



**Akingbade v Commissioner for Refugee Affairs (Civil Appeal E323 of 2020)
[2022] KEHC 14918 (KLR) (Civ) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E323 OF 2020**

**CW MEOLI, J
OCTOBER 28, 2022**

BETWEEN

TUNJI AKINGBADE APPELLANT

AND

COMMISSIONER FOR REFUGEE AFFAIRS RESPONDENT

*(Being an appeal from the decision of the Refugee Appeals Board delivered
by Hon Wangari Mwanzia, Board Chairperson on the 2nd July 2020
In the Matter of Tunji Akingbade Moses – RAB/823-15 C02187/2019)*

JUDGMENT

1. The Appellant who claimed to be a Christian Nigerian national and a native of Oyo State, Southwestern Nigeria came to Kenya in January 2015, allegedly fleeing religious persecution in Nigeria. In 2016 he made an application to the Commissioner for Refugee Affairs (hereafter the Respondent) for recognition as a refugee. By a letter dated May 28, 2019 the Respondent rejected the Appellant's application on the ground that no well-founded fear of persecution had been established by the Appellant if he were to return to his country-of-origin Nigeria. Aggrieved by the commissioner's decision, the Appellant on June 17, 2019 lodged an appeal to the Refugee Appeals Board (hereafter the Board) on grounds *inter alia* that there was a well-founded fear of persecution based on traditional belief; a well-founded fear of persecution of recruitment into the Boko Haram (a terrorist group in Nigeria) ; and well-founded fear of persecution based on threats issued by one Alhaji who allegedly assisted the Appellant in his flight from Nigeria to Kenya.
2. Upon hearing the appeal, the Board delivered its decision on July 2, 2020 dismissing the Appellant's appeal and confirming the decision of the Respondent in finding the Appellant was ineligible within the meaning of Section 3 of the *Refugees Act* to be granted refugee status in Kenya. Aggrieved with the



outcome, the Appellant preferred an appeal to this court challenging the Board's decision, based on the following grounds: -

- “ 1. That the Refugee Appeals Board erred in law and in fact in failing to have due regard, take into account and appreciate the substantive issues of law and fact raised by the Appellant during the hearing at the Board.
 2. That the Refugee Appeals Board erred in law and in fact in failing to consider any of the compelling evidence adduced by the Appellant during the Board's hearing.
 3. That the Refugee Appeals Board erred in law and in fact in failing to find that the Appellant faces a well-founded fear of persecution based on his religious belief.
 4. That the Refugee Appeals Board erred in law and in fact in failing to find that the Appellant faces imminent danger and well-founded fear of persecution from the Boko Haram.
 5. That the Refugee Appeals Board erred in law and in fact in failing to consider the existential and geographical threat that Boko Haram pose.
 6. That the Refugee Appeals Board erred in law and in fact in finding that the Appellant's return to his home area in South-West or any other state in the South-Western region of Nigeria would not pose any harm to the Appellant.
 7. That the Refugee Appeals Board erred in law and in fact in failing to find that the Appellant faces imminent danger and fear of persecution from Alhaji.
 8. That the Refugee Appeals Board erred in law and in fact by dismissing and failing to grant the Appellant application for refugee status.
 9. That the Refugee Appeals Board erred in law and in fact in disregarding and failing to take into account credible and reliable evidence adduced by the Appellant thereby arriving at a wrong decision.” (sic)
3. The appeal was canvassed by way of written submissions followed by oral highlighting. Counsel for the Appellant contended that the Board's decision was inconsistent with Article I (A) (2) of the 1951 *Convention Relating to the Status of Refugees*, in that despite correctly finding that the Appellant's evidence was credible, the Board proceeded to make a finding that the Appellant was not eligible to be considered as a refugee. Further, citing Section 3(1) (a) of the *Refugees Act 2006* and reiterating the Appellant's evidence before the Board, counsel submitted that this court ought to determine whether the Board erred in its decision and whether the Appellant has a well-founded fear of persecution and is therefore both unable and unwilling to return to Nigeria.
 4. Invoking the principle of non-refoulment as articulated in *Kenya National Commission on Human Rights & Another v Attorney General & 3 Others* [2017] eKLR counsel argued that the Board's conclusion that the Appellant is of low profile, and could safely return to a different part of his country of origin, where he could enjoy effective state protection without facing the risk of persecution was not founded on any law and must be rejected. Counsel asked the court to take judicial notice of the threat arising from Boko Haram activities in parts of Nigeria and asserted that the government of Nigeria was incapable of protecting the Appellant from persecution from witches, Boko Haram and Alhaji, the latter who would not want his assistance to the Appellant disclosed. In conclusion it was reiterated



that the Appellant had proved that he had a well-founded fear of persecution owing to which he not only unable but also unwilling to return to Nigeria and is hence deserving of refugee status in Kenya. The court was thus urged to allow the appeal.

