



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. E008 OF 2020

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, ARTICLE 22, 29, 39, 47 AND 49

BETWEEN

COMMISSION FOR HUMAN RIGHTS & JUSTICE.....PETITIONER

VERSUS

1. THE IMMIGRATION OFFICER IN CHARGE MOI INTERNATIONAL AIRPORT

2. DIRECTOR IMMIGRATION & REGISTRATION OF PERSONS

3. CABINET SECRETARY INTERIOR & COORDINATION OF NATIONAL SECURITY

4. CABINET SECRETARY FOR TOURISM & WILDLIFE

5. ATTORNEY GENERAL.....RESPONDENTS

JUDGEMENT

1. The Petitioner is a registered non-profit making, non-governmental organization based in Mombasa. It has filed this Petition under Article 22 of the constitution on behalf of Mr. Alberto Marchesi, a Kenyan tourist who was denied entry into the country, and is now in Italy. The 1st Respondent is a public officer appointed and employed in the public service under the provisions of the immigration Act Cap 172 Laws of Kenya; the 2nd Respondent is the Director of Immigration services and registration of persons; the 3rd Respondent is the Cabinet Secretary for the Ministry of Interior Coordination of National Security of Kenya; the 4th Respondent is the Cabinet Secretary for Tourism and Wildlife while the 5th Respondent is the Attorney General who is the principal legal advisor to the Government.

2. The Petitioner, in the Petition herein dated 6/11/2020 states that on 29/10/2020, the 1st Respondent without any reasonable cause, illegally, and wrongfully arrested, detained, repatriated and deported **Mr. Alberto Marchesi** an Italian tourist without following the due process. The Petitioner further states that the repatriation violated and trumped upon the basic fundamental rights and freedom of **Mr. Marchesi** since he is a holder of a valid Italian Passport, and he had regularly obtained visa for his travel and entry into Kenya.

3. The Petitioner avers that vide a letter dated 2/11/2020 the Petitioner demanded to be furnished with reasons and grounds for the 1st Respondent's arbitrary decision, which in the Petitioner's view was tantamount to violation of the principles of natural justice, constitutional and human rights since the deportation of Mr. Marchesi was done without affording him an opportunity to be heard and have the dispute resolved in a court of competent jurisdiction.

4. It is the Petitioner's case that the deported foreigner was not a prohibited immigrant within the meaning and provisions of Section 33 of the Kenya Citizenship and Immigration Act 2011 (hereinafter "*the Act*") and thus, the arrest and deportation without being arraigned in a court of law was malicious, and a violation of Articles 10(2), 28, 47(2), 73 and 129(1) of the Constitution that protect public interest by ensuring that public bodies and officers act strictly within and according to the law, in order to prevent the abuse of power, *ultra vires* and unconstitutional acts.

5. Being aggrieved by the action of the Respondents, the Petitioner prays for the following orders:

a. A declaration be and herby issue that the said tourist Alberto Marchesi is not a prohibited immigrant and be allowed to enter and remain in Kenya as per the visa granted.

b. An Order be and herby issued allowing the Alberto Marchesi upon him acquiring the necessary visa.

c. Declaration that the Respondent have violated the Constitution and thereby restrained from further contravention and violation of the Constitution in prohibiting entry into Kenya by Alberto Marchesi.

d. Costs of this Petition.

6. The Petition is supported by the affidavit of **Julius Ogogoh** sworn on 6/11/2020, who is the Executive Director of the Petitioner.

The Response

7. The Respondents opposed the Petition vide Replying Affidavit sworn on 13/11/2020 by **Kipkoech Sang** who is an Immigration Officer. The deponent avers that on 13/10/2020, they received adverse intelligence information against Alberto Marchesi of Italian Passport No. YA813877. In the said Intelligence report, which was marked for this Court's eyes only, the informant informed the Respondents that Mr. Alberto Marchesi had abused Kenya's hospitality by sexually exploiting young boys on video and sending the said videos back to Italy. Further, it was deponed that Mr. Alberto Marchesi had planned to travel into the country on 15/10/2020 with other two Italians. Consequently, the 2nd and 3rd Respondents placed Mr. Alberto Marchesi's name on a watch list pursuant to Section 33(1) (b) of the Act.

8. The deponent avers that Alberto Marchesi flew into the country aboard Ethiopian Airline Flight No. ET322, on 29/10/2020 and upon presenting his passport at the immigration counter, he was flagged as being an undesirable immigrant pursuant to Section 33 (1) (b) of the Act. On being interrogated, he declined to answer questions on his activities in the country. Since Mr. Alberto Marchesi did not hold a resident permit and/or a work permit allowing him to engage in any business in the country, he was denied entry into the country pursuant to Section 33(5) of the Act which provides that entry of a prohibited immigrant or undesirable person into Kenya is unlawful whether or not he or she is in possession of any document allowing him/her entry or transit through Kenya.

