**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 359 OF 2018**

**ALEX OLESEGUN ADEBAYO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(A request for revision of the ruling of Hon. Lewa, SRM delivered on 13th July, 2018 in Shanzu Principal Magistrate's Court PCR 680 of 2018)

**RULING**

1. The applicant, Alex Olesegun Adebayo was on 26th June, 2018 arraigned in court charged with the offence of unlawfully overstaying in Kenya contrary to the provisions of Section 55(1)(2) of the Kenya Citizenship Immigration Act, 2011. The particulars of the charge were that on the 5th day of June, 2018 at Umoja Estate in Nairobi within the Republic of Kenya, being a Nigerian national, he was found in Nairobi having unlawfully overstayed in Kenya for a period of 110 days in contravention of the said Act.

2. The applicant pleaded guilty to the charge. The facts were read out to him on 13th July, 2018. The applicant admitted that the facts were correct and he was convicted on his own plea of guilty. He was sentenced to serve 6 months imprisonment after which he would be repatriated back to his country of origin, Nigeria. It was further ordered that his passport be held by immigration authorities through the Investigating Officer.

3. The applicant being aggrieved by the above decision applied for revision of the said orders through a letter dated 1st August, 2018 written to the court by his Advocate, Wycliffe Makasembo.

4. In arguing the application for revision, Counsel for the applicant submitted that the Hon. Magistrate erred in law by ignoring the applicant's mitigation and by not imposing a fine. He argued that the general rule in migration matters is that courts are bound to impose reasonable fines in place of custodial sentence. It was stated that the Hon. Magistrate never gave the applicant a chance to rectify his status. This court was informed that the applicant has a 4 month old child and he intends to marry the mother of the said child. Counsel made reference to a birth certificate of the child as well as the child's mother's documents attached to the letter written to the court.

5. He prayed for the order repatriating the applicant to Nigeria to be revoked and that he be allowed to stay in Kenya for about 3 months to enable him to rectify his status. Mr. Makasembo cited the decision in **Omar Mohamed Ali vs Republic**, Mombasa High Court Criminal Revision No. 2 of 2018 where the court imposed a fine of Kshs. 30,000/= against an applicant and gave him time to rectify his status.

6. Ms Marinda, Learned Counsel for the respondent opposed the application by submitting that the sentence imposed against the applicant was lenient. She stated that the applicant overstayed his visit by 6 months after his visa that allowed him to stay in Kenya for 2 months expired on 12th January, 2018. She indicated that the applicant was arrested on 5th June, 2018. Counsel for the respondent beseeched the court not to interfere with the sentence of 6 months imposed against the applicant.

7. On the issue of the applicant having sired a child with a Kenyan woman, Ms Marinda submitted that the applicant came to Kenya on 13th November, 2017 and the minor was born on 19th March, 2018. In her view, the birth certificate relied on was questionable as to the date the child was born and if the applicant was his father.

8. In response to the foregoing, Mr. Makasembo submitted that it is highly likely that the applicant used to visit Kenya before the 13th of November, 2017 and got emotionally involved with the child's mother.

**ANALYSIS AND DETERMINATION**

9. The issues for determination are:-

(i) If the lower court erred by failing to impose a fine against the applicant instead of a custodial sentence;

(ii) If this court can impose a fine in place of the custodial sentence the applicant is serving; and

(iii) If this court should grant the applicant 3 months to rectify his migration status.

10. The provisions that give this court the powers to call for and examine proceedings of the lower court on revision are enshrined in both the Constitution of Kenya and Section 362 of the Criminal Procedure Code. Article 165(6) of the Constitution provides as follows:-

***"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising judicial or quasi-judicial function but not over a superior court.***

***(7) For the purposes of clause 6 the High Court may call for the record of any proceedings before the subordinate court or person, body or authority referred in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."***

11. Section 362 of the Criminal Procedure Code stipulate thus:-

***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose 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 any proceedings of any such subordinate court."***

12. Section 364 (1) of the said Act states as follows:-

***"In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, the High Court may-***

***(b) In the case of any other order other than an order of acquittal alter or reverse the order.***

***(2) No order under this section shall be made to the prejudice of an accused person unless he has had an opportunity of being heard either personally or by an advocate in his own defence.....".***

13. The applicant was charged with the offence of unlawfully overstaying in Kenya contrary to Section 55(1)(2) of the Kenya Citizenship Immigration Act, 2011. The said Section provides as follows:-

