REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CRIMINAL REVISION NO. E001 OF 2022

SEROGO ALEX.....1ST APPLICANT

MUMUPOREZE ANN.....2ND APPLICANT

KEZIA ALICE.....3RD APPLICANT

MUNYARUGAMBA ERICK.....4TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The revision proceedings herein were initiated by the applicants herein vide a Motion, dated 5th January 2022, brought under certificate of urgency. They had been arrested at the Kisian area of Kisumu, along the Kisumu-Busia Highway, on 27th November 2021, and were presented in court on 30th November 2021, on charges of being unlawfully present in Kenya, contrary to section 53(1)(j) of the Kenya Citizenship and Immigration Act, No. 12 of 2011. They pleaded guilty to the charges, according to the trial records, and were convicted and sentenced to a fine each of Kshs. 50, 000.00 or in default to serve six months in jail. There were additional orders that, upon payment of the fine or completion of sentence, they were to be deported to their country of origin with immediate effect.

2. They were aggrieved by the said orders, hence the instant revision. They contend that the proceedings were conducted in English, without the assistance of an interpreter, and without conducting an enquiry on whether they understood or could communicate in the language. They assert that they could not communicate in ether English or Kiswahili, and were only conversant with French and their native Congolese language, and they were, therefore, incapable of following and participating in the proceedings. They further contend that the trial court ordered their deportation despite them being asylum seekers, information which could not be presented to court by them on account of the language barrier. They state that they were persons of vulnerable concern in Kenya, as they were fleeing their country of origin for fear of persecution, and came to Kenya to seek asylum. They further contend that they did not have the benefit of legal representation at the time of taking plea, and throughout the proceedings, upto the point of conviction and sentence. They further contend that they were unfamiliar with Kenyan law that governs refugees and asylum seekers, and that that, together with the language barrier, led to their pleading guilty to the offence of unlawful presence. They contend that the imposition of the deportation order without regard to the merits of their claim for asylum was a likely violation, by the Kenyan State, of its obligations to protect the human rights of everyone within its territory. They state that the order to repatriate them to their country of origin exposed them to imminent danger.

3. The matter was placed before the Recess Duty Judge, Aburili J, on 7th January 2022, was certified urgent, directions were given as to service, and interim relief was granted to stay the deportation order.

4. The application was urged orally before me, on 14th January 2022. Mr. Nyamori, Advocate, for the applicant, stated that two of the applicants were registered refugees, while the other two had just arrived in the country and were on their way to Nairobi to register as refugees. He contended that the trial court did not consider the Refugee Act, No. 13 of 2006, and in particular its sections 11, 13 and 18. He asserted that, based on those provisions, the substance of the charges against the accused, and the subsequent proceedings were improper and illegal, as two of the applicants held valid papers and the other two were on their way to the refugee office. He stated that the lives of the applicants were under threat in their home country, which brought their human rights under threat. He stated that the trial court did not properly address itself to the law and the facts. He submitted that the applicants were vulnerable foreigners, and the record of the trial court did not detail whether the court tried to find out if the applicants were foreigners. He stated that the deportation orders would push the applicants back to a country from which they were running away, and where their human rights were in jeopardy. He submitted that the refugee status of the applicants with papers ought to be upheld, while those without papers ought to be given opportunity to register as such.

5. Ms. Odumba, for the State, submitted that the issue raised should have been canvassed by way of appeal, and not revision, given that section 362 of the Criminal Procedure Code, Cap 75, Laws of Kenya, was limited to illegality. She submitted that the issues were being

raised after the court had become *functus officio*. She submitted that the Immigration Department needed to confirm the authenticity of the papers held by the two applicants, and that she had not, as at the time she was submitting, received further documents, saying that, if the documents were found to be authentic, she would have no objection to the application, with respect to them. Regarding the other two applicants, she submitted that there was no evidence as to when they arrived in the country. She asserted that there was no illegality, that the application was premature and the court dealt with what was before it. She also stated that she believed that the applicants had the benefit of an interpreter.

