



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL APPEAL NO. 5 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ASAPA ZALAGA

ADINO FITABO

ASAFA ASHAMO

AMANIEL FIKIRE

TASFAE TAMASGEI

FLAMAYO NUKURU

DEGEFA LEJISO

SAMIE ABUYE

TADESA ALAMO

SIBANO WALDE

YISACK LEREBO

LEBONA DAMISE:.....ACCUSED

ORDER IN REVISION (JUDGEMENT)

1. The revision of the orders herein was undertaken after my attention was drawn to the complaint of the applicants by the Deputy Registrar of this court (Mr V.O. Nyakundi). The application is brought under sections 362 and 364 of the Criminal Procedure Code (Cap 75) Laws of Kenya. The applicants who are nationals of Ethiopia were sentenced to a fine of Kshs 30,000/- in default to serve nine months imprisonment by the court of the Chief Magistrate at Embu on 15th July, 2015, following their conviction on a plea of guilty to a charge 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 of 2011, Laws of Kenya.

2. In addition to being sentenced to a sentence of a fine, they were also ordered to be repatriated to Ethiopia by the OCS Embu Police Station upon completion of their sentence.

3. I have perused the record of the proceedings and I find that their conviction on a plea of guilty is unequivocal. They were provided with an Amharic speaking interpreter, which is the national working language of Ethiopia. The record further shows that the interpreter was paid Kshs 2,000/- by the Deputy Registrar for her interpretation services.

4. In terms of **Article 50 (2) (m) of the 2010 Kenya Constitution**, the convicted persons had the assistance of an interpreter at Government expense, because they did not understand both the English and Swahili languages, that are used in court proceedings in this country.

5. The complaint of the convicted persons is that the sentence imposed was manifestly excessive and it was their submission that they should be repatriated or be removed to Ethiopia.

6. In this regard, it is important to refer to **section 53 (2) of the Kenya Citizenship and Immigration Act**, which provides for the penalty for those who are convicted under that section. The provisions of that section do provide that upon conviction, the accused person shall be liable to “*a fine not exceeding Kshs 500,000/- or to imprisonment for a term not exceeding 3 years or to both.*” It is equally important to note that these penal provisions do not provide for a default sentence. In the circumstances, recourse must be had to the **Penal Code in section 28 (2) (Cap 63) Laws of Kenya**. In terms of that section, where a court has imposed a fine, the default imprisonment shall be according to the following scale:

(2) In the absence of express provisions in any written law relating thereto, the term of imprisonment or detention under the Detention Camps Act ordered by a court in respect of the non-payment of any sum adjudged to be paid for costs under section 32 or compensation under section 31 or in respect of the non-payment of a fine or of any sum adjudged to be paid under the provisions of any written law shall be such term as in the opinion of the court will satisfy the justice of the case, but shall not exceed in any such case the maximum fixed by the following scale-

<i>Amount</i>	<i>Maximum period</i>
<i>Not exceeding Sh. 500</i>	<i>14 days</i>
<i>Exceeding Sh 500 but not exceeding Sh 2,500</i>	<i>1 month</i>
<i>Exceeding Sh 2,500 but not exceeding sh 15,000</i>	<i>3 months</i>
<i>Exceeding Sh 15,000 but not exceeding Sh 50,000</i>	<i>6 months</i>
<i>Exceeding Sh 50,000</i>	<i>12 months</i>

(3) The imprisonment or detention which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.

7. It is clear from these provisions that the default sentence of imprisonment to be imposed, where a fine has not been paid are of a general application. In the instant case, the default sentence imposed by the court of the Chief Magistrate following the failure of the accused/applicants to pay the fine was nine (9) months imprisonment.

8. In terms of the foregoing provisions of section 28 (2) the default sentence of imprisonment should have been six months and not nine months. It therefore follows that the default sentence of nine months imprisonment is not authorized by **section 28 (2) of the Penal Code**.

9. In the circumstances, the sentence of a fine together with the default sentence are hereby set aside because they are unlawful.

Furthermore, **section 26A of the Penal Code** provides the procedure of repatriating foreigners to their country of origin upon completion of their sentence.

