REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MARSABIT

CRIMINAL REVISION NO. E001 OF 2021

NEGA WELDEGHIORGHIS GHEBREMARIAAM.....1ST APPLICANT

NARDOS TAREKE BAYE.....2ND APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

DIRECTOR OF IMMIGRATION AND REGISTRATION OF PERSONS...2ND RESPONDENT

(Being an application for revision of the orders of Hon.E.K.Too(PM) in Moyale PMC Criminal Case No.MCCR/E055OF 2021 delivered on 3/2/2021)

RULING

1. The applicants were convicted on their own plea of guilty of the offence of entering Kenya without valid pass or permit contrary to section 53(1)(j) of the Kenya Citizenship and Immigration Act No. 12 of 2011 and sentenced to a fine Ksh.20,000/= in default to serve 3 months imprisonment. The particulars of the charge were that on the 2nd February 2021 at Biashara street in Moyale Sub-county being Eritrean citizens were found to have entered Kenya without valid pass or permit.

2. Upon pleading guilty to the charge, the 1st applicant mitigated that they were Eritrean nationals. That they have been living in Ethiopia but were now fleeing away from the conflict in Ethiopia. That they wanted to get access to the Eritrean Embassy so that they could be returned to their country.

3. Before sentencing the applicants, the trial magistrate observed that the applicants were not desirous of seeking for asylum in Kenya but only wanted to be given safe passage to the Eritrean Embassy for repatriation to their home country. That their explanation for their unlawful presence in the country was not merited and consequently fined them with further orders that they be repatriated to their home country.

4. The applicants have now moved to this court seeking for revision of the conviction and the sentence together with the orders of repatriation on the grounds that there is new evidence that the applicants are registered refugees with the United Nations High Commissioner for Refugees in Ethiopia and have since given their intention to seek for asylum in Kenya. That the trial magistrate made a decision to repatriate the applicants without knowledge of the fact that they were refugees as the information was not presented to him but which information, marked CB1, is now available in this application. That had the legal status of the applicants been brought to the attention of the trial court, the court would have arrived at a different finding.

5. The court on the application of the applicants issued interim orders against deportation pending the hearing of the application.

6. The application is made under the provisions of sections 362 and 364 (1) of the Criminal Procedure Code. Section 362 gives this court power to call for and examine any criminal proceedings before any subordinate court for the purpose of satisfying itself as to –

> **"the correctness, legality, or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any such proceedings of any such subordinate court."**

7. The application was supported by the affidavit of **Clara Barasa**, Advocate for the applicants. She stated in her affidavit that the applicants are husband and wife respectively. That they are Eritrean refugees in Ethiopia. That there has been reports of insecurity in Ethiopia as a result of which the applicants and their two children fled to Kenya to seek for asylum. That they were arrested and charged with the offence of unlawful entry into Kenya. That they did not have the benefit of counsel when they took plea and thus pleaded guilty. That they are aggrieved by the orders of repatriation to their country of origin where they face imminent danger to their lives. That had the court been

made aware that the applicants were refugees it could have arrived at a different finding. That it is only proper that the impugned orders be set aside.

8. Counsel referred to sections 11 and 18 of the Refugees Act, 2006 that provide that:

> **11(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 or, in any case, within thirty days after his entry into Kenya".**
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> **(18) "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—**
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> > **(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.**

9. The application was opposed by the state through the replying affidavit of the officer who investigated the case**, PC Kesis Saima** of Moyale police station. The officer depones in his affidavit that the applicants are Eritrean nationals who were found having entered into Kenya illegally. That they unequivocally pleaded guilty to the charges. That in mitigation they pleaded to be pardoned and to be returned to their country, Eritrea. That investigations revealed that the applicants had been living in Ethiopia but never produced any identification cards to show that they were registered refugees there. Neither did they inform the court that they wanted to seek asylum in Kenya. That it cannot therefore be true that the applicants wanted to seek asylum in Kenya. That the application for revision is unmerited as there is no illegality to correct since the sentence imposed was proper and legal.

10. The state was represented by a prosecution counsel, **Mr. Ochieng** during the hearing of the application. Both the counsel for the applicants and the prosecution counsel made oral submissions to the court. They reiterated the averments contained in the supporting and replying affidavits.

11. I have considered the application, the grounds in opposition thereto and the submissions by the counsels for both parties. When the court is exercising its powers of revision under Section 362 of the CPC, it has to always bear in mind that the powers should only be limited to rectifying a manifest error in the proceedings. In **George Aladwa Omwera – Vs- Republic, High Court Milimani Criminal Revision No. 277 of 2015 (2016) Eklr, Wakiaga J.** held that:-

> **"In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.**
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> **In Veerappa Pillai –Vs- Remaan Ltd the Supreme Court of India has this to say:-**
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> > **"The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made....."**

12. The application is premised on the grounds that there is new evidence that the applicants were Eritrean refugees in Ethiopia and that they are desirous of seeking asylum in Kenya. That this information was not brought to the attention of the trial court when it passed the sentence and made orders of repatriation to Eritrea.

