Republic v Khadar & 5 others (Criminal Revision E303 of 2023)
[2023] KEHC 25813 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E303 OF 2023

RN NYAKUNDI, J

NOVEMBER 24, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

ZAKRIYE KHADAR ..... 1ST RESPONDENT

BADRA KHADAR ..... 2ND RESPONDENT

ABDIRHAMAN KHADARS ..... 3RD RESPONDENT

ISSAN KHADAR ..... 4TH RESPONDENT

MUNA KHADAR ..... 5TH RESPONDENT

HABON KHADAR ..... 6TH RESPONDENT

RULING

Coram: Before Justice R. Nyakundi

Mr. Mugun for the State

Mr. Ombego Advocate

1. There are two applications in respect of the same subject matter arising out of the decision made by the trial magistrate Hon. R. Odenyo on the 7th October, 2023 couched as follows: "Accused persons discharged under section 35(1) of the *penal code* accused persons be repatriated back to Uganda. The department of immigration to oversee the repatriation."

2. The background of all this is based on an indictment by the state against the applicants of being unlawfully present in Kenya c/section 53(1) as read with Section 53(2) of the *Kenya Citizenship and Immigration Act* No. 12 of 2011. The brief facts are that : On the 19th day of

October 2023 at around 1830hrs at Simat area along Eldoret Malaba highway within Uasin Gishu County being Somalia citizens, you were found to be in Kenya illegally and without any documents to warrant your stay in Kenya which is in contravention of the said Act.

3. In the first instance the state was aggrieved with the decision by the learned trial magistrate as expounded in the following statement of facts expressed to be brought under article 165(6) and (7) Section 362 to 364 of the *Criminal Procedure Code* and section 53(1) (j) as read with section 53(2) of the Kenya citizenship and immigration Ct of 2011 and section 43(2) (5) of the *Kenyan citizenship and immigration Act* of 2011 seeking these orders to abide:

    1. That this Honourable court urgently call for the file being criminal case No 2329/2023 Republic Vs Zakriye Mohamed & 5 Others at court 2 and examine the record of the proceedings therein as to the legality and or property of the finding made by the said court on the 27th October, 2023.

    2. That the Honourable Court be pleased to alter and/or reverse the said orders made by the lower court on 27th October 2023 directing the accused persons be repatriated to Uganda instead of Republic of Somalia.

    3. That in the interest of justice there be a stay of execution of lower courts orders made on the 27th October 2023 until the final determination of this Revision proceedings which application is supports by the following grounds:-

        i. That the learned trial magistrate erred in both law and fact by ordering for repatriation for the respondents to the Republic of Uganda instated of the Republic of Somalia where they are citizens and legally recognized as such as such by law.

        ii. That the accused persons were charged with being in Kenya unlawfully and pleaded guilty and were discharged under section 35(1) of the penal code

        iii. That the accused persons are Somali nationals having entered the county illegally and unlawfully through the Uganda border

        iv. That the learned trial magistrate erred in both law and fact by failing to direct that the accused persons be repatriated to the Republic of Somalia for the simple fact they are citizens of that county

        v. That the learned trial magistrate erred in both Law and Fact in disregarding that the respondents are citizens of Somalia by dint of their passports and it is the immigration office which has powers to effect repatriation to the Republic of Uganda within the confines of section 43(2) (5) *Kenya citizenship and immigration Act* No. 12 of 2011.

        vi. That the learned trial magistrate error is on the face of the record which can be cured by this honorable court under section 362 and 364 of the criminal procedure code

        vii. That the issued by the lower court on the 27th October 2023 is prejudicial to the accused persons and the prosecutions and we pray as hereunder:

            a. That order issued by the Chief Magistrate Court 2 criminal case number E2329 of 2023 on 27th October 2023 be reviewed and or reversed.

b. That an order be issued to the effect that the accused persons be repatriated back to the Republic of Somalia by the in charge of immigration officer Eldoret.

c. That order be issued staying reversing or reviewing the ruling date issued by the trial court pending determination of this review.

