



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 438 OF 2019

BETWEEN

SYLVIA NJERI WACHIRA..... PETITIONER

VERSUS

1. DIRECTOR, IMMIGRATION SERVICES

2. CABINET SECRETARY,

MINISTRY OF INTERIOR & CO-ORDINATION

OF NATIONAL GOVERNMENT.....RESPONDENTS

AND

ERIC BUTOYI.....INTERESTED PARTY

JUDGMENT

Introduction:

1. *Sylvia Njeri Wachira*, the Petitioner herein is a Kenyan. She is married to *Eric Butoyi*, the Interested Party herein. Eric Butoyi is a Burundian national.
2. In this matter the Petitioner brings these proceedings on behalf of her spouse who was declared a Prohibited Immigrant under Section 33(1) of the *Kenya Citizenship and Immigration Act, No. 12 of 2011* (hereinafter referred to as '*the Citizenship Act*'). The Interested Party was, henceforth, deported.
3. The parties in this case, however, recorded a consent on 4th December, 2019 where the Interested Party was allowed to apply for a Prohibited Immigrant Pass so as to gain entry into Kenya in the event he so wished.
4. The Petition challenges the manner in which the Interested Party was declared as a Prohibited Immigrant.
5. The Petition is opposed.

The Petition:

6. The Petition is dated 31st October, 2021. It was supported by the Affidavit sworn by the Petitioner. The Petitioner also filed an evenly dated Notice of Motion seeking some conservatory orders to re-enter Kenya pending the determination of this matter. The application was the basis of the consent order which was recorded on 4th December, 2019.
7. The Petitioner deponed that the Interested Party and herself are blessed with a daughter one *Annabell Mutoni Butoyi* who was born on 16th August, 2016.

8. The Petitioner further deposed that the Interested Party first came to Kenya in 1997 with his parents and siblings as a result of the civil war in Burundi. They were accordingly granted refugee status. In October, 2020 the father to the Interested Party died at the Kenyatta National Hospital and was buried at Lang'ata cemetery. The mother of the Interested Party is still alive.
9. It was averred that in 2011 the Interested Party went back to Burundi. Between 2014 and 2017 the Interested Party operated a business in Tanzania and he used to occasionally visit his family in Kenya.
10. The Petitioner posited that sometimes in February, 2017 the Interested Party was requested by his long-time friend one *Jared Ombongi Nevaton* to ferry his friend's visitors from the Central Business District to Lavington. The visitors were foreigners. He obliged. On reaching at the destination they were joined by other foreigners and they were immediately arrested by officers from the Directorate of Criminal Investigation on allegations of obtaining money by false pretences.
11. The Interested Party and some of the other people who were arrested were presented to Court the following day. It was in *Milimani Chief Magistrates Court in Misc. Criminal Application No. 597 of 2017*. The police sought for more time to complete the investigations and the request was granted.
12. On 22nd February, 2017 the prosecution failed to prefer any charges against any of the arrested persons. Upon objections, the prosecution successfully managed to have the matter marked as closed.
13. The Interested Party and the other foreign nationals who had just been released were immediately arrested by officers of the 1st Respondent. They were detained in various police stations until on 28th February, 2017 when the Interested Party was deported from Kenya to Burundi.
14. The Petitioner later learnt that the Interested Party had been classified as a Prohibited Immigrant thereby would not gain entry to Kenya where his mother, spouse and daughter lives.
15. It is contended that the declaration of Prohibited Immigrant against the Interested Party was done in contravention of the Constitution and the law since the Interested Party had never been a criminal or a security threat.
16. The Petitioner also posited that their daughter developed a medical condition known as autism sometimes in September, 2019 and the medical experts have called for joint parental input over the matter. According to the Petitioner, the Interested Party's presence is indispensable since both parents need to be trained on various aspect of the condition in order to be able to assist their daughter.
17. Arising from the foregoing, the Petitioner sought for the following prayers in the Petition: -
 - a) *A declaration that the decision to tag the Interested Party as a prohibited immigrant without any lawful cause and due process is unconstitutional/unlawful.*
 - b) *A declaration that the Interested Party is by law entitled to due process if a decision is to be made declaring him a prohibited immigrant.*
 - c) *A declaration that the failure by the 1st and 2nd Respondents to issue the Interested Party/Petitioner with a written explanation for declaring him a prohibited immigrant is illegal, unlawful and amounts to a denial, breach and violation of the Petitioner's and Interested Party's fundamental right and freedom under Article 47(1) and (2) of the Constitution of Kenya.*
 - d) *A declaration that under and by virtue of the provisions of Article 27 (1) of the Constitution of Kenya the Interested Party is entitled to equal protection of the law.*
 - e) *A declaration that the absence of the Interested Party from his family in Kenya by virtue of the actions/decision of the Respondents, is in breach and violation of the Interested Party's fundamental rights and freedoms under Article 45(1) and 53(1)(e) of the constitution of Kenya.*
 - f) *A declaration that the Respondents are in breach of the Interested Party's fundamental rights and freedoms under Article 39(1) of the constitution of Kenya.*
 - g) *An Order to issue to the 1st and 2nd Respondents, jointly and severally and through their agents or officers claiming authority under them, to forthwith remove/delete the tag of a 'prohibited immigrant' placed against the Interested Party in the Respondents' border control data system.*
 - h) *The Honourable Court be pleased to issue an order of permanent injunction prohibiting the 1st and 2nd Respondents, jointly and severally and through their agents or officers claiming authority under them from prohibiting the Interested Party from entering back into Kenya upon his impugned and illegal deportation using his Burundian Passport No.OPO105572, based upon the Respondents' February, 2017 declaration classifying the Interested Party as being a Prohibited Immigrant.*
 - i) *Such other or further relief as this Honorable court may deem just and fit to grant.*