5. Counsel for the Respondent defended the Board's findings and in so doing anchored her submissions on the [1951 Convention Relating to the Status of Refugees](#) , the [1967 Protocol Relating to the Status of Refugees](#), The [1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa](#) and the [Refugees Act 2006](#). Reliance was also placed on a raft of foreign decisions, journals, and articles. These included the *UNHCR Handbook Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and 1967 Protocol* ; the English decision of *R v Secretary of State for the Home Department, Ex parte Sivukumaran and Conjoined Appeals Case* [1988] AC 958; *Karen Musalo: Claims for Protection Based on Religion or Belief: Analysis and Proposed Conclusions*; *Jenni Millbank and Anthea Vogl : Adjudicating Fear of Witchcraft Claims in Refugee Law*, *Journal of the Law Society* (2018); UK Home Office, *Operational Guidance Notes: Nigeria v 10* (2013); the Canadian decision in *Oloyede v Canada (Minister of Citizenship and Immigration)* [2001] FCT 255; the Constitution of the Federal Republic of Nigeria 1999; the USA Court of Appeal decision in *Francis Gatimi et al Petitioners v Eric H Holder Jr, Attorney General of the United States No 08-3197* and; the English decision in *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489.
6. Based on the foregoing authorities, counsel for the Respondent argued that the Appellant had failed to establish a well-founded fear of persecution; treatment that amounts to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; and being unable or unwilling to obtain protection from the country of origin, and as such the Board did not err in its decision. Further, citing the UNHCR Handbook (*supra*) and the Canadian decision in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* Canada Federal Court, 1993 counsel asserted that the Appellant could relocate to any other part of his country of origin where there was no risk of persecution from Boko Haram whose insurgency was predominantly confined to the Northern part of Nigeria. Additionally, that the practice of witchcraft is prohibited under Nigerian Criminal Law. Moreover, the Appellant's risk of persecution was not anticipated from state actors and thus internal relocation was a viable option as the Appellant who was not a prominent individual in the populous nation of Nigeria and would be accorded state protection, if necessary.
7. In rebutting the Appellant's invocation of the principle of non-refoulement it was argued that while the principle is an important customary international law doctrine, it does not apply to the Appellant's circumstances . That despite denial of refugee status, the Appellant has remained in the country pending determination of the present appeal. In closing, counsel submitted that the Appellant did not establish that he has fulfilled any of the Convention and statutory grounds for eligibility as a refugee, and that the decision of the Respondent and appeals Board ought not to be overturned. The court was thus urged to dismiss the appeal.
8. The court has considered the grounds of appeal, the record of appeal and especially record of the Board proceedings as well as the submissions by the respective parties. This is a first appeal from the Board. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle –Vs- Associated Motor Boat Co* [1968] EA 123 in the following terms: -

“ An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.



An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

9. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See *Ephantus Mwangi & Another vs Duncan Mwangi Wambugu* [1982 – 1988] 1 KAR 278.
10. The thrust of the Appellant's case before the Board was that he was eligible for consideration as a refugee as he had a well-founded fear of religious and other persecution from practitioners of traditional religion whom he referred to as witches, Boko Haram and one Alhaji and was therefore unable and unwilling, owing to the fear, to return to Nigeria. Indeed, on this appeal, as before the Board, the central issue arising for determination was whether the Appellant demonstrated his claim.
11. The term "refugee" was defined as follows in section 3(1) a of the *Refugees Act 2006* which was in force at the relevant time (and now repealed by the *Refugees Act* of 2021): -

"(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..."

