



Malicha & 2 others v Director of Public Prosecution (Revision Case E149 of 2022) [2023] KEHC 21262 (KLR) (Crim) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21262 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
REVISION CASE E149 OF 2022
DR KAVEDZA, J
JULY 28, 2023**

BETWEEN

**GUYO WARIE MALICHA 1ST APPLICANT
ABDINASIR MOHAMED ALI 2ND APPLICANT
GOLICHA GARBOLE QUYO 3RD APPLICANT**

AND

DIRECTOR OF PUBLIC PROSECUTION RESPONDENT

RULING

1. A revision is sought herein vide applications by way of Notice of Motion dated February 7, 2023 and February 13, 2023 by M/s Ayuo and company, Advocates for the applicants.
2. The applications seek to have the repatriation orders issued by the Trial Magistrate in Criminal Case No E001 of 2023, at Kahawa Law Courts, in respect to the applicants be lifted and set aside.
3. The application is anchored on the grounds on the face of the application and affidavit of the applicants; Guyo Warie Malicha, Abdninasir Mohamed Ali and Golicha Garbole Quyo.
4. The grounds upon which the application is premised is as follows:
 - a. That the applicants took plea on January 9, 2023 pleading guilty to the charge of being unlawfully present in the country and being in possession of a drone without a license.
 - b. The applicants admitted the facts of the case, they were convicted and sentenced as follows:
 - a. 1st Applicant was sentenced to one-year imprisonment,



- b. 2nd and 3rd applicants were sentenced to pay a fine of Kshs 10,000 or in default to serve one-month imprisonment.
 - c. The applicants indicated to the trial court that they were escaping from war in Ethiopia and are fit to be granted asylum in Kenya, a right protected under international laws that Kenya is party to.
5. The powers of revision are donated to the High Court by Section 362 of the [Criminal Procedure Code](#) which provides that; -

' The High court may call for the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to its correctness, legality or propriety of any findings, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court'
6. I have perused the record of proceedings and it shows that the applicants were arrested on December 31, 2022 and charged with the offence of being unlawfully present in Kenya contrary to section 53 of the [Kenya Citizenship and Immigration Act](#), No 12 of 2011 and importation of an unmanned aircraft system without a permit issued by the authority contrary to section 7(1) as read with section 51(3) of the Kenya [Civil Aviation Act](#).
7. They were arraigned before the Chief Magistrate's Court at Kahawa on January 9, 2023, where they pleaded guilty to the said charges and were accordingly convicted. Consequently, the 2nd and 3rd accused were sentenced to pay a fine of Kshs 10,000 in default to serve one-month imprisonment, whereas, the 1st Accused was sentenced to serve one-year imprisonment. It was further directed that each accused be repatriated to Ethiopia upon serving the jail term or paying the fine.
8. On July 18, 2023, counsel for the applicants informed the court that the orders of repatriation against the 2nd and 3rd applicants had already been effected. The court therefore issued stay orders restraining the Immigration Office from repatriating the 1st applicant to his country pending determination of this matter.
9. The 1st applicant in his supporting affidavit dated February 7, 2023 averred that he ran away from war in Ethiopia and did not wish to go back. He further averred that he was part of Oromo Liberation Front and he deserted the war after being pursued by the Government. Lastly, he averred that if he were to be repatriated to his county, he is likely to be killed by either the government or the rebel group-Oromo Liberation Front.
10. I note from the trial record that the applicants had claimed to be asylum seekers. The prosecution counsel informed the court that the applicants were referred to the Department of Refugee Services which responded with a letter indicating that no bonafide asylum claim had been established in favour of the applicants. The same was not controverted by the applicants. Section 3(1) of the [Refugees Act](#), No 10 of 2021 provides for the meaning of a 'refugee' as follows: -
 - (1) A person shall be a refugee for the purposes of this Act if such person—
 - (a) Being outside of his or her country of nationality and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion who is in Kenya and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of his or country of nationality or the country of habitual residence; or



- (b) Not having a nationality and being outside the country of his or her former habitual residence owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, who is in Kenya and is unable or, owing to such fear, unwilling to return to the country of his or her habitual residence;
- (c) Owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his or her country of origin or nationality is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality.'

Section 12 of the [Refugees Act](#) further provides that an application for the grant of refugee status shall be made to the Commissioner either directly or through an authorized officer.

- 11. In the application before court, as well as the hearing before the trial court, the applicants did not avail any documentation from the Department of Refugee Affairs confirming that they had been registered as refugees by the said office. Neither did they produce any alien cards, registration or screening forms to prove the same.
- 12. Had these documents been provided, the trial court would not have ordered that the applicants be repatriated to their country upon completion of their sentences or payment of fines as per section 15 of the [Refugees Act](#), which states: -

' Despite the provisions of the [Kenya Citizenship and Immigration Act](#), 2011 no proceedings shall be instituted against any person or any member of his or her family in respect of his or her unlawful entry or presence within Kenya if such a person—

- a. Has made a bona fide application for recognition as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his or her right of appeal; or;
 - b. Has become a refugee'.
- 13. The applicants in this instant case, having not demonstrated that they had made an application for registration as refugees for consideration by the Commissioner of Refugee Affairs, it follows that they do not fall within the ambit of section 15 of the [Refugees Act](#) and thus, they were properly charged and prosecuted. Therefore, their prosecution and sentence that they be repatriated to their country upon completion of sentence was lawful.
 - 14. Furthermore, I note that the proceedings in the lower court were conducted in Borana, a language which all the applicants conceded to understand. The applicants were accorded a fair hearing pursuant to Article 50 of the [Constitution](#) and to my mind, the proceedings in the trial court were regular.
 - 15. The upshot is that the application for revision fails for want of merit and is hereby dismissed

Orders accordingly.

RULING DATED AND DELIVERED VIRTUALLY THIS 28TH DAY OF JULY 2023.

D. KAVEDZA

JUDGE

In the presence of:



Ms. Chege for the State.

Ayuo for the applicants.

Joy C/A

