

**IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM SUB- REGISTRY**

AT DAR ES SALAAM

MISCILINEOUS CRIMINAL REVISION NO. 10010 OF 2024

(Arising from the decision in Criminal Case No. 7506 of 2024 in the Resident Magistrate's
Court of Dar es Salaam at Kisutu before Y.R. RUBOROGA, PRM)

**EMMANUEL NYISHOBORABYOSE @ KHALIFA AKBAR
MWAKALINGA.....APPLICANT**

VERSUS

REPUBLIC..... RESPONDENT

RULING

6th & 17th May 2024

MKWIZU, J: -

In this revision, this court is invited to revise and set aside the custodial sentence of three years in three counts meted against the applicant by the Magistrate court of Dar es salaam at Kisutu in Criminal case No.7506 of 2024 and substitute it with fine.

During the hearing, the applicant had nothing substantive to tell the court apart from adopting his chamber summons and the affidavit in support thereof. The learned State Attorney on the other hand opposed the prayer on the ground that the trial court's sentence was based on the aggravating factors that the committed offences are recurrent posing threat to the national security.

I have perused the records. The applicant is Rwandan citizen. He was on 11/3/2024 found at Kurasini area in Temeke District within Dar es salaam Region without any lawful traveling document, valid visa or any document authorising him to enter, stay or pass through the United Republic of Tanzania with falsely obtained document which he used to make false declaration and returns for obtaining Tanzanian Passport and accordingly charged of three counts, unlawful presence in Tanzania contrary to section 45(1) (i) and (2) of the Immigration Act, (Cap 54 RE 2016); False declarations for passport contrary to section 45(1) (b) of the Immigration Act, and uttering false documents contrary to section 19 (2) (j) of the Tanzania Passports and Travelling documents Act No. 20 of 2002 before the resident Magistrate Court of Dar es salaam at Kisutu. was ultimately convicted on his own plea of guilty and sentenced to three years jail term in each count without an alternative to fine.

I have read the provisions under which the applicant was charged. They all provide for fine as an alternative to custodial sentence. Section 45 (2) of the Immigration Act in counts 1 and 2 provides for a fine not less than 500,000/= or jail term not exceeding three years or both while section 19 (2) of the Passport and travel documents act cited in counter 3 provides

for 200,000 minimum fine and 1000,000 as a maximum fine rate or two years imprisonment or both.

In sentencing the applicant, the trial magistrate did not consider the fine element in the statute despite the fact that the applicant was a first offender as admitted by the State Attorney. He only confined himself on the custodial sentence without even referring to the provisions under which the applicant was convicted. I say so because had he done so, he would have realised that the third count attracts a maximum sentence of only two years jail term and not the three years term he imposed on the applicant. The record on this issue reads:

"With due consideration to the mitigation and particularly the antecedents, I sentence the accused to serve a three-year jail term for each count without fine. The sentences shall run concurrently..."

This is, in my view wrong. The trial court has a duty not only to consider the requirement of the law, but also the aggravating and mitigating factors including guilty plea, accused criminal records, time spent in remand custody if any and seriousness of the offence. This wasn't done in this case. The reasons behind the custodial sentence meted against

the applicant in this case are not so open for validation. Nothing was stated to justify the imposed sentence.

It is a trite law that where a provision of law provides an option of fine, the sentencing court is duty bound to impose a fine first before resorting to imprisonment sentence unless the offence is weighty or prevalent and any contrary findings would attract a cogent reason(s) to support the court's decision. See for instance the decision in **Bakari Hamis vs R** [1969] HCD No. 311. No such findings were made by the trial magistrate in this case. I find the application sensible.

Accordingly, the revision application is allowed. The custodial sentence of three years meted against the applicant is hereby quashed and set aside, and lieu thereof, the applicant is sentenced to pay a fine of 500,000 Tanzanian shilling or three years jail term in case of default in the 1st and 2nd counts and Tsh 200,000 fine in the 3rd count or two-year jail term in case of default. The substituted custodial sentences are as usual to run concurrently from the date of the initial sentence .

DATED at ES SALAAM this 17th Day of May 2024.



E.Y. MKWIZU

JUDGE

17/ 5/2024