12. Regulation 22 of the Refugees (Reception, Registration and Adjudication) Regulations made under the repealed Act imposes the burden of proof on the person seeking asylum "to establish that he is a refugee as defined in section 3 of the Act" and further provides that in the absence of documentary evidence, the credible testimony of the asylum seeker alongside consideration of the conditions in the country of origin may suffice to establish eligibility for refugee status. Thus, the burden of proof was upon the Appellant to bring his case within the definition of a refugee in section 3 of the repealed Act. Regulation 23 provides that:

"(1) The eligibility of an asylum seeker for grant of refugee status in accordance with the Act shall be made on a case by case basis, taking into account the specific facts of the case and conditions in the country of origin.

(2) In making a determination on eligibility, a refugee status determination officer may—

- (a) request further information or clarification from the asylum seeker;



(b) consult with the office of the United Nations High Commissioner for Refugees; ..”

13. And the standard of proof under the UNHCR Handbook and Guidelines on Procedure and Criteria for Determining Refugee Status (hereafter the UNHCR Handbook) is to a reasonable degree, that is, on a balance of probabilities. See section 107,108 and 109 of the *Evidence Act* and the case of *Thirunavukkarasu v Canada (Minister for Employment and Immigration)* (supra). The Court of Appeal discussing the standard of proof in civil cases stated in *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR that:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

14. The Board in considering the matter before it was obligated to assess the Appellant’s claim from his own subjective account and the objective pertinent country of origin information available to it. As I understand it, the Appellant’s subjective account was that the Appellant was a committed Christian, and having suffered persecution on account of his faith from the witches or practitioners of traditional spiritism in his native home who demanded that he takes up the mantle of the oracle priest, from Boko Haram who had forcefully recruited him and compelled him to convert to Islam, and fearful of reprisals from Alhaji, was owing to his fear, unwilling to return to Nigeria. The Board proceedings indicate that the Board conducted exhaustive proceedings to appreciate the Appellant’s fears and juxtaposed it with available information from the country of origin and relevant research.

15. The Appellant however faults the Board’s decision which he views as contradictory in that while the Board accepted as credible the Appellant’s evidence, it nevertheless found him ineligible for consideration as a refugee. This contention in my view arises from a partial reading of the Board’s decision. The Board’s finding concerning the credibility of the Appellant’s evidence or account was clearly confined to three aspects, namely, his nationality as a Nigerian, his profession of the Christian faith and his abduction and forceful recruitment into Boko Haram. The Court however is of the view that the approach taken in the decision of the Board in identifying the issues before it was problematic; the credibility of a witness touches on every issue falling for determination and should not be isolated as a separate issue as happened in this case. Regulation 22 does not require such an approach in my view. What the Board ought to have done is to identify all the issues falling for determination and weave matters of the credibility of the Appellant’s evidence in the consideration of the said issues.

16. In considering the issue of a well-founded fear of persecution, the Board considered the Appellant’s asserted well-founded fear based on traditional beliefs and concluded that having looked at the Appellant’s statements, the legal position in Nigeria alongside available country of origin information the Appellant had not demonstrated a well-founded fear “to render him unwilling to avail himself of the protection of the government of Nigeria”.