j) *An Order that this petition being brought in good faith and in favour of the Interested Party who could not bring it himself, the costs therefore be borne by the 1 and 2nd Respondents jointly and severally.*

18. The Petitioner also filed written submissions dated 6th March, 2020.

19. The submissions largely expounded on the Petition in urging the Court to allow the Petition. The Petitioner relied on several decisions in her said quest.

20. In the end, the Petitioner prayed that the Petition be allowed as prayed.

The Response:

21. The Petition is opposed.

22. The Respondents relied on a joint Replying Affidavit sworn by *Alfred Abuya Omangi*, a Principal Immigration Officer, on 3rd December, 2019.

23. It was deponed that the 1st Respondent received a letter dated 17th February, 2019 from the Directorate of Criminal Investigations requesting the deportation of six foreign nationals including the Interested Party herein. The basis for the request was that the said foreigners were defrauding Kenyans in scrupulous and non-existent gold deals.

24. The request was sent to the 2nd Respondent for consideration. On 20th February, 2017 the 2nd Respondent declared the six foreign nationals prohibited immigrants pursuant to Section 33(1) of the Citizenship Act and they were deported.

25. It was further deponed that one does not need to be first convicted of any offence before being declared a Prohibited Immigrant and that such a party is at liberty to apply for a special pass to re-enter Kenya.

26. The Respondents filed written submissions dated 27th August, 2020.

27. They reiterated their foregoing position and also referred to several decisions in support of their case.

28. The Respondent prayed that the Petition be dismissed with costs.

Analysis and Determination:

29. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find that there is only one main issue herein. It is whether the declaration of the Interested Party as a Prohibited Immigrant contravened Articles 27(1), 39(1), 45(1), 47(1) and (2) and 53(1)(e) of the Constitution.

30. The Respondents contended that the declaration of the Interested Party as a Prohibited Immigrant (hereinafter referred to as '**the impugned declaration**') was pursuant to Section 33(1) of the Citizenship Act. I will reproduce the entire provision as under: -

33. (1) *For purposes of this Act, a prohibited immigrant is a person who is not a citizen of Kenya and who is-*

(a) *not having received a pardon-*

(i) *has been convicted in Kenya or any The Kenya Citizenship and Immigration Act, 2011 28 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) *a person who procures or attempts engage in trafficking or smuggling into and out of Kenya any person for the purpose of engaging in sexual offenses;*

(d) *a person who is reasonably suspected to be engaged in or facilitates the trafficking of narcotics, prohibited, controlled or banned substances;*

(e) *a person who there is reasonable cause to believe that he is engaged in or facilitates trafficking in persons;*

(f) *a person whose presence in or entry into Kenya is unlawful under any written law;*