4. This application is not the end of the story. On 7th of November, 2023 learned counsel Mr. Ombego for the Applicants filed a notice of motion premised under Article 2(5) of *the Constitution* of Kenya 2010, Section 33, 37(2) © 40, 43(2) (a) all of *Kenya citizenship and immigration Act*, Section 3, 7, 8 20, 21, 24, 25, 29 all of the *Refugee Act* cap 10 of the Laws of Kenya, Article 2,3,6 and 12 of the *United Nations Conventions on the Rights of Children*, Article 22, 23, 28 34 35, 37, 38 and 40 of the *Geneva Convections on the Right of children* seeking asylum, and all enabling provisions of the law. Learned counsel therefore moved the court to review the trial magistrate's order on discharge under Section 35(1) of the *CPC* and subsequent order of repatriation to Uganda based on the following grounds:

a. The applicants are persons referred to as Non-refoulement persons under section 29 of the Refugee Act cap 10 of the Laws of Kenya

b. That the applicants escaped from their country of origin in somali for fear of persecution having lost one of their family members due to inter-clan conflict and the activist nature of their mother

c. That prior to their escape, the Applicants mother had since been threatened by an armed group and due to that she escaped on the same fateful night tht her 1st born son was killed.

d. That currently, the Applicants are targeted members of an inter-clam conflict within their area thus making the situation even dire for humanitarian aid.

e. That the assailants promised to kill them one after another until they bring they their mother back to be killed or else, they shall be killed one by one on behalf of their mother.

f. That the applicants being fearful of that threat and having witnessed one of their children being murdered in cold blood, decided to escape to Uganda since they had the Visas to Uganda

g. That the applicants could not process the Kenyan Visa due to the short notice issued by the assassins hence the reason why the used their Uganda Visa which was processed to them by a German Based NGO in Somali due to the threats made to their mother.

h. That the applicants having filed away for their lives decided to come to Kenya for help due to her well founded laws on asylum seekers that they believe in applicable to them based on their circumstances.

i. That the said NGO is willing to assist the Applicants in getting Visas to join their mother in Germany who has since been given a German Nationality due to the threats by the assassins.

j. The applicants are law abiding citizens with no records save for the confusion that cropped in which made them come to Kenya without proper documentation.

k. That the Applicants had a genuine and innocent belief that since Uganda is a member of the East African Organization, and because they had a valid passport for Uganda, they could access Kenya without any pass.

l. That the mistake was an innocent one and they should not be expelled from the county due to non-compliance at the entry point. It was a genuine mistake

m. That it will therefore be fair, just and expedient that orders sought be granted

n. That this application has been brought promptly and in utmost good faith

o. That it will therefore be fair that this be allowed and the orders sought be granted.

5. In support of this application is an affidavit sworn by Khadar Mohammed in which he alludes to the following circumstances:

1. That I am a Somali Citizen who escaped from the county due to fear and threat of victimization of any family and my children (Annexed and marked as KM-1 is a copy of my marriage certificate.

2. That my wife Safiye Ahmed Faraha is an activist in Somali and due to her role in fighting for the rights and welfare of Somali girl child, our life has been severally threatened by our close neighbors and some clan members because we have refused to Marry off our children as they are still going to school and my wife escaped from Somali to Germany where she is currently a refugee ending in the year 2026. (Annexed and marked as KM-2 is a copy of the passport and the Visa for my wife to Germany indicating that she is a refugee.

3. That the said close neighbors and/or clan indeed actualized their threats and they forcefully broke into our house and demanded to be informed of the whereabouts of my wife.

4. That upon failing to be informed on the whereabouts they made away with my son who we later found dead and dumped in a thicket just some few kilometres from our village

5. That the assassins informed me that they will be coming to check whether or not my wife is back and in my event that they don't find her they will get away with one child until they are all finished/murdered

6. That I made a report to our nearest security urgency but they were reluctant to assist my family after the demise of my son. Our lives then remained at risk of being killed.

7. That I them made a report to the NGO where my wife was working and they informed me that the best way is to leave the country and seek refuge in another country as they process for me and my children our travelling documents to join my wife as refuge in Germany

8. That since it's a process getting a Kenya Visa and our lives were in danger, we decided to try our lack in Uganda and we indeed got a Ugandan visa which we were made to believe that are equally applicable to all East African Countries. (Annexed and marked as KM-3 (a) to (h) are copies of the passport and Visas for my family members)

9. That were informed at the Boarder that since we have a valid Ugandan Visa we don't need a Kenyan visa to gain entry into Kenya. This made us to come to Kenya through the help of Kenya officers at the Bordar but unfortunately, we were later arrested on the very same day while going to Nairobi to collect our Visas to Germany

10. My wife requested to be accommodated as refugee with all her family members who are facing serious threats to life in somlai and she was granted the same in Germany and informed to process their documents from the German Embassy in Kenya (Annexed and marked as KM-4 are copies of German processing Reference Number for all my family members.)