17. Regarding Boko Haram, the Board concluded that the Appellant could return to his home in the Southwest Nigeria or any other state in the Southwestern region as the activities of Boko Haram were confined to the Northeastern part of Nigeria. Similarly, the Board dismissed the fear concerning Alhajji given the circumstances in which he interacted with the Appellant and remote possibility of him tracing the Appellant if he were to return home. The Appellant faults the Board's findings and has asserted that the proposed internal flight or relocation alternative amounted to a breach of the principle of non-refoulement. The Court will deal first with that complaint.
18. In that regard, section 18 of the Kenyan repealed *Refugees Act* which is cast in terms similar to Article 33 of the 1951 Convention Relating to the Status of Refugees states that:
- “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.”
19. In response to the complaint, the Respondent cited the UNHCR Advisory Opinion on Extra-territorial Application of Non-refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocols to assert that while the protection applies to asylum seekers and persons who qualify as refugees under the Convention, it does not entail an entitlement to refugee status, and that the Appellant had been allowed to remain in Kenya pending determination of his status. In this instance, there is no dispute that the Appellant was allowed entry into Kenya and has remained here pending the legal process of determining his eligibility as a refugee under Kenyan law. Indeed that is in keeping with section 12 of the repealed Act. In the circumstances, the claim that the Board's finding at the end of the legal process that he can safely return to Nigeria is tantamount to refoulement is difficult to sustain.
20. That said, it appeared that the Appellant's chief complaint against the decision of the Board was that since the Board had found his account credible, it should have automatically found that the Appellant had discharged his burden of proof. The Court has already addressed the apparent misconception underlying this position. This court having reviewed the lengthy proceedings containing the evidence of the Appellant before it, agrees with the Board that the claim that the Appellant's persecution by witches in his home state and in Borno state arose from his refusal to accept the oracle priest position was not made out. The Appellant was unable to demonstrate that in fact such a demand had been made of him and secondly, he admitted that he had not sought protection from local authorities.
21. Juxtaposing the Appellant's statements against the legal framework, the documented religious diversity of the Nigerian population and research indicating the long process of identification and grooming of potential oracle priests, the Board was unpersuaded. As held in *Horvath V Secretary of State for the Home Department* (2001) 1 AC 489 and stated in the UNHCR Handbook the primary duty to provide reasonable, protection to citizens against non-state perpetrators of persecution lies with the state and in this case the Board correctly found no well-grounded fear for the Appellant refusing the said legal protection. The reason given by the Appellant for rejecting such protection that the Appellant feared that state officers were also involved in traditional worship appeared unconvincing to



the Board. Similarly, this Court finds that the Appellant failed to demonstrate a well-founded fear of persecution by the practitioners of traditional spiritism owing to which the Appellant was unwilling to avail himself of the protection of the state of Nigeria.

22. Besides, this specific aspect of the Appellant's claim involved alleged employment of supernatural powers by witches which the Appellant held responsible for the death of his father by road accident, the mental illness of his brother and his capture by Boko Haram. He asserted that the witches did not need anyone to alert them that he was back in Nigeria if they claim him as the next oracle priest. Thus, the Appellant relied on a Nigerian proverb to the effect that "If witches are chasing you in Lagos and you decide to run to Abuja, where do you think the hands of the witches can't reach?" This translates to a scenario where the Appellant, whether physically resident in Nairobi or Abuja, cannot hide from the witches as their supernatural powers supposedly transcend territorial boundaries. This kind of claim by the Appellant is inherently self-defeating to his plea for refugee status as the Appellant apparently cannot escape the clutches of the witches merely by becoming a refugee in Kenya. Perhaps, the Appellant exaggerated the supernatural powers of the witches.
23. Equally, reviewing the evidence of the Appellant concerning the threat posed by Boko Haram and Alhaji, and the reasons upon which the Board dismissed the Appellant's alleged fears, the Court was persuaded that notwithstanding the Appellant's plight at the hands of Boko Haram, it was feasible for him to return to his home state in the South West or another state where the risk of persecution would not be well-founded given that Boko Haram activities against which the Nigerian authorities have mounted appropriate responses are mainly confined in the North east region of Nigeria. There is no reason to believe that if the Appellant were to return, the Boko Haram would expend their resources in searching everywhere in the vast and populous state of Nigeria for a low-profile escapee such as the Appellant with a view to retribution. Ditto for Alhaji, the kind old Muslim man from Borno state in the Northeast of Nigeria the who allegedly aided the Appellant's escape to Kenya. To my mind both fears regarding Boko Haram and Alhaji appear far-fetched.
24. As earlier observed, internal flight or relocation in this case appears a viable option as the perpetrators of anticipated persecution are non-state actors against whom the State is under obligation to protect the Appellant, and there being no well-grounded reason or fear for the Appellant refusing such protection. Ultimately therefore the Appellant was not a person entitled to international protection and the status of a refugee as defined in the 1951 Convention and the repealed *Refugees Act* of Kenya and as per the UNHCR Handbook. Hence the Board's decision was well founded. In the circumstances, this Court finds that the Appellant did not discharge his burden of proof and his appeal is without merit. Accordingly, the court will dismiss the appeal, save that each party is to bear its own costs.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 28TH DAY OF OCTOBER 2022

C.MEOLI

JUDGE

In the presence of:

Mr. Yusuf h/b for Mr. Okulo for the Appellant

Respondent: N/A

C/A: Carol