10. In terms, *section 26A of the Penal Code* states as follows:

26A. Where a person who is not a citizen of Kenya is convicted of an offence punishable with imprisonment for a term not exceeding twelve months the court by which he is convicted, or any court to which his case is brought by way of appeal against conviction or sentence may, by directions to the Commissioner of Police and the Commissioner of Prisons (including directions on how the order shall be carried out) order that the person be removed from and remain out of Kenya either immediately or on completion of any sentence of imprisonment imposed; but where the offence for which the person is convicted is punishable with imprisonment for a term exceeding twelve months, the court shall, where it is satisfied that the person may be removed from Kenya, recommend to the Minister for the time being responsible for immigration that an order for removal from Kenya be made in accordance with section 8 of the Immigration Act.

11. It is clear from these provisions that a court that convicts and sentences a foreigner or the one which reviews the conviction and sentence may only make a recommendation to the commissioner of prisons and the Inspector General of Police (formerly known as Commissioner of Police) on how the foreigner may be repatriated from Kenya.

12. In the instant case, the court of the Chief Magistrate ordered the convicted persons to be repatriated to Ethiopia by the OCS Embu Police Station on completion of their sentences. In terms of section 26A of the Penal Code, the order made by the court of the Chief Magistrate is not one that is authorized by law. In terms of section 26 (A) of the Penal Code a court is only allowed to issue a recommendation to the Commissioner of Prisons and the Inspector General of Police to remove the convicted foreigners from Kenya to their country of origin. The magisterial order which positively directed the OCS Embu Police Station to repatriate the convicted persons was contrary to the provisions of section 26A of the Penal Code. The reason for this approach is that it gives the two government officials a free hand either to repatriate them or leave them within the country. Section 26A of the Penal Code was enacted with a view to the practise that prevails in the implementation of international law. The order to repatriate or not to repatriate convicted foreigners to their country of origin will have an impact in the diplomatic and consular relations between the concerned countries. Some of the convicted persons may turn out to be asylum seekers or refugees in which case the recommendation of the courts may only be taken into account in deciding whether they should be repatriated or not. In this regard, I wish to refer to the case of **Okumu v R (1985) KLR 803 at page 813 and 814**. In that case, a soldier by the name Hezekiah Ochuka was wanted by the government of Kenya to stand trial on treason. The Kenyan government applied for his extradition in the courts of Tanzania. The Tanzanian courts refused to order his extradition to Kenya. Shortly thereafter, the government of Tanzania changed its mind and handed over the appellant and his colleagues to the Kenya government. The procedure of recommendation contained in section 26A of the Penal Code is a reflection of the realities that are at play in international relationships. If the government was to be ordered to repatriate and it fails to do so, the government runs the risk of being accused of ignoring court orders. It is for this reason that a court is required only to make a recommendation for removal of the convicted persons to their country of origin. In the circumstances of this case the magisterial court should only have recommended to the Commissioner of Prisons and the Inspector General of Police to remove the convicted persons to their country of origin. In the circumstances, the order of the Chief Magistrate is hereby set aside.

13. In view of what I have stated in the foregoing paragraphs, the sentences imposed together with the repatriation order of the magisterial court are hereby set aside.

14. Some of the convicted persons namely, **Asapa Zalaga (Accused 1), Asafa Ashamo (Accused 3), Tadesa Alamo (Accused 9), Yisack Lerebo (Accused 11) and Lebona Damise (Accused 12)**, have

been released from prison after paying the fines imposed upon them. It therefore follows that the revisional proceedings do not extend to them. The reason being that they were ordered to be repatriated upon payment of those fines. The revisional application in relation to them is moot.

15. The remaining accused persons **Adino Fitabo (Accused 2), Amanel Fikire (Accused 4), Tasfae Tamasgei (Accused 5), Elamayo Nukuru (Accused 6) Degefa Lejiso (Accused 7), Samie Abuye (Accused 8), Sibano Walde,(accused 10)**, have been in prison since 15th July, 2015. In view of this, I hereby set aside the sentence of the fine of Kshs 30,000/- together with the default sentence of 9 months imprisonment imposed upon them.

16. I therefore make recommendations to the Commissioner of Prisons and Inspector General of Police to repatriate these persons to Ethiopia.

JUDGEMENT DELIVERED, DATED and SIGNED at EMBU this 5th day of FEBRUARY 2016.

J.M. BWONWONGA

JUDGE

05.02.16