



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
MISC. CRIMINAL APPLICATION NO. 22 OF 2016

KEYSE MOHAMUD MOHAMED APPLICANT

V E R S U S

REPUBLIC RESPONDENT

RULING

Before me is a Notice of Motion under certificate of urgency brought by the applicant under Article 165 (6) (7) of the Constitution of Kenya 2010 and Section 362 and 364 of the Criminal Procedure Code (Cap 75 of the Laws of Kenya). The application was filed on behalf of the applicant by Abdi Bashir and Company Advocates and seeks the following orders:-

- a) That the sentencing of the applicant herein be reviewed.
- b) That the maximum fine imposed be reduced to Kshs 50,000/= only.
- c) That the applicant be deported back to his own country in line with the conviction.

The application was filed with a supporting affidavit sworn on 8th November 2016 by Yussuf Bashir Advocate.

When the application came for hearing, Mr. Bashir learned counsel for the applicant, submitted that his client was a poor man and could only afford to pay a fine of Kshs 50,000/=. Counsel submitted further that the applicant was a first offender and was ready to be repatriated back to Somalia. Counsel emphasized that the applicant was a young man and mentioned that he was representing him in these proceedings without any payment.

Learned Prosecuting Counsel Mr. Okemwa submitted that each case has to be considered on its own special facts. Counsel submitted that the applicant was arrested at Dadaab Refugee Camp which was a mitigating factor for the kind of offence alleged, that the maximum sentence handed down by the trial court, was not justified.

I have considered the application, the documents filed and the submissions of counsel on both sides.

It is apparent that the applicant was handed down the maximum sentence for the offence after he pleaded guilty to the charge of being unlawfully present in Kenya.

The provisions of the Constitution cited in the application are Article 165(6) and (7) of the Constitution. The said Article provides as follows:-

“165(6) the high court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a 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 any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

In my view, the above provisions of the Constitution donate on the High Court wide powers in ensuring that justice is done by all subordinate courts and other bodies or authorities exercising judicial of quasi judicial function which are subordinate to the High Court. The exercise of that power is not limited to awaiting the final conclusion of the decision in those proceedings. In the present case the proceedings in the magistrate's court were concluded and conviction and sentence entered.

These are criminal proceedings. The revision powers of the High Court are contained in Section 362 through to Section 367 of the Criminal Procedure Code (cap.75). Counsel for the applicant has cited Section 362 and Section 364 of the Criminal Procedure Code.

Section 364 (5) of the Criminal Procedure Code limits the powers of the High Court in entertaining revision proceedings. It states as follows:-

“164 (5) when an appeal arise from a finding, sentence or order, and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who would have appealed.”

It's abundantly clear from the above provisions of the law that a person who has a right of appeal, and who has failed to appeal, cannot be entertained by the High Court in revision proceedings brought by that person.

This is exactly what the applicant herein has done in the present matter. I am not talking of the merits or otherwise of his complaints against sentence. I am saying that the law prohibits the High Court from entertaining such an application for revision filed by a person who has a right of appeal and who has not appealed. In my view, the applicant herein has a right of appeal and the said right is still open.

I thus decline to entertain this application for revision and dismiss the same. However the applicant may appeal from the decision of the trial court if he wants to do so. It is so ordered.

Dated and delivered at Garissa this 10th day of November 2016.

GEORGE DULU

JUDGE