6. In rejoinder, Mr. Nyamori submitted that revision was the correct approach to the matter, as the applicants were challenging the legality of the sentence imposed. He argued that the relevant laws were not considered, and that the status of the applicant could not be considered without considering the Refugee Act, submitting that lack of consideration of the provisions of the Refugee Act rendered the charge unlawful. He further submitted that there was nothing on record to show that the applicants understood the charge nor that they responded to it in a language that they understood. He asserted that Kenya had a duty in international law to protect the applicants, who were entitled to access the offices of the Refugee Services Department. He submitted that the department had no offices at Busia, and that the applicants had thirty days, upon entering the country, to register. He stated that the proper course of action should have been to direct them to the department instead of punishing them. He further submitted that the applicants paid the fine based on what they were instructed, and that they had no benefit of legal advice on what had transpired in court.

7. The applicants have presented a two-pronged case. One, they say that the proceedings were conducted in a language they did not understand. Two, they say that the trial court should have treated them as refugees and asylum seekers, and applied the Refugee Act to them. I shall consider the two sides of the case in turn, starting with the most basic one, the language used at the trial.

8. The Constitution of Kenya 2010 and the law governing conduct of criminal trials, the Criminal Procedure Code, both deal with the subject of the language to be used at the trial. Both declare English and Kiswahili to be the official languages in Kenya, and, therefore, the languages to be used ordinarily in criminal trials. They go on to provide that an accused person is entitled to use, in court, the language that he understands, as between English and Kiswahili. Where the accused in not conversant with either official languages of the court, then he is entitled to be provided with an interpreter or translator, who then interprets or translates either of the two official languages to whatever other language that the accused uses in court.

9. The Constitution makes language at a criminal trial to be a matter of fundamental importance, so that the accused has a constitutional right to have the trial conducted in a language that they understand, as part of their fair hearing or trial rights. Article 50(2)(m)(3) states as follows:

> *50. (1) ...*
>
> *(2) Every accused person has the right to a fair trial, which includes the right—*
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) …
>
> (g) …
>
> (h) …
>
> (i) …
>
> (j) …
>
> (k) …
>
> (l) …
>
> (m) *to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*
>
> (n) …
>
> (o) …
>
> (p) …

(q) …

(3) *If this Article requires information to be given to a person, the information shall be given in language that the person understands.*

(4) ...

10. With regard to this constitutional tenet, the court, in *Wilson Kipchirchir Koskei vs. Republic* [2019] eKLR (Mativo, J), stated:

The constitutional dictate to a fair trial cannot be met if the accused cannot understand the language of the court. If this goal is not met, it means that the court shall be misinterpreting the letter and spirit of the supreme law of the land thereby belittling the Constitution and the very purpose for which it was intended. Courts must therefore be very keen in ensuring that this provision is adequately given regard to so as to ensure that the rights of an accused person are not violated.

11. The Criminal Procedure Code deals with language at criminal trials at section 198, which states as follows:

Interpretation of evidence to accused or his advocate

(1) *Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.*

(2) *If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate, it shall be interpreted to the advocate in English.*

(3) *When documents are put in for the purpose of formal proof, it shall be in the discretion of the court to interpret as much thereof as appears necessary.*

(4) *The language of the High Court shall be English, and the language of a subordinate court shall be English or Swahili.*

12. On the matter of the language to be used at the trial including plea-taking, has been addressed by the courts over the years, of course in interpretation and application of the provisions of the Criminal Procedure Code relating to language and plea-taking. The former Court of Appeal for Eastern Africa, in *Hando s/o Akunaay vs. Rex* [1951] 18 EACA 307 (Sir Barclay Nihill, P, Sir Newnham Worley, VP & Sir Hector Hearne, CJ), stated:

When a person is charged with an offence, the charge and the particulars thereof should be read out to him so far as possible in his own language, but if that Is not possible, then in a language which he can speak and understand. Thereafter the court should explain to him the essential ingredients of the charge and he should be asked be asked if he admits them. If he does, then his answer should be recorded as nearly as possible in his own words and then a plea of guilty formally entered.

