



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MISC.CRIMINAL APPLICATION NO. E011 OF 2021

IN THE MATTER OF CRIMINAL PROCEDURE CODE(CAP.75)

AND

IN THE MATTER OF CRIMINAL CASE NO. E022 OF 2021 AT

THE PRINCIPAL MAGISTRATE 'S COURT AT MOYALE

AND

IN THE MATTER OF AN APPLICATION BY

MAJID ALI ABDU & ABDUL MAJID FOR REVISION OF ORDERS

MAJID ALI ABDU.....1ST APPLICANT

ABDUL MAJID.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application for revision of the orders of Hon.M.S.Kimani,

PM, in Moyale PMCC Misc. Criminal Case No.EO22 of 2021)

RULING

1. The applicants were convicted 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. The particulars of the charge were that on the 17th day of January 2021 at Odda police barrier in Moyale Sub-county within Marsabit County being Yemen citizens were found to have entered Kenya without valid pass or permit.
2. The applicants pleaded guilty to the charges whereupon they were discharged unconditionally under the provisions of section 35(1) of the Penal Code but ordered to be repatriated to Djibouti where they had applied to be registered as refugees.
3. The applicants have now moved to this court asserting that they were asylum seekers in the country. They are seeking to have the orders of repatriation revised and an order be made for them to present themselves before the Refugee Affairs Secretariat for consideration to be registered as refugees in Kenya.
4. The application is made under the provisions of Section 362 of the Criminal Procedure Code which gives this court the power to call and examine the record of any criminal proceedings from the lower court so as to satisfy itself as to -

“The correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

5. The application was supported by the affidavit of **Lenah Moenga**, Advocate for the applicants. The grounds in support of the application

are that the applicants are Yemeni nationals. That they fled their country for fear of persecution and sought for asylum in Djibouti where they were registered as refugees. That the orders for repatriation are not proper as there is likelihood that the lives of the applicants will be endangered should they return to Yemen or Djibouti. That to return the applicant to their country of first asylum where they will face persecution will be an express violation of international humanitarian law of *non-refoulement*. That this court is enjoined to protect the applicants from penalisation on account of their unlawful entry in the country as they are persons of concern who wish to seek asylum under the refugee framework in Kenya.

6. 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 replying affidavit that the applicants unequivocally pleaded guilty to the charges that they were Yemeni nationals and that they entered Kenya without valid permit. That in mitigation they produced refugee identification card indicating that they were registered as refugees in Djibouti. That the allegation that the applicants fled Djibouti owing to hostilities is not supported by any evidence and does not hold any water as there is no report from the UNHCR which registered them as refugees alongside the government of Djibouti. That there is also a UNHCR office in Ethiopia through which the applicants passed and where they would have coordinated their relocation but they instead chose to sneak into Kenya. That the allegations that they fled Djibouti for fear of hostilities is false and meant to hoodwink the court from seeing the illegality perpetuated by the applicants. That there are no grounds for orders of revision as there is no illegality to correct as the sentence imposed is proper and legal. That it would be against public interest and miscarriage of justice if the application is allowed.

7. The advocate for the applicants submitted to this court that the applicants fled their country of origin and went to Djibouti and later moved to Ethiopia. That they fled Ethiopia out of fear. That during the trial at the lower court they explained that they wanted to seek asylum in Kenya. That they have a right to do so as they are not disqualified persons as stipulated by section 4 of the Refugees Act. That it is only proper that the repatriation orders be set aside so that the applicants can apply for asylum in Kenya.

8. The prosecution counsel, **Mr. Ochieng**, on his part submitted that the plea entered on the applicants was unequivocal. That they claimed to have been registered as refugees in Djibouti. That the 1st applicant produced a document to prove so which document is however not translated. That there is no evidence from UNHR that the applicants faced threats in Djibouti. That the applicants passed through Ethiopia where they could have sought for refuge.

9. The prosecution counsel further submitted that revision is not the proper procedure in this matter as conviction was not illegal. That the intention is to take the applicants to Djibouti where they are registered as refugees.

10. I have considered the application, the grounds of opposition thereto and the submissions by the respective counsels for the parties. The original file of the lower court was availed to this court. I have gone through the proceedings. A pre-sentencing report presented to the trial court by the Officer Commanding Anti- Terrorism Police Unit indicated that the applicants had commenced registration as asylum seekers in Djibouti. That there was no risk of persecution in Djibouti and therefore that the applicants ought to be repatriated to that country. The trial magistrate thereupon adopted the report and held that the applicants were asylum seekers in the country. He consequently discharged the applicants under the provisions of section 35(1) of the Penal code and ordered that they be repatriated to Djibouti for them to complete their asylum application process there.

11. When exercising its powers of revision provided by Section 362 of the CPC the court 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.

In Veerappa Pillai –Vs- Remaan Ltd the Supreme Court of India has this to say:-

“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 trial court accepted that the applicants were asylum seekers in the country. Section 3(1) of the Refugees Act, 2006 gives the meaning of a “refugee” as follows: -

(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.

Section 11(1) of the Act provides that:-

(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.

13. The charge against the applicants was that on the 17th January 2021 they entered Kenya without valid pass or permit. The court record indicates that the applicants were arraigned in court on the 18th January 2021 which was a day after the entry. Since the trial court found that the applicants were asylum seekers in the country the applicants had, in accordance with the provisions of section 11(1) of the Refugees Act, a period of one month from the date of entry to make their intentions known to the relevant authority that they wanted to seek asylum in the country. The applicants were charged with the offence before the grace period of one month was over. The charges were therefore premature and the conviction and the sentence *null and void ab initio*. The order for repatriation was in the same vein illegal. A similar finding was made in **Fysha Abrha Redae & 2 others v Cabinet Secretary Ministry of Interior & Coordination of National Government (2015)Eklr** where the applicants were arrested on the same day of their entry into the country and charged with illegal entry into Kenya.

14. In view of my aforesaid finding, the application for review of the lower court's orders is merited for the reason that the orders were unlawful. The upshot is that the conviction entered on the applicants and the sentence imposed on them are set aside and the applicants set at liberty forthwith. Similarly, the order for repatriation is set aside. The applicants are hereby granted a period of 30 days from the date of delivery of this ruling for them to present themselves before the Refugee Affairs Secretariat for the purpose of making their intentions known that they wish to remain in Kenya as refugees.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT MARSABIT THIS 22ND DAY OF APRIL 2021.

JESSE NYAGA NJAGI

JUDGE

In the presence of:

Miss Maina.....for Applicants thr' Teams video link

Mr. Ochieng.....for Respondent

Court Assistant:Mr.Oche.....

14 days R/A.