6. First and foremost, by virtue of the lower court proceedings this one family unit was being set asunder by the decision ordering for their repatriation to another country which is not a country of their origin. There is prima facie evidence of parental relationship between Khanda Mohammed and the 2nd, 3rd, 4th 5th 6th & 8th Applicants to this revision application. In lieu of these two applications I am minded to contextualize the issues raised by the Applicant and the enabling provisions of the law.

Decision

7. In the first instance its Article 2(5) &(6) of *the constitution* which states as follows:

   (5) The general rules of international law shall form part of the law of Kenya

   (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution.

8. Kenya is a country and a member of OAU and United Nations. It is therefore governed by the supremacy of *the constitution* whereas International treaties, conventions and rules of International Law form part of the Laws of the Republic. Therefore, the discussion on exercising revisionary jurisdiction would not be complete without reference the key touchstone constituting Human rights, Refugee Law, asylum seekers and persons generally being processed by courts as being unlawfully present in Kenya. For purposes of this weighty issues Article 33 of the 1951 *Convention Relating to the Status of Refugees* duly domesticated in our Refugee Act No. 10 of 2021 provides as follows:

   1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

   2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

9. The 1966 *Principles Concerning Treatment of Refugees* adopted by the Asian African Legal Consultative Committee, Article III(3) of which provides: "No one seeking asylum in

accordance with these principles should, except for overriding reasons of national security of safeguarding the populations, be subjected to measures such as rejection at the frontier, return or expulsion. As if that is not enough the 1967 Declaration on Territorial Asylum adopted unanimously by United Nations General Assembly (UNGA) as Resolution 2132 (XXII) 14 December, 1967 Article 3 of which provides:

> 1. No person referred to in article 1, paragraph 1 [seeking asylum from persecution], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution. 2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.
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> 3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

10. The above instruments approach appears consistent with approach taken in the 1969 organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee problems in Africa, Article II(3) of which provides: "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2 [concerning persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or who is compelled to leave his country of origin or place of habitual residence in order to seek refuge from external aggression, occupation, foreign domination or events seriously"

11. As seen from the preceding discussion application of the principle of non refoulment to a decision by the court is capable of producing different results than application of the traditional test of being unlawfully present in Kenya. Such strong views are as provided for in the 1984 Cartagena Declaration, Section III, paragraph 5 of which reiterates: the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens.

12. By reference to the significance of the above provisions and bearing in mind the question in this revision it emerges from the uncontroverted affidavit by the father to the applicants that there are high chances for them being exposed to the danger of torture or cruel in human or degrading treatment upon return to Somali. The corresponding Ugandan Visa provision was never verified by the trial court whether it was transit, tourist, or the tenure of it to permit re-entry back to that country. It can be inferred from the repatriation order that the instrument applicable would not have allowed them multiple entry to Uganda.

13. From my understanding of the affidavit there is an irrefutable presumption that the applicants were within the scope of Article 33 of the 1951 Convention Relating to the Status of Refugees, the 1969 Organization of Africa Unity (OAU) *Convention Governing the specific Aspects of Refugee Problems in Africa* and Section 29 of the Refugee Act of Kenya No. 10 of 2021. The applicants no doubt were outside their country of nationality. The affidavit by the

father to the minors as demonstrated that they had well founded fear of persecution for compelling reasons deponed arising out of the prevailing circumstances in the Republic of Somalia. He has also deposed that the mother of the minors took flight from her country of Nationality due to the same fears and she was unwilling to avail herself of the protection of her motherland. Essentially, the applicants are persons in need of International protection including the Republic of Kenya. It is clear from the sources of Kenyan law that the need for protection on the basis of the charge sheet in this context would not be anticipated by the trial court whatever instruments applicable to fall within the purview of the directorate of immigration.