13. In *Elijah Njihia Wakianda v Republic* [2016] eKLR (Waki, Nambuye & Kiage, JJA)**,** the court said:

The beginning point of ensuring that the accused person has entered into a free and conscious plea of guilty is being satisfied that he understands the proceedings and that he in particular understands the charge that is facing him. Indeed, the court taking the plea is required to read and explain to the accused the charge and all the ingredients in the accused person's language or a language he understands … We think that it is good practice for the specific language used to state the elements of the charge be specifically stated. That should be established by specifically asking the accused what language he understands, and recording his answer before either using the language he mentions or ensuring a translator is present to convey the proceedings to him in the chosen language. We also think that the elements of the offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. One surely ought to know the consequences of his virtual waiver of his trial rights that the Constitution guarantees him. That did not occur here and yet the appellant was unrepresented calling upon the trial court to be particularly solicitous of his welfare. The officer presiding is not to be a mere umpire aloofly observing the proceedings. He is the protector, guarantor and educator of the process ensuring that an unrepresented accused person is not lost at sea in the maze of the often- intimidating judicial process.

14. So also *Adan vs. Republic* (1973) EA 445 (Sir William Duffus, P, Spry, VP & Mustafa, JA) and *KGK vs. Republic* [2019] eKLR (Lagat Korir, J).

15. What emerges from above, that is the Constitution, statute and case law, is that when an accused person appears for trial, the charge must be read and explained to him in the language he understands, as between the official language of the court; or the charge may be interpreted to him by the court interpreter before he is required to pleaded. From case law what emerges is that whenever the services of an interpreter are employed, the fact of the interpretation must be reflected in the record. Indeed, in *Desai vs. Republic* [1971] EA 416 (Sir William Duffus, P, Spry, VP & Lutta, JA), it was said that whenever interpretation was required, the fact of the interpretation should be recorded, together with the name of the interpreter and the languages used. From both the Constitution, statute and case law, it has been made clear that a court, faced with an accused person presented for plea taking, should bother itself with establishing the language that the accused person understands, and should put that language that he claims to understand on the record. Secondly, the trial court, should the language be none of the two official languages, should bother itself with finding an interpreter or translator conversant with the language that the accused person says he understands, and record the fact in the proceedings, inclusive of the name of the interpreter. This is a requirement of the law. It is part of the fair hearing or trial principles, and it is a fundamental right stated in the Bill of Rights in the Constitution. Failure to observe this requirement should have the consequence of rendering the trial deficient, for violation of the constitutional right of the person in

question. This right is available to citizens and foreigners alike, for Article 50(2) of the Constitution talks of "every accused person."

16. It is not a disputed fact that the applicants are all Congolese. It is not clear, from the trial record, the language that they were familiar with. Put differently, it is not clear whether they were familiar with the two official languages in Kenya. The starting point for a court in a criminal trial, when dealing with foreign nationals, should be with the question of the language that they are familiar with, for the purposes of the trial, and specifically taking of plea. The fact that the persons presented before court are foreigners should trigger, in the mind of the court, concern about the language that ought to be employed in the proceedings, to ensure compliance with Article 50(2)(m) of the Constitution and section 198 of the Criminal Procedure Code.

17. The record of the proceedings that were conducted by the trial court do not to indicate the language the accused persons preferred or understood. It simply indicates *"Interpretation-Swahili" …" the substance of the charge(s) and every statement thereof has been stated by the court to the accused person in that language that he/she understands. Who being asked whether he/she admits or denies the truth of the charge(s) replies…."* The rest of the proceedings are recorded in English. The record is silent on whether the trial court made an effort to find out, from the applicants, whether they were familiar with and understood the two Kenyan official languages, for that fact was not recorded. Secondly, if the applicants indicated to the trial court that they understood a language or languages other than the two official languages, that is not reflected on the record.

18. According to https://en.wikipedia.org/wiki/Democratic_Republic_of_the_Congo, French is the official national language of Congo, though other national languages, such as Kikongo, Lingala, Swahili and Tshiluba, are recognized. So, with respect to the applicants, the court should have made an effort to establish whether the applicants, being foreign nationals, understood either English or Kiswahili, and if not, establish the language, among those spoken in their country, that they understood, so that the court could arrange to find a suitable interpreter; and thereafter place all that on record. There was need to go the extra mile, as required by the law, when faced with persons who might not be familiar with the two languages of the court. Failure to do so leads to miscarriage of justice.