9. The Respondents aver that if at all Mr. Alberto Marchesi engaged in any business in Kenya as it is alleged, then he did so contrary to Section 53 (1) (m) of the Act.

10. It is the Respondents' case that Mr. Alberto Marchesi was only denied entry into the country. Therefore, he was never arrested, intimidated, threatened, and/or deported. Consequently, the Respondents never violated and/or threatened any of Mr. Alberto Marchesi's rights. Consequently, the current Petition is malicious, vexatious and ought to be dismissed with costs.

Submissions

11. When the matter came up for hearing on 16/11/2020, the Court directed the same to be determined by way of written submissions. The Petitioner and the Respondents have complied.

12. **Mr. Mkan** learned counsel for the Petitioner reiterated the contents of the Affidavit in support of the Petition. On the Replying Affidavit by the Respondents, counsel submitted that the said Affidavit was full of hearsay and uncorroborated averments, and that the deponent has not disclosed under whose authority is he swearing the Affidavit, since the 1st Respondent is a known officer, he is available and there is no reason why he could not swear an Affidavit in response to the complaint by the Petitioner.

13. While responding to the evidence by the Respondents dubbed for the "courts eyes only", **Mr. Mkan** submitted that the alleged evidence was never provided availed to the Mr. Alberto Marchesi. Therefore, this Court ought to bring an end to such illegalities by rectifying the breach of fundamental rights under its supervisory jurisdiction.

14. **Mr. Makuto** learned counsel for the Attorney General reiterated the contents of the Respondents' Affidavit and submitted that under Article 39 of the Constitution, foreigners require permission to enter Kenya and that permission may be denied. Counsel cited the finding in **Mohammed Ibrahim Naz v Cabinet secretary Responsible for Matters Relating to Citizenship and the Management of Foreign Nationals & another [2013]eKLR**, where the Court held that the right to enter and reside in Kenya is restricted to citizen, both by the constitutional and international laws.

15. **Mr. Makuto** further submitted that Alberto Marchesi was merely held at the point of entry in a facility envisaged under Section 50 of the Act, awaiting return to his country of origin after being denied entry.

16. Counsel also relied on **Article 53(1)** of the Constitution in arguing that it was the responsibility of the State to protect its citizen especially children and pursuant to Section 26(1) of the Act, a prohibited immigrant is required to make an Application in accordance with Section 33 thereof.

The Determination

17. I have carefully considered the Petition, the opposing Affidavit and submissions by the parties. I have isolated the following issues, which is my view fall for determination:

1. Whether due process was followed in denying Mr. Alberto Marchesi entry into Kenya.

2. whether Mr. Alberto Marchesi was arrested and deported.

1. Whether due process was followed in denying Mr. Alberto Marchesi entry into Kenya.

18. Section 33 of the Kenya Citizenship and Immigration Act which is in respect of Prohibited Immigrants and inadmissible persons provides thus:

(1) For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who—

(a) not having received a pardon—

(i) has been convicted in Kenya or any country of an offence created under a statute for which a sentence of imprisonment is for a minimum term of three years;

(ii) has been acquitted by a court of any offence and who at the time of acquittal has no valid immigration status;

(iii) has committed or is suspected of having committed an offence provided for under international treaties and conventions ratified by Kenya;

(b) a person engaged in human trafficking, human smuggling, sexual exploitation and sex crimes;

(c)

(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who—

(a) refuses to submit for examination by a medical practitioner after being required to do so under section 48(1)(d) of this Act;

(b) the family and dependants of a prohibited immigrant;

(c) incapable of supporting himself and his dependants (if any) in Kenya;

(d) is adjudged bankrupt;

(e) anyone who has been judicially declared incompetent;

(f) an asylum seeker whose application for grant of refugee status has been rejected under the Refugee Act, 2006 (No. 13 of 2006); or

(g) is, by order of the Cabinet Secretary, declared inadmissible on grounds of national security or national interest.

(3) The Cabinet Secretary may make regulations on admission of immigration officer's right to deny entry a person other than an asylum seeker who, upon entering or seeking to enter Kenya, fails to produce a valid and acceptable passport or travel document recognized in Kenya to an immigration officer on demand or within such time as that officer may allow.

(4) Deleted by Act No. 12 of 2012, Sch.

