



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

MISC. CRIMINAL PETITION NO.49 OF 2018

MULKI AMINA ISSA.....1ST PETITIONER/APPLICANT

ERIC TCHUNOUNENEU OUAFO.....2ND PETITIONER/APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

NAIROBI AREA POLICE DCIO.....2ND RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

AND

DIRECTOR OF IMMIGRATION.....1ST INTERESTED PARTY

THE OCS KILIMANI POLICE STATION.....2ND INTERESTED PARTY

RULING

The Applicants in this case, Mulki Amina Issa (1st Applicant) and Eric Tchunouneneu Ouafo (2nd Applicant) are husband and wife. The 1st Applicant is a Kenyan while the 2nd Applicant is a Cameroonian. According to their affidavits they were married on 3rd September 2016 at Madina Centre Mosque. Their marriage has been blessed with one child. According to the 2nd Applicant, his immigration status is in order. He has deponed that he earns a living by running a business under an incorporated company known as Dynasty Logistics Limited. From the affidavit sworn, it appears that the 2nd Applicant's stay in the country was uneventful until the 17th January 2018, when the police, acting on information, raided an office situated at Tebere Crescent, Nairobi. According to the investigating officer, Sgt. Samuel Macharia, in the office, they found a group of foreigners including two Cameroonian nationals, Etah Ako Fidel and Ateba Armand Mboge. Apparently, Ateba Armand Mboge had been deported from Kenya in January 2017 by the then Cabinet Secretary, Interior and Coordination of National Government on account of activities that the police believe were criminal in nature and inimical to the security of Kenya. Among those arrested was the 2nd Applicant and the other foreigners.

After their arrest, the police filed a miscellaneous application before the Chief Magistrate's Court Nairobi seeking orders to further detain those arrested to enable the police conduct investigations. The police were granted ten (10) days to continue holding the arrested foreigners in detention. After investigations, the police reached the conclusion that the foreigners were engaged in a suspected fake gold nuggets and fake US currency syndicate. According to Sgt. Macharia;

“This led to reasonable cause to believe that the foreigners were jointly with others engaged in criminal activities detrimental to the security of Kenya under Section 33(1)(h) of Kenya Citizenship and Immigration Act (No.12 of 2011) which states “A prohibited immigrant is any person who is not a citizen of Kenya in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates any activity detrimental to the security of Kenya or any other State”.

The police then recommended to the Cabinet Secretary, Interior and Coordination of National Government to have all the concerned foreigners deported, which recommendation was acceded to by the Government. Among those ordered deported is the 2nd Applicant.

Aggrieved by this decision, the Applicants moved this court under Articles 165(3)(a), (b) & (4), 25(c), 28, 29(a), (b), (e) & (f), 31(b), 36, 39, 45(1), 51, 244(h) and 258 of the Constitution seeking various orders from the court. Among the orders sought was a conservatory order to

restrain the Immigration Directorate from deporting the 2nd Applicant pending hearing and determination of the application. This court granted the conservatory orders sought by the Applicant, pending hearing and determination of the application. The grounds in support of the application are essentially as follows: that the 2nd Applicant, without any proof of guilt on his part, is being lumped together with others and referred to as a criminal; that no evidence has been presented before the court by the police to establish the allegation that the 2nd Applicant was engaged in criminal activity; that he is a law abiding person who is legally in Kenya conducting legitimate business; that he is married to a Kenyan and has a child who is Kenyan; that the recommendation by the police that he be deported from Kenya was inimical to his human rights as guaranteed by the Constitution and further his inherent rights as a human being who is entitled to enjoy his rights and fundamental freedoms. In other words, the 2nd Applicant is saying that without proof of criminal conduct on his part, other than the fact that he was arrested while in the company of those suspected to be engaged in a criminal enterprise, there was no basis in law for the police and Cabinet Secretary, Interior and Coordination of National Government to direct that he be deported from Kenya.

As indicated above, the police are of a contrary view; the main thrust of their case is that the 2nd Applicant, after investigations, was implicated in criminal conduct which was inimical to the security of the Kenyan State. Instead of prosecuting the 2nd Applicant, the government opted to deport him. This, according to the police, was within the powers of the government to do. In essence, the police are saying that the 2nd Applicant's presence in the country will not serve the security interest of the country.