19. In view of the above discussion, it is my finding that the trial court was not faithful to Article 50(2)(m) of the Constitution and section 198 of the Criminal Procedure Code, as well as the guidelines given in *Hando s/o Akunaay vs. Rex* [1951] 18 EACA 307 (Sir Barclay Nihill, P, Sir Newnham Worley, VP & Sir Hector Hearne, CJ), *Desai vs. Republic* [1971] EA 416 (Sir William Duffus, P, Spry, VP & Lutta, JA), *Adan vs. Republic* (1973) EA 445 (Sir William Duffus, P, Spry, VP & Mustafa, JA), *Elijah Njihia Wakianda v Republic* [2016] eKLR (Waki, Nambuye & Kiage, JJA), *Wilson Kipchirchir Koskei v Republic* [2019] eKLR (Mativo, J) and *KGK vs. Republic* [2019] eKLR (Lagat Korir, J), and, therefore, the applicants did not receive a fair trial, for the fair hearing principles set out in the law were not observed, and were violated.

20. On the second prong, with respect to compliance with the Refugee Act, two issues arise, whether the trial court should have considered the said law, and, if it had considered the same, how should it have dealt with the applicants.

21. Mr. Nyamori used words such as "asylum," "asylum seeker" and "refugee" in his submissions. Asylum, asylum seeker and a refugee are defined, in the Refugee Act, as follows:

> *2. "asylum" means shelter and protection granted by the Government to persons qualifying for refugee status in accordance with the provisions of this Act and in accordance with International Conventions relating to refugee matters referred to in section 16;*
>
> *"asylum seeker" means a person seeking refugee status in accordance with the provisions of this Act …*
>
> *Meaning of "refugee"*
>
> 3(1) *A person shall be a statutory refugee for the purposes of this Act if such person—*
>
> *(a) owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or*
>
> *(b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.*

22. Sections 11(1)(3), 13 and 18 of the Refugee Act were cited to me. They provide as follows:

> *11. Recognition of refugees*
>
> *(1) Any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act shall make his intentions known by appearing in person before the Commissioner immediately upon his entry into Kenya.*
>
> *(2) ...*
>
> *(3) Without prejudice to the provisions of this section, no person claiming to be a refugee within the meaning of section 3(1) shall merely, by reason of illegal entry be declared a prohibited immigrant, detained or penalized in any way save that any person, who after entering Kenya, or who is within Kenya fails to comply with subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.*

13. Stay of proceedings Notwithstanding the provisions of the Immigration Act (Cap. 172) or the Aliens Restriction Act (Cap. 173), no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within Kenya —

(a) if such a person has made a bona fide application under section 11 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 right of appeal under that section; or

(b) if such person has become a refugee.

18. Non-return of refugees, their families or other persons

No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where—

(a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country.

23. My understanding of these provisions is that illegal or unlawful entry into Kenya, of itself, should not necessarily expose the person who has entered the country as such to be handled as an illegal alien or foreigner. Illegal entry, of course, refers to entry without the requisite travel documents. Persons who enter the country while fleeing persecution or in fear of the same in their home countries, and with an intent to seek refuge in Kenya, whether as asylum seekers or refugees have a right in law to protection and accommodation in Kenya, prior to conferment of asylum or refugee status. The law affords them a chance to take the steps to have themselves registered as such, upon presenting themselves to the relevant government offices. A court faced with alleged illegal aliens or foreigners charged with being in the country illegally, if they originate from a country known to have internal or even external conflict, is obliged to establish whether or not such persons are in the country in pursuit of a safe haven, before subjecting them to the criminal process, and once it is apparent to the court that they are either refugees or asylum seekers, then it should deal with them as such. If they are not yet accorded asylum or refugee status, the court should facilitate that by directing the authorities that have presented them to court to place them before the authorities responsible for grant of refugee or asylum status for facilitation. The criminal justice system should only be employed as a last resort, after the said persons have been assessed by the relevant authorities, and found not to be genuine refugees or asylum seekers, whereupon they should be charged with being in the country illegally, penalize them and have them repatriated thereafter. See *Bivamunda Erick vs. Republic* [2014] eKLR (F. Tuiyott, J), *Fysha Abrha Redae & 2 others vs. Cabinet Secretary Ministry of Interior & Coordination & another* [2015] eKLR (Ngenye-Macharia, J), *Majid Ali Abdu & another vs. Republic* [2021] eKLR (Njagi, J) and *Mesret Berihu & 18 others vs. Republic; Kituo Cha Sheria (Interested Parties) & another* [2021] eKLR (PJO Otieno, J).

