



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 20 OF 2014

REPUBLIC APPLICANT

VERSUS

FADAI IDI ISMAELRESPONDENT

(From the Original Conviction and Sentence in Criminal Case Number 709 of 2014 of the Chief Magistrate's Court Mombasa – Hon. Kituku - PM)

RULING

On the 14th day of April, 2014 the Respondent **FADAI IDI ISMAEL** was arraigned in Court for 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 Number 12 of 2011.

He pleaded not guilty to the charges and the case was fixed for hearing on 22nd April, 2014.

On the hearing date the learned trial magistrate found issues surrounding the circumstances under which the Visa for the Respondent was issued and made orders for investigations to be carried out.

The matter was fixed for hearing on 5th May, 2014.

On 30th April, 2014 the Respondent pleaded guilty to the charges. The facts were read to him on 2nd May, 2014 and he admitted them and was subsequently Convicted and Sentenced. He was discharged under Section 35(1) of the Penal Code.

It is the States contention that the learned trial magistrate erred by discharging the Respondent unconditionally under Section 35(1) of the Penal Code without issuing a deportation order.

Section 35(1) of the penal Code provides,

“ Where a Court by or before which a person is Convicted of an offence is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order under the probation of offenders Act is not appropriate, the Court may make an order discharging him absolutely, or, if the Court thinks fit, discharging him subject to the condition that he commits no offence during such period, not exceeding twelve months from the date of the order, as may be specified therein”.

In the present case the learned trial magistrate had himself questioned how the Respondent was able to acquire a Visa while he was in custody and had ordered for investigations and a report to be availed to the Court.

It is not clear whether a report was availed to the Court but there is a letter dated 1st May, 2014 addressed to the Court prosecutor by the OCS Changamwe in which he questions the authenticity of Visa serial number 04473968 dated 15th April, 2014 and a Visa payment receipt number 2327588 fixed on the suspects passport issued at Moi International Airport Mombasa. The issuing office holder bore the stamp number 0697 a staff at Moi International Airport.

It was noted in the letter that the procedure for issuing the Visa was not followed and the person who presented the passport to the Immigration officer was still being followed.

Section 53(2) of the Kenya Citizenship and Immigration Act Number 2 of 2011 provides,

“Any person Convicted of an offence under this section shall be liable to Conviction to a fine not exceeding five Hundred Thousand Shillings or to Imprisonment for a term not exceeding three years or to both”.

To discharge the Respondent under Section 35(1) of the Penal Code unconditionally the Court was required to satisfy itself of the nature of the offence, and the character of the offender. Whereas a Court has discretion in Sentencing, that discretion should be exercised and applied Judiciously.

The Court was aware that there were investigations ordered by itself as to how the Visa was acquired while the Respondent was in custody at Shimo La Tewa G.K. Prison.

After carrying out investigations police subsequently arraigned the Respondent in Court for the charges of forgery contrary to section 352 (a) as read with Section 349 of the Penal Code, giving false information among others.

Charges have also been prepared against the Immigration officer who approved and renewed a Visa card number S.A.A 04739678 and Warrants of arrest have been issued against him.

Section 362 of the Criminal Procedure Code provides,

“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, as to the regularity of any proceedings of any such subordinate Court”.

In the circumstances of this case the Respondent pleaded guilty to the offence of being unlawfully present in Kenya.

He faces other charges of forging a Visa stamp stamp for purposes of false information, fabricating evidence, conspiracy to commit a felony among others.

The Court is cognizant of the fact that he is innocent till proved guilty but these are not attributes consistent with the requirements envisaged under Section 35(1) of the Penal Code, which relates to the character of the Accused and the nature of the offence he is charged with.

I find that there is good reason to interfere with the Sentence partially to include an order for deportation to his mother Country (USA) upon the finalization of the cases/case pending against him.

Ruling delivered dated and signed this **13th** day of **May, 2014**.

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M. MUYA

JUDGE

13TH MAY, 2014

In the presence of:-

Mr. Abwere for the Respondent

Ayodo holding brief Kipro for the State

M. MUYA

JUDGE

Mr. Abwere: We are asking for clarification of the deportation order.

Court: The Applicant/Respondent may make an application for bond before the lower Court and thereafter the matter to be mentioned before this Court for further directions.

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M. MUYA

JUDGE

13TH MAY, 2014