He appellant having been a first offender and since section 53 (2) of the Citizenship and Immigration Act provides for an alternative of a fine, the trial magistrate ought to have considered the option of a fine with regard to count 2.

12. Therefore, in view of the said provision, the sentencing policy guidelines of the Judiciary at paragraph 11.5 which advocates for a consideration of fine first where it is provided as an alternative, and the period the applicant has been in custody, I proceed to revise the sentence against the applicant in count 2.

13. I order that the applicant pays an alternative fine of Kshs Thirty Thousand shillings (Ksh 30,000) and in default thereof, to complete the remainder of sentence in respect of count II.

14. And upon payment of fine or completion of sentence, the Applicant to be escorted to the UNHCR to ascertain his refugee status.

Mention on 26.6.2018 for the UNHCR to bring back a report on the Applicant's refugee status.

Ruling delivered, signed and dated this 5th day of June, 2018.

HON. LADY JUSTICE D. O. CHEPKWONY

In the presence of:

M/s Ocholla, counsel for the state

Appellant in person – Present

C/clerk-Beja