24. Kenya has obligations, under the Refugee Act and the United Nations Convention Relating to the Status of Refugees, to handle any foreigners originating from volatile countries in a humane manner, to establish their refugee status, before subjecting them to criminal proceedings on account of illegal entry. See *Republic vs. Khadija Abdikadir Hassan* [2021] eKLR (Ali-Aroni, J). That does not appear to have been done here. The applicants were not handled, as they should have been, in accordance with the Refugee Act. If they had been properly handled, the court would have had the two with papers assessed to establish whether or not their papers were genuine; and those without papers to establish whether or not they were genuine asylum seekers prior to subjecting them to the criminal process. All this would have been avoided, had an effort been made to comply with the constitutional tenet relating to the language to be used at trial, as well as the right to legal representation, in cases where vulnerable foreigners had difficulty appreciating the proceedings to which they were being subjected.

25. The provisions of the Refugee Act mirror the provisions of the United Nations Convention Relating to the Status of Refugees, and in particular Articles 31, 32 and 33 thereof. Kenya is signatory to that Convention. The same is also part of Kenyan law by virtue of Article 2(5) of the Constitution of Kenya, 2010. See *Adel Mohammed Abdulkader Al-Dahas vs. Commissioner of Police & Another* [2003] eKLR (Kubo, J).

26. I was addressed on the point as to whether this was a proper case for revision, or whether the applicants should have filed an appeal instead. Appeals turn largely on the merits of the decision challenged. Revision, on the other hand, turns on technicalities relating to the legality, propriety, regularity or correctness of a decision. Revision is not about the merits of the decision. Is the matter before me founded on the merits of the decision? I do not think so. The applicants complain that the trial process was not proper or regular or correct or legal, to the extent that the fair trial principles were not adhered to, as the court was not faithful to the rules that govern the language of trial. That is a matter that falls squarely within the realm of revision. Secondly, they argue that, being refugees and asylum seekers, the trial court ought to have been sensitive to the requirements of the Refugee Act; and that the failure to advert to the Refugee Act made their trial improper, irregular, incorrect and even illegal. It was said, in *Fysha Abrha Redae & 2 others vs. Cabinet Secretary Ministry of Interior & Coordination & another* [2015] eKLR (Ngenye-Macharia, J), that a charge of being in the country unlawfully was illegal, if brought before expiry of the thirty-day window, allowed under the Refugee Act, within which a foreigner may register as a refugee or a person seeking asylum. It is my finding, therefore, that the application before me was properly filed, and I can quite properly deal with it.

27. In view of everything that I have said above, it is my finding that the proceedings that were conducted by Hon. J. Wambilianga, Senior Principal Magistrate, in Kisumu Chief Magistrate's Court Criminal Case No. E1425 of 2021, were tainted by illegality, impropriety,

incorrectness and irregularity, for the reasons foregoing. I hereby quash the conviction of the applicants and set aside the sentences imposed on them. I direct that the applicants be handed over to the Commissioner for Refugee Affairs or the United Nations High Commission for Refugees for processing, in terms of prayer 7 of the Motion, dated 5th January 2022. They should be subjected to the criminal process only if it is established by the Commissioner for Refugee Affairs, or the United Nations High Commission for Refugees, that they are not genuine refugees or asylum seekers. It is so ordered.

DELIVERED VIRTUALLY, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF JANUARY 2022

W MUSYOKA

JUDGE

MR. E. ZALO AND MR. NGONGE, COURT ASSISTANTS.

MR. NYAMORI, INSTRUCTED BY KITUO CHA SHERIA, FOR THE APPLICANTS.

MS. ODUMBA, INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS, FOR THE RESPONDENT.