14. The circumstances of this particular case may warrant the commissioner of Refugee Affairs as warranted under section 7, 8 & 9 of the *Refugee Act* of Kenya pursuing protection of refugees or asylum seekers coming within his mandate and by reference to the International and Regional Treaties mentioned above as well as other pertinent conventions including taking fair administrative procedures guided by the principle of non- refoulement to take appropriate measures to hear and determine the issues involving these applicants. Article 31 of the convention cushions the rights and protection of Refugees or asylum seekers in the following language

    1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence. 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such

15. Similarly Article 11(3) of the OAU convention is sacrosanct when it comes to the application of the doctrine of non-refoulement there is no exception to the circumstances and conditions upon which a citizen of another country who finds herself or himself within the frontier of that state can be repatriated without first complying with the due process clauses on fair trial rights. I reiterate that even in refugee or asylum seekers circumstances as long as they find themselves either lawfully or unlawfully within our borders the fundamental rights and freedoms as envisaged in Articles 27, 28, 47, 10, & 25 of our constitution can only be limited to the extent that the state demonstrates the issues identified from the outset on consonant with Article 24 of the same constitution. Little is seen from the trial court record specifically which bound the learned magistrate to depart from enforcing the Bill of Rights, when pronouncing itself on the order of repatriation to Uganda which is not even a country of origin for the applicants. The point is that for the purposes of that trial there was need to establish whether the minors migration from Somalia via Uganda to Kenya they were persons whose case could be carefully drawn within the ambit of Article 37 of the 1951 convention and the provisions of our Refugee Act. In the case of Gabcikovo –Nagymaros Project (Hungary/Slovakai) , Judgement, ICJ Reports 1997____ the court observed that treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A court cannot endorse actions which are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.

16. Before turning to the detail of the charge sheet a number of preliminary observations were necessary by the trial court pursuant to the 1951 convention the Refugee Act of Kenya No. 10

of 2021 the 1969 OAU convention, Article 14 of the Universal Declaration of Human Rights, Article 20, 21, 23, 24, 25, 26, 27, 28, 29, 47, 48, & 50 of *the Constitution*. It is also significant to note that Article 1(a) (2) of the 1951 convention does not define a refugee as being a person who has been formerly recognized as having a well-founded fear of persecution. It is simply provides that the term shall apply to any person who owing to well founded fear of being persecuted. By the National Police Service limiting the Human Rights of the Applicants and proceeding to charge them for being unlawful present in Kenya contrary to Section 53(1) (j) as read with Section 53(2) of the *Kenya Citizenship and Immigration Act* No. 12 of 2011 at the very minimum was unreasonable and lacked justification. Justifiability requires the importance of the purpose of the limitation to be one that is worthwhile and important in a constitutional democracy. Therefore, a limitation of rights of individuals found within our borders with valid passports which did not serve the purpose which contributes to an open and democratic society based on human dignity equality and freedom cannot find its place in our legal system. According to the trial court record, there was no evidence of textual qualification that the applicants were a threat to the National Security of our country to create a special criterion in terms of which some of the rights which accrue in our constitution, International and Regional Instruments may be limited by the court.

17. It required a review of the individual circumstances of each applicant's case by the relevant authorities in Kenya as the Directorate of Refugee Affairs and other organs created under the Act as a condition precedent to any denial of protection by the court. This was not the case in the impugned proceedings. On the other hand, there can be no doubt that there exist other administrative legal mechanisms which could have been engaged by the National Police Service and the Director of Public Prosecution than the elective criminal process to purport to lawfully charge and seek a conviction of the applicants. It has not been shown that the trial court that this was an exceptional case to the principle of non- refoulement. This was the position taken by the joint working group of the OAU/UNHCR in December 1980 where it was resolved as follows: " No person shall be rejected at the frontier, returned or expelled, or subjected to any other measures that would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons mentioned in paragraph 1(a) and (b) of Section 1 (reflecting the definitions of refugee in both the 1951 Convention and the OAU Refugee Convention

18. This notwithstanding that I am not ultimately persuaded tht the applicants had been fully explained their rights as stipulated in Article 50 of *the Constitution* and the safety provisions indicated in the Refuge Act of Kenya. The nature of the risk faced by the applicants required individual assessment and given specific consideration as provided for in the Refugee Act of Kenya, and if the removal was necessary to achieve a particular end that could have alleviated an automatic order of repatriation. Whether the danger entailed in their being unlawfully present in Kenya outweighs the necessity that consideration given for them to be interviewed by either the Director of Refugee Affairs or Immigration Directorate was never a matter addressed by the trial court. That is the reason of the application of the proportionality test which would have given due regard:

    a. The seriousness of the danger posed to the security of the county

    b. The likelihood of that danger being realized and its imminence

    c. Whether the danger to the security of the country would be eliminated or significantly alleviated by the removal of the individual concerned.

d. The nature and seriousness of the risk to the individual from refoulement

e. Whether other avenues consistent with the prohibition of refoulement are available and could be followed, whether in the country of refuge or by the removal of individual concerned to a safe third country.