(5) Subject to section 34 the entry into and residence in Kenya of a Prohibited Immigrant or an inadmissible person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or inadmissible person, be refused permission to enter or transit through Kenya, whether or not he or she is in possession of any document which, were it not for this section, would entitle him or her to enter or transit through Kenya.

(6) An immigration officer may issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorize such prohibited immigrant or inadmissible to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes.

(7) The Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons.

(8) The Cabinet Secretary may from time to time review the status of prohibited immigrants and inadmissible persons, subject to the advice of the relevant committee.

19. The Respondents argue that Alberto Marchesi was flagged as being an undesirable immigrant pursuant to Section 33(1) (b) of the Kenya Citizenship and Immigration Act, and when interrogated, he declined to answer questions regarding his activities in the country, resulting in him being denied entry and held in accordance with **Section 50** of the Act, which provides as follows:

“50. The Service shall establish a holding facility at ports of entry and exit and any other immigration operation

areas which shall be used for holding persons ordered to be removed to their countries under section 26A of [the Penal Code](#), ordered deported under section 43 of this Act, persons whose citizenship has not been established, deportees in transit, and persons denied entry awaiting return and who are not under carrier liability.”

20. However, the Petitioner avers that the repatriation and/or deportation of the said tourist was done without affording him a chance to be heard and have his dispute resolved in a court of competent jurisdiction.

21. It is noteworthy that Regulation 33 of the Kenya Citizenship and Immigration Regulations, 2012 is in respect of a person who has been found to be a prohibited immigrant or inadmissible for a prohibited immigrant’s pass or inadmissible person’s as stipulated under Section 33 of the of the Citizenship and Immigration Act. It provides:

“(1) An application by a person who is, in accordance with section 33 of the Act, a prohibited immigrant or inadmissible for a prohibited immigrant’s pass or inadmissible person’s pass shall be in Form 32 set in the First Schedule and the application shall be made before arriving at the point of entry.

(2) An immigration officer may, after considering an application made under paragraph (1), issue a prohibited immigrant’s or inadmissible person’s pass in Form 34 set out in the First Schedule, to the applicant.”

22. On the issuance of notice to prohibited immigrant or inadmissible persons, Regulation 37 provides:

(1) An immigration officer may issue a notice, in Form 38 set out in the First Schedule, to a person who has been declared to be a prohibited immigrant or an inadmissible person and who enters or intends or attempts to enter Kenya by any means.

(2) A notice to a prohibited immigrant or an inadmissible person may require the prohibited immigrant or inadmissible person—

(a) to remain on the carrier by which he entered, intended or attempted to enter Kenya;

(b) to leave Kenya by such means and within such period as may be stated in the notice; and

(c) to enter into or remain in Kenya subject to complying with such requirements as to place of residence, occupation, security or reporting to a specified authority as may be specified in the notice.

(3) An immigration officer may vary the terms and conditions specified in the notice to a prohibited immigrant or inadmissible person.

(4) Any prohibited immigrant or inadmissible person to whom a notice has been issued under this regulation has been who refuses or fails to comply with any requirements of the notice commits an offence.

(5) Where an immigration officer has issued a notice to a prohibited immigrant or inadmissible person under this regulation, the immigration officer may, if he deems it fit, issue a copy of such notice to the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya, and thereafter the owner, person in charge or agents may take such steps as shall be necessary to ensure that the prohibited immigrant or inadmissible person complies with the terms of the notice served on him:

Provided that compliance with the requirements of a notice under this regulation shall not relieve the owner, person in charge or agents of the carrier of his obligations under the Act or any other written law.

(6) Where a prohibited immigrant or an inadmissible person has been refused permission to enter Kenya, the immigration officer shall issue a notice in Form 39 set out in the First Schedule to the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya requiring the owner, person in charge or agents of the carrier on or from which the prohibited immigrant or inadmissible person entered, intended or attempted to enter Kenya to take the prohibited immigrant or an inadmissible person into their custody and ensure that the prohibited immigrant or an inadmissible person is removed from Kenya.

23. From the foregoing, I find and hold that under Section 33(7) of the Act, the Cabinet Secretary may make Regulations for the declaration of prohibited immigrants or inadmissible persons. It is very unfortunate that the aforesaid Regulations on declaration of a prohibited Immigrants or inadmissible persons are yet to be enacted 10 years after the Act came into force. However, it is noteworthy that under Section 33(2) (g) of the Act, it is provided, that by order of the Cabinet Secretary, a prohibited immigrant or inadmissible person may be declared inadmissible on grounds of national security or national interest. From the foregoing, I find that the Cabinet Secretary has the discretion to declare a person to be an inadmissible person and/or a prohibited person under Section 33(2) (g) of the Act. However, like every discretion, this discretion must be exercised judiciously and in an open and transparent way. Even a foreigner who comes to Kenya has constitutional rights. It would be very unfortunate that such a foreigner is unilaterally declared a prohibited person without any due process.