***"(1) Where at any port of entry or exit a departing foreign national is found to have overstayed in the country in contravention of this Act, the Immigration Officers shall have the power to bring it to the notice of that person the option to enter a written admission of contravention in the prescribed manner in relation to the offence.***

***(2) Upon receipt of the said written admission of contravention the immigration officer may impose a fine not exceeding fifty thousand shillings.***

***(3) An immigration officer may prosecute any person who fails to immediately pay the penalty imposed in subsection (1) above for the offence of unlawful presence."***

14. The above provisions **give the procedure to be followed where a foreign national who is departing from Kenya at any port of entry or exit has overstayed**. The said provisions empower an Immigration Officer to summarily deal with the issue of a foreign national who has overstayed. The thinking behind such a procedure is to hasten the process of the said foreign national being allowed to leave Kenya without delay as soon as he/she has paid the fine imposed against him by an Immigration Officer under the summary procedure.

15. The summary procedure was not applied in the applicant's case as he was not arrested at a port of entry or exit. According to the facts of the case, he was arrested on 5th June, 2018 at Umoja Estate in Nairobi by Police Officers and upon interrogation, he was found to be a Nigerian national. He produced a passport showing that he arrived in Kenya on 13th November, 2017. He had been given a 2 months' visa, which was due for renewal on 12th January, 2018.

16. I do agree with Mr. Makasembo that the Hon. Magistrate should have imposed a fine in default of which, the applicant would have served the sentence of 6 months imprisonment. As at the time of writing this ruling, the applicant has a few days left of him completing the sentence of six months imprisonment. It would therefore serve no useful purpose at this late stage to substitute the custodial sentence with a fine.

17. An issue that was not raised that this court would like to address for clarity is that the provisions of Section 5(1) and subsection (2) of the Kenya Citizenship Immigration Act, 2011 indicates that the applicant was charged under the wrong provisions of the law. The applicant should have been charged under the provisions the Section 53(1)(j) of the said Act which state as follows:-

***"A person who unlawfully enters <u>or is unlawfully present in Kenya</u> in contravention of this Act; commits an offence."***

18. Section 53(2) thereof provides as follows:-

***"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 to both."***

19. Although this court has found that the applicant was charged under the wrong provisions of the law, I invoke the provisions of Section 382 of the Criminal Procedure Code to cure the defect in the charge. The facts do reveal that the charge that the applicant faced was that of being unlawfully present in Kenya. He admitted that he had overstayed his visit in Kenya.

20. In my considered view, the Kenya Citizenship Immigration Act is not a tool that is aimed at encouraging a court to grant orders to a person who has deliberately failed to comply with Kenyan law. This court cannot therefore extend to the applicant an olive branch for 3 months to enable him to regularize his immigration status. The applicant herein breached immigration laws by failure to renew his visa. If this court was to grant him orders to rectify his status in Kenya, it would be condoning his illegal act.

21. Inasmuch as the applicant claims to have a Kenyan woman he intends to marry. The promise of marriage cannot be a basis of making his stay in Kenya legal. In any event, a promise of marriage made by a man to a woman or vice versa can be withdrawn at any time without consulting the party to whom such a promise has been made.

22. The claim that the applicant has a child aged 4 months cannot also hold as he arrived in Kenya on 13th November, 2017 and the child he is said to have sired was born on 19th March, 2018. When the applicant was given a chance to mitigate before the trial court, he pleaded for leniency. He did not disclose the existence of the said child. I do agree that the submissions made on the foregoing are farfetched and cannot be introduced into the proceedings in support of the request for revision.

23. I have gone through the decision of Chepkwony Judge in **Omar Mohamed Ali alias Shair vs Republic** (supra), the circumstances of the case therein were slightly different. The court ordered for the applicant to be escorted to the UNHCR upon payment of a fine or completion of the sentence with a view of ascertaining his refugee status. The said court made a further order for the UNHCR to make a report on the applicant's refugee status. The court did not order for the applicant to remain in Kenya illegally. In the present revision, there is no claim that was made that the applicant is a refugee. The facts of the case are clear that the applicant is a Nigerian national and his passport supported the said fact. Nothing entitles him to stay in Kenya after contravening immigration laws.

24. The result of the revision is that it is hereby dismissed and the decision of the lower court is upheld. The applicant will be repatriated back to Nigeria after completion of his prison term of 6 months.

It is so ordered.

**DELIVERED**, **DATED** and **SIGNED** at **MOMBASA** on this **9th** day of **November**, **2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Anagwe for the applicant

Ms Ogweno for the respondent

Mr. Oliver Musundi - Court Assistant