19. The Kenya Refugee Act affirms the countries commitment guarantee and protect Refugee Rights as contained in our domestic law and International and Regional Instruments as set out and structured in Article 2(5) & (6) of *the constitution*. Particularly, in a country such as Kenya it recognizes two types of refugees prima facie and statutory Refugees. The next step therefore was for the trial court to induce and invoke the jurisdiction of the Refugee Act and to the very minimum extent of the Citizenship and Immigration Act. The African Charter on Human and Peoples Rights was rtified by Kenya in 1992 and some of this provisions include the right of asylum as set forth at Article 12(3) "(e) very individual shall have the right, when persecuted to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions. The wording of Article 12(3) is potentially far-reaching, but offers no definition of "persecution." Rending it difficult to fully determine the scope of the provision. Article 5 of the African Charter provides a district set of protections from ill treatment, as follows (e) very individuals shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade torture cruel inhuman or degrading punishment and treatment shall be prohibited." This provision could be invoked to protect a refugee from being returned to a state where the refugee is likely to face torture of cruel, inhuman or degrading treatment.

20. The cause of fairness generally speaking is hardly served relating to the Refugee Rights or asylum seekers when judicial rolls legal scheme in hearing and determination of their rights is confined to the *Kenya Citizenship and Immigration Act* and Refugee Act without reference to the vindication to the fundamental rights enshrined in the International and Regional treaties and convention ordained for that vulnerable group.

21. As to whether the decision of the trial court should be left to stand I am guided by the principles in the case of John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & another (53) it provides the roots upon which this court exercises revisionary jurisdiction as outlined in Article 165 (6) & (7) of *the Constitution*, Section 362 & 364 of the CPC. The key features being the foundation for this court to intervene in a decision of a lower court or tribunal for that matter.

a. Illegality- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.

b. Fairness- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. Irrationality and proportionality- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker.

22. Given the wide discretion enjoined by the National Police Service and the Director of Public Prosecution giving due regard of this case the high threshold set by *the constitution* to investigate and initiate a criminal proceeding against the applicants was never met. Whereas on the face of it the decision may look rational and for the public interest but it was underpinned on wrong factual matrix and subsequently an error of law on the face of the record. In considering this matter, I dare say that a person entrusted with a decision making process and finally makes it affecting the rights of another person must so to speak, direct himself or herself properly in law. He or she as truly said must consider the question whether the means used to impair the Rights and Fundamental Freedoms are no more than his necessary to accomplish the objective. It appears for the time being that the repatriation orders did not take into account that for the immigration officers to execute the order there was a risk of false detention of the applicants for a lengthy period of time and at that interim period have their human rights threatened, or infringed or all together violated. No person shall be subjected by a member state to measures such as rejection, repatriation, expulsion, return at the frontier which will compel him or her to a violation of his or her right to life, persecution, or freedom.

23. For those reasons, the entire basis of the charge and repatriation of the Applicants to the Republic of Uganda by the trial court must be and is hereby reviewed and set aside forthwith. As a consequence a declaration be and is hereby issued to remove the applicants from their respective detention facilities and be availed to the jurisdiction of the Directorate of Refugee Affairs to consider the ramifications of the Refugee Act in protecting the rights of the applicants. That in doing so, the same be in consonant with the provisions of the Act and other protocols within our legal regime to address the issues raised in the supporting affidavit by the Applicants. It is worthy to note that the doctrine of the best interest of the child used by courts to determine a wide range of issues relating to the wellbeing of children is also applicable in this case. Given the gravitas of this matter such removal and placing the applicants within the jurisdiction of the Director of Refugee Affairs in Nairobi by the two organs of government upon which the Applicants are currently detained shall not take more than seven days from today's ruling. For compliance purposes the Deputy Registrar of the High Court causes this decision to be served upon the Directorate of Refugee Affairs for implementation and execution.

It is so ordered

DATED AND SIGNED AT ELDORET THIS 24TH DAY OF NOVEMBER, 2023

In the presence of

Mr. Mugun for the State

Mr. Ombego Advocate

Respondents

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R. NYAKUNDI

JUDGE