



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL REVISION NO. 2 OF 2016

1. LADAN OMAR HAJIAPPLICANT

2. AYAN MUSE AHMED.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON REVISION

1. This matter was placed before me by the Deputy Registrar **Honourable Rose Ombata** following a letter written by **J. K. Mwalimu and Company Advocates** seeking revision of the sentence imposed by the subordinate court for being too harsh and inconsiderate.
2. **Ladan Omar Haji** and **Ayan Muse Ahmed** were convicted of the offence of being unlawfully present in Kenya contrary to **Section 53(1)(j)** as read with **Section 53(2)** of the **Kenya Citizenship and Immigration Act No. 12 of 2011** on their own plea of guilty. Accordingly, each was sentenced to pay a fine of **Kshs. 300,000/=** or serve **three (3) years imprisonment**.
3. It is now contended that though described in the charge sheet as adults they were young girls of **Somali origin** and their actual age was not ascertained; They were described as first offenders for lack of any previous records; the trial magistrate failed to consider the general principles of sentencing as the offenders ought to have been given lenient sentences and not the maximum sentence provided by the law.
4. This being an application for revision, though not specifically pointed out by the Applicants, I am duly guided by the provisions of **Section 362** and **364** of the **Criminal Procedure Code**. **Section 362** of the **Criminal Procedure Code** provides 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.”

5. The Applicants are described as adults in the charge sheet. An adult means an individual who has attained the age of **Eighteen years**. (**See Article 260 of the Constitution**).
6. It is alleged that the Applicants are young girls but it is not stated that they are minors. Their age has not been disclosed to enable this court establish if indeed they are girls as opposed to young women or even mature women for that matter. What is apparent is the fact that they pleaded guilty and consequently convicted of the charge as framed.
7. The penalty provided for the offence admitted is a fine not exceeding **five hundred thousand shillings** or imprisonment not exceeding **three (3) years** or to both. The wording of the provision

of **Section 53(2)** of the **Kenya Citizenship and Immigration Act No. 2 of 2011** is discretionary. Imposing a fine that did not exceed **Kshs. 500,000/=** was at the discretion of the magistrate. Therefore in order for this court to find the sentence meted out to have been improper warranting interference, the trial court must have applied a wrong principle making the sentence itself unreasonable. It must also be excessive in the circumstances. (**See Republic vs. Murimi Njiru (2015) eKLR; Sayeka vs. Republic (1989) KLR 306**).

8. I have considered facts of the case presented by the Prosecution. The Applicants avoided using the **Tia Road Bridge**. They passed through bushes and as they moved towards the tarmac road they were arrested. They were of **Somali origin** and had no permit to enter or remain in Kenya. They could not communicate in either Kiswahili or English. It was not stated whether they were offered services of an interpreter and if they gave reasons why they entered the country. The Applicants admitted the charge at the first instance. They were first offenders. In mitigation they asked for leniency. In sentencing them the trial court considered the security threats posed by persons who enter Kenya without any permits.
9. In determining the fine to be imposed the learned trial magistrate should have considered if the Applicants would raise the sum imposed as fine. The inability to raise the fine imposed means that the Applicants will continue serving the default sentence in prison which may also be a worse of security threat, the mischief that the court intended to address.
10. In the premises, it calls upon me to interfere with the sentence imposed. I therefore set aside the sentence meted out and substitute it with a fine of **Kshs. 60,000/=** or **(6) months imprisonment** in default.
11. The order of repatriation to their country of origin upon service of the sentence is affirmed.
12. It is so ordered.

Dated and Signed at Kitui this 10th day of February, 2016.

L. N. MUTENDE

JUDGE