This court has carefully read the pleadings and the rival affidavits filed by the parties to this application. It has also considered the argument by counsel during the hearing of the application. As stated earlier in this ruling, this court granted the Applicants interim conservatory orders restraining the Directorate of Immigration from deporting the 2nd Applicant. The issue for determination by this court is whether the Cabinet Secretary, Interior and Coordination of National Government was justified in declaring the 2nd Applicant a prohibited immigrant and therefore liable to be deported from Kenya. As was held by Korir W. J. in **Republic vs Cabinet Secretary in charge of Internal Security & 2 others Ex parte Nadeem Iqbal Mohammed [2015] eKLR**:

“In my view, a deported foreign national is entitled to know the specific reason for his deportation. That is why Parliament through Section 33(1) listed all the reasons that can form the basis for deportation of an immigrant. In the case before me the reason for the deportation of the Applicant has been hidden in a blank statement called “national interest”. As was aptly observed by G.V. Odunga J. in ex-parte C. O. (supra):

“The law is that in the ordinary way and particularly in cases, which affect life, liberty or property, a minister should give reasons and if he gives none the court may infer that he had no good reasons. Similarly, where the reason given by the Minister is not one of the reasons upon which the Minister is legally entitled to act, the court is entitled to intervene since the action by the Minister would then be based on irrelevant matter.”

That should be the case in an environment where public servants exercise their powers within the law.”

In **Republic vs Director of Immigration Services Ex-parte Planet motors Company Ltd and Anor [2016] eKLR**, the court held, while dealing with a case similar to the present one that:

“The test and elements of procedural fairness was laid down and elucidated in R vs Commission for Higher Education Ex-parte Peter Shitanda [2013] eKLR as follows:

“Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of the law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and law before it, would have made such decision. Such a decision is usually in defiance of logic or acceptable moral standards... Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the Rules of Natural Justice to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

In the present application, it is the 2nd Applicant's complaint that the Respondents made the decision to deport him without any legally justifiable reason. In particular, he was aggrieved that no legally discernible reason had been advanced to support the decision made to deport him other than the generalized allegation that he was involved in criminal activity that was inimical to the security of the State. The Respondents on their part are categorical that the 2nd Applicant, with other foreigners, were involved in fraudulent activities by dealing in fake gold and fake US currency. In the affidavit sworn in response to the application, the investigating officer deposed that the 2nd Applicant was involved in criminal activity that was inimical to the security of the State hence the recommendation to the Cabinet Secretary, Interior and Coordination of National Government that the 2nd Applicant be deported.

This court has carefully considered the facts in issue and takes the following view of the matter: For this court to uphold the decision of the Cabinet Secretary, Interior and Coordination of National Government to order the deportation of the 2nd Applicant, it must be established to the satisfaction of this court that indeed the reason that necessitated the decision to make the deportation order was valid and was made within the law. In the present application, the Respondents did not present to the court any evidence in support of their assertion that the 2nd Applicant was involved in criminal activity. Such evidence could have been documentary or in form of a witness statement indicating the particulars of the criminal activity that the 2nd Applicant was involved in. From the affidavit sworn by the investigating officer, it was apparent that the 2nd Applicant was arrested while in the company of other foreigners, two of whom were suspected to have been involved in criminal activity in the past. Being found in the company of persons suspected to be involved in criminal activity, by itself, without evidence

of consorting or conspiracy, is not a criminal offence. The 2nd Applicant is justified in complaining that he had been judged to be a criminal suspect solely by reason that he was associating with persons who may be criminal suspects. No evidence was presented to this court to establish the involvement of the 2nd Applicant in criminal activity or the very least that he was aware that the persons he was arrested in their company were indeed criminal suspects.

The hallmark of any criminal justice system is the determination of the criminal culpability of an individual and not a group of persons. In the present application, it was clear to this court that the decision to deport the 2nd Applicant was made on the basis of group guilt which concept is unknown in the Kenyan criminal justice system. The reason advanced by the Respondents in their bid to secure the deportation of the 2nd Applicant is not legally tenable.

In the premises therefore, this court allows the Applicant's application on the following terms:

- 1) The declaration made by the Cabinet Secretary, Interior and Co-ordination of National Government on 23rd January 2013 in purported exercise of his powers under Section 33(i)(ii) of the Kenya Citizenship and Immigration Act that the 2nd Applicant is a prohibited immigrant and therefore liable to be deported is hereby quashed and set aside as it was made without any valid reason recognized by the law.**
- 2) The order issued in (1) above does not prohibit or prevent the Director of Immigration Services or any other officer working under him from making any lawful decision concerning the 2nd Applicant's immigration status provided it accords with the law.**
- 3) The parties shall be at liberty to appeal.**

It is so ordered.

DATED AT NAIROBI THIS 19TH DAY OF JANUARY 2021

L. KIMARU

JUDGE