REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CRIMINAL APPLICATION NO. E025 OF 2021

CONSOLIDATED WITH MISC. NO. E026 AND MISC. NO. E027

MULUK SEID .....1ST APPLICANT

LUWAM GEBRETENSAE.....2ND APPLICANT

ESHETU ALOSE.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Each of the applicants herein moved this court vide individual applications dated various dates all of which were brought under certificate of urgency. When the applications came up for hearing on the 26th day of July, 2021 the court made an order consolidating them wherein Misc. Criminal Application E025 was made the lead file.

2. The applications sought for orders that this honourable court do exercise its discretion to revise the orders made by the trial magistrate Hon. J. Ndengeri on 10th May 2021 in the respective criminal case files and wherein the applicants were ordered to serve six (6) months imprisonment and that upon completion of the sentence, to be repatriated back to Ethiopia by CCIO Embu County; that this Honourable Court be pleased to release the applicants, on condition that they present themselves before the Refugees Affairs Secretariat for registration forthwith; any other order be made and directions taken as the court may deem fit and expedient and in the interest of justice.

3. The applications are premised on the grounds on their face and further supported by the affidavit sworn by Samuel Guantai - advocate of the High Court of Kenya.

4. In a nutshell, it was deposed that the applicants are Ethiopian citizens and that they were arrested on the 19th April 2021 at Kivwe area along Embu – Meru Highway in Embu County and charged with the offence of being unlawfully present in Kenya contrary to Section 53(1)(j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act. That the applicants pleaded guilty to the charges levelled against them and they were sentenced to serve six (6) months imprisonment and upon completion of the sentence to be repatriated back to Ethiopia by the CCIO, Embu County.

5. It was further deposed that the applicants fled their country of origin, Ethiopia, under the apprehension of persecution and torture and other human rights violations. That their habitual place of abode is at Tigray region where there is an ongoing war and thus fled to Kenya to seek protection.

6. It was averred that when the applicants appeared before the trial court, they expressly indicated that they came to Kenya to seek asylum and there is likelihood of persecution should they return to their country of origin. Further that, they wish to seek asylum and benefit from international protection offered to persons under the refugee protection framework and that, to return the applicants to their countries, they will face persecution which would be an express violation of the international humanitarian law principle of non-refoulement.

7. They have urged the court to grant the applications as the court is enjoined in protection of the applicants from penalization 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.

8. When the applications came up for hearing, parties were directed to file submissions and following the said directions, counsel for the applicants filed his submissions.

9. The matter came up for mention to confirm filing of submissions, on which date counsel for the respondent informed the court that she was not opposing the application.

10. The court has considered the application and the submissions by the counsel for the applicants. In his submissions, counsel for the applicants submitted that the orders issued by the trial court on the 10th day of May, 2021 in Criminal Case No. E530"B" of 2021 were illegal and improper and hence there is need for revision; the reason being that the learned magistrate entered a plea of guilty yet the accused persons were unrepresented and at that point, they expressly stated that they were asylum seekers.

11. Counsel argued that the procedure was deficient and failed to meet the high threshold stipulated in Section 207 of the Criminal Procedure Code. Reliance was made on the case of **Simon Gitau Kinene Vs Republic [2016] eKLR** and that of **Bivamunda Erick Vs Republic [2014] eKLR** on the issue of entering a plea of guilty with regards to an accused person who admits to entering the country illegally.

12. Counsel also took issue with the learned magistrate's order for the repatriation of the applicants back to their country of origin and stated that the conditions that led to their fleeing still persists, and for that reason, the order goes against the principle of non-refoulement and it is contrary to the provisions of Section 18 of the Refugees Act 2006.

13. The applicant relied on the case of **Unknown Vs Director of Public Prosecution & Another [2017] eKLR** in which the court held that immigration matters should be dealt with not just legislatively but also administratively and through the exercise of discretion due to their unique nature.

14. As to how the applicant ought to have approached the court either by way of petition or revision, it was submitted that in light of the illegal and improper finding by the trial court, the remedy falls within the ambit of Section 362 and 367 of the Criminal Procedure Code and hence the way to approach the court was by way of a revision. Reliance was made on the case of **Joseph Nduvi Mbuvi Vs Republic [2019] eKLR** which was cited in the High Court of Malyasia in **Public Prosecutor Vs Muhari bin Mohd Jani & Another [1996] 4LRC 728.**

15. As stated earlier, the court has considered the application and the submissions filed by the applicant herein. The applications have been brought under Section 362, 364(1)(2) of the Criminal Procedure Code and Article 50(2)(k) of the Constitution 2010.

16. Section 362 provides as follows: -

> **The High Court may call for and examine the record of 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 proceedings of any such subordinate court".**

17. The rationale of the revisionary powers of this court was discussed by Nyakundi, J. in the case of **Republic Vs James Kiarie Mutungei [2017] eKLR.** Under Section 364 the exercise of revisionary jurisdiction can either be upon application by a party or *suo moto*. (where the proceedings come to the knowledge of the court). The revisionary jurisdiction should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision and under Section 364, on revision, the court should steer clear from trespassing into the realm of appellate jurisdiction.

18. The applicants have challenged the order made by the trial court as illegal for the reasons that when they were arraigned in court, though they pleaded guilty to the charge, they indicated that they came to Kenya to seek asylum and hence the conviction, sentence and subsequent order of repatriation are illegal as the same flies on the face of the international humanitarian law principle of non-refoulement.

19. The record shows that the applicants herein after pleading guilty to the charge indicated that they had come to Kenya as asylum seekers. As such, they were justifying their entry into Kenya as being protected by the law. It therefore means that the plea of guilty ought to have been changed to that of not guilty as the plea cannot be said to have been unequivocal. I find and hold that the conviction was illegal and the subsequent sentence meted out on them was also illegal and cannot be left to stand.

20. On the principle of non-refoulement, the same is provided for in Section 18 of the Refugee Act which provides: -

> **No person shall be refused entry into Kenya, expelled or extradited from Kenya or returned to any other country or subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such a person is compelled to return to or remain in a country where –**
>
> > **a. The person may be subjected to persecution on account of race, religion, nationality, membership of a particular social group or political opinion;**
> >
> > **b. The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign denomination or events seriously disturbing public order in part or the whole of that country.**

21. The above section codifies the principle of non refoulement. The principle prohibits not only the removal of individuals but also mass expulsion of refugees. This principle was well discussed by Hon. Mativo, J. in the case of **Kenya National Commission on Human Rights & Another Vs Attorney General & 3 Others [2017] eKLR**.

22. My understanding is that the principle does not only apply to the refugees but also to asylum seekers (persons seeking refugee status).

23. The question then is, how would the court know if the applicants are genuine asylum seekers or illegal immigrants? The only sure way is by affording them an opportunity to be heard. This court takes cognisance of the fact that the issue of aliens entering Kenya through our

borders is rampant and which has been blamed for the various insecurity incidences. It is my considered view that in the interest of justice, a retrial ought to be ordered so that the applicants can indeed prove the legality of their presence in Kenya.

24. In the end the court makes the following orders;

i. The plea by the applicants was equivocal and the same is hereby set aside.

ii. The sentence meted out on the applicants and the subsequent order of repatriation is also set aside.

iii. The applicants to be retried by a different magistrate other than the trial court.

25. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 4TH DAY OF AUGUST, 2021

L. NJUGUNA

JUDGE

……..…….for the Petitioner

……..…...for the Respondent