24. In [Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others \[2016\] eKLR](#) the Court of Appeal cited *Marbury -vs- Madison- 5 US. 137* where it was stated that:

“The province of the court is solely, to decide on the rights of individuals and not to enquire how the executive or executive

officers perform duties in which they have discretion.”

25. From the foregoing, it would appear that it is not the duty of this Court to enquire how the Respondents arrived at the decision to declare that one **Alberto Marchesi** a prohibited immigrant or inadmissible person. Further, under the Act, once a person has been declared to be a prohibited immigrant or inadmissible person under Section 33 of the Act, there is no provision for the dispute to be resolved by a court of competent jurisdiction. What happens after a notice under Section 33 of the Act is issued is provided for under Regulation 37 of the Kenya Citizenship and Immigration Regulations as mentioned earlier. There is no provision for the due process before a court of law or even the right to appeal the decision of the Respondents. Clearly, the provisions of the Act and regulations made under it are in contravention of the right to fair hearing under Article 50 of the constitution or the right to fair administrative action under Article 47.

26. In High Court Petition No. 586 of 2012 between **Bashir Mohamed Jame Abdi and Minister for Immigration & Others** Lenaola Judge held that,

“By denying the subject Abdi Bashir entry into Kenya and deporting him to the UK without a formal process or service on him of any written allegations, reasons or orders and without according him a hearing to contact his family or counsel, to appeal against the order of denial of entry into Kenya and deportation to the UK was a violation of the subjects fundamental rights and freedoms ...equal treatment and equal action/justice to deprivation of the society and recognition of his family under articles 27(1), 45(1) and 47 of the Constitution”.

27. **Mr. Makuto**, learned counsel for the Respondents had submitted that Mr. Alberto Marchesi should apply for entry to Kenya under Section 33 of the Act. Under Section 33 of Act, there is a remedy, for a person who has been declared a prohibited immigrant or inadmissible person, who can apply to the Respondent for re-entry into this country. However, this option is available only for a person who has been declared a prohibited immigrant, and who has accepted that status.

28. Section 33 (6) of the Act states:

“(6) An immigration officer may issue a pass to a prohibited immigrant or inadmissible person to enter or remain temporarily in Kenya for such period or authorize such prohibited immigrant or inadmissible to transit through Kenya subject to such conditions as may be specified in that pass or for transit purposes.”

29. The issue is whether Mr. Alberto Marchesi was accorded a fair hearing, or his rights to fair administrative action under Article 47 and the Fair Administrative Actions Act. Article 47 of the Constitution and the Fair Administrative Actions Act, 2015. Article 47 states:

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) ...”

Section 4 of the Fair Administrative Action Act (No. 4 of 2015) provides that:

“4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to—

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.”

30. However, Section 33 (6) aforesaid is a discretionary power to be exercised by the immigration officer. In addition, this power only comes after a person has been declared as a prohibited immigrant. In other words, this Section is available to persons already found unfit to enter Kenya. The Section does not cure the mischief, which Article 47 and the Fair Administrative Actions Act envisaged. Therefore, **Mr. Makuto's** submission that Mr. Alberto can apply under Section 33 of the Act is not applicable until Mr. Alberto Marchesi has accepted the status of a prohibited immigrant. Further, it would appear that Section 33 (6) of the Act affords affected persons fair administrative action, but in the reverse gear, that is, after they have already been condemned unheard. The issue therefore remains whether or not Alberto Marchesi was afforded the right secured under Article 47 of the constitution. It has not been shown that he was accorded such rights, and that being so, it is the finding hereof that the Petition has been proved on a balance of probability.

31. The criminal allegations made against the said Alberto Marchesi should be investigated and appropriate action taken according to the results of the investigations.

32. In the upshot, I issue orders as hereunder:

i) A declaration is hereby made that the said tourist Alberto Marchesi is not a prohibited immigrant and that he shall be allowed to enter and remain in Kenya in terms of the visa granted.

ii) An Order is hereby issued allowing the said Alberto Marchesi to enter Kenya upon him acquiring the necessary visa.

iii) An Order is hereby issued that upon the entry into Kenya of the said Alberto Marchesi, any adverse criminal allegations against him shall be investigated in accordance with the laws of Kenya, and necessary actions be taken pursuant to any such investigations.

v) Costs of the Petition are for the Petitioner.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Mr. Mkhani for Petitioner

Ms. Kiti for Respondents

Ms. Peris Court Assistant