13. The powers of the High Court in respect to adduction of new evidence is provided under section 364 (1) as read with section 358 of the Criminal Procedure code. Section 364 (1) provides that:

> **In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders or which otherwise comes to its knowledge, the High Court may -**
>
> > **(a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354,357 and 358 and may enhance the sentence;**
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> > **----------**

Section 358 provides that:

(1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.

(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.

(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as it were evidence taken at a trial before a subordinate court.

14. The criteria for adduction of additional evidence in a criminal appeal or in exercise of powers of revision under section 358(1) of the CPC was expounded by the Court of Appeal in the case of **Republic v Ali Babitu Kololo** (2017)Eklr where it stated that:

2.The locus classicus case on the principles that a court ought to takeinto account in exercising such discretion has all along been the decision of the predecessor of this Court in *Elgood vs. Regina (1968) E.A. 274* which adopted the summary enunciated by Lord Parker C.J in *R. vs. Parks (1969) All ER at page 364*. The principles are:-

***a.* That the evidence that is sought to be called must be evidence which was not available at the trial.**

b. That it is evidence that is relevant to the issues.

c. That it is evidence that is credible in the sense that it is capable of belief.

***d.* That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."**

The court further continued to state that*:*

15. ……As per *Section 358(1)* of the *Criminal Procedure Code* which we have set out herein above, the High Court has absolute discretion to take additional evidence but it should only exercise such discretion if there is sufficient reason. This Court while discussing its power to admit additional evidence under *Rule 29 (1)* of the *Court of Appeal Rules* in *Samuel Kungu Kamau vs. Republic [2015] eKLR* stated:-

"It has been said time and again that the unfettered power of the Court to receive additional evidence should always be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal. In the words of Chesoni Ag JA (as he then was) in Wanje v Saikwa [1984] KLR 275:

'This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.' (Emphasis added)

16. In as much as this Court in the above mentioned case was discussing its power under Rule 29(1) of the Court of Appeal Rules, we believe that the considerations set out thereunder are applicable where the High Court is considering a similar application of admission of additional evidence under Section 385(1) of the *Criminal Procedure Code.*

15. This was further expounded by the Supreme Court in the case of **Charles Maina Gitonga – V - Republic** (2018)eKLR where it was laid out that:

a. The additional evidence must be directly relevant to the matter before the Court and be in the interest of justice;

b. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. It is shown that it would not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

e. The evidence must be credible in the sense that it is capable of belief;

f. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. Whether a party would reasonably have been made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;

h. Where the additional evidence discloses a strong prima facie case of willful deception of the Court;

i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing the lacunae and filing gaps in evidence. The Court must find the further evidence needful;

j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in the appeal, fill up omissions or patch up the weak points in his/her case;

k. The Court will consider the proportionality and prejudice of allowing the additional evidence. This requires the Court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

16. Applying the above test in the facts of this case, it is in the first place to be noted that the subject documents are personal documents that were presumably in the custody and possession of the applicants. There is no explanation as to why the applicants did not produce the documents to the trial court. The evidence therefore does not amount to new evidence that was not available to the applicants at the time when they took plea.

17. The credibility of the documents is also questionable. The 1st applicant

categorically told the trial court that they had no refugee status in Ethiopia. To quote him he said the following:

"I have lived in Ethiopia for 2 years. We do not have refugee status in Ethiopia."

If then the applicants were not registered refugees in Ethiopia, where did the purported documents crop up from? The evidence is not capable of belief. It is geared towards making a fresh case other than the one that was before the trial court. No ground has been laid out to warrant the court making an order to receive additional evidence in the case.

18. The manner of taking pleas in a criminal trial is as set out in section 207 of the CPC and as was expounded in the case of **Adan v Republic** (1973)EA 446. The manner in which the plea was taken in the case has not been challenged. There is no denial that the applicants pleaded guilty to charges of illegal entry into Kenya. They mitigated that they only wanted to be given safe passage to their homeland. There is no time that they said that they were desirous of seeking for asylum in Kenya.

19. The fact that the applicants wanted to have access to their embassy so as to be assisted to go back home was not lawful reason for entry into Kenya without permit. No error on the face of the record has been pointed out in the application. The trial magistrate cannot be faulted for entering a plea of guilty as there was no indication of lawful reason for entry into Kenya.

20. The upshot is that there is no illegality to correct in the application. The sentence imposed on the applicants was lawful. The applicants requested for repatriation to Eritrea. The trial court was in order to issue the said orders in accordance with the wishes of the applicants. The order for repatriation was therefore proper. There is no merit in the application. The same is dismissed, consequent whereof the interim orders issued herein against repatriation are vacated.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 23RD DAY OF APRIL, 2021.

JESSE N. NJAGI

JUDGE

In the presence of:-

……N/A……. for Petitioners

....….....Mr Ochieng.....…….. for Respondent

Court Assistant: ……Mr.Oche……

14 days R/A.