- (g) a person in respect of whom there is in force an order made or deemed to be made under section 43 directing that such person must be removed from and remain out of Kenya;
- (h) a person 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 Kenya Citizenship and Immigration Act, 2011*
- (i) a person in respect of whom there is reasonable cause to believe that he or she is engaged in, facilitates or is sympathetic to acts of terrorism or terrorist activities directed against Kenya or detrimental to the security of Kenya or any other state;
- (j) a person involved in or is reasonably suspected to be engaged in money laundering;
- (k) a person convicted of war crimes or crimes against humanity, genocide, murder, torture, kidnapping or in respect of whom there are reasonable grounds for believing they have financed or facilitated any such acts;
- (l) a person engaged in or suspected to be engaged in illicit arms trade;
- (m) a person engaged in or suspected to be engaged in illegal human body organs trade;
- (n) a person involved or reasonably suspected to be involved in crimes related to patents, copyrights, intellectual property rights, cybercrimes and related crimes;
- (o) a person involved in or reasonably suspected to be involved in piracy or has been convicted of piracy and served his sentence;
- (p) a person who is or has been at any time a member of group or adherent or advocate of an association or organization advocating the practice of racial, ethnic, regional hatred or social violence or any form of violation of fundamental rights;
- (q) a person whose conduct offends public morality;
- (r) a person who knowingly or for profit aids, encourages or procures other persons who are not citizens to enter into Kenya illegally; *The Kenya Citizenship and Immigration Act, 2011 30 No. 13 of 2006.*
- (s) a person who is seeking to enter Kenya illegally;
- (t) a person who is a fugitive from justice; (u) a person whose refugee status in Kenya has been revoked under the *Refugee Act, 2006*; and (v) any other person who is declared a prohibited immigrant by the order of Cabinet Secretary subject to the approval of parliament or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the *Immigration Act (now repealed)*.

(2) For purposes of this Act, an inadmissible person is a person who is not a Kenyan citizen and who- *No. 13 of 2006.*

- (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 insolvent; (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*;

(3) The Cabinet Secretary may make regulations on admission of regulatory officer's right to deny entry a person other than an asylum seeker who, upon entering or seeking to *The Kenya Citizenship and Immigration Act, 2011 31* 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) Any other person who is declared an inadmissible person by the order of Cabinet Secretary in line with an objective and written criteria or who was, immediately before the commencement of this Act, a prohibited immigrant within the meaning of the *Immigration Act (now repealed)*, including matters legislated in the public health.

(5) Subject to Section 34 the entry into and residence in Kenya of a Prohibited Immigrant or an undesirable person shall be unlawful, and a person seeking to enter Kenya shall, if he or she is a prohibited immigrant or undesirable 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.

31. Section 33(3) of the Citizenship Act makes it clear that any order given by the Cabinet Secretary under Section 33 must be subject to the Constitution and other related laws.

32. I will begin with ascertaining whether the impugned declaration ought to have complied with Article 47(1) and (2) of the Constitution. The provisions states as follows: -

(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.

33. The right to fair administrative action is further amplified in the *Fair Administrative Actions Act*, No. No. 4 of 2015. Section 4 thereof provides that: -

(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.

34. Section 2 of the Fair Administrative Actions Act defines an 'administrative action' and an 'administrator' as follows: -

'administrative action' includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘administrator’ means ‘a person who takes an administrative action or who makes an administrative decision’.

‘decision’ means any administrative or quasi-judicial decision made, proposed to be made, or required to be made, as the case may be.

35. The Courts have also, on an equal measure and in many occasions, dealt with the right to a fair administrative action. In **Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR** Court of Appeal addressed itself on Article 47 of the Constitution. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

36. The South African Constitutional Court in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...

37. The right was further discussed in **Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR**. The Court had the following to say:

25. In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano [39] the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.

These are: -

a. **Illegality** - Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "**illegal**". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.

b. **Fairness** - Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.

c. **Irrationality and proportionality** - The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute "**irrationality**" or "**perversity**" on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation**: -

If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...

38. The impugned declaration had the effect of classifying the Interested Party as an unwanted person in Kenya. That decision definitely adversely affected the Interested Party more so given that the Interested Party has a family in Kenya. The impugned declaration was, hence, an administrative action. As such it had to comply with Article 47 of the Constitution to the extent that it was expeditious, efficient, lawful, reasonable and procedurally fair.

39. As the impugned declaration is in writing, then it complied with Article 47(2) of the Constitution as read with Section 4(2) of the Fair Administrative Actions Act. The decision is also lawful for it is based on a legal provision.

40. On procedural fairness, the 1st Respondent was to, at the minimum, comply with Section 4(3) and (4) of the Fair Administrative Actions Act. The 1st Respondent ought to have undertaken the following: -

- (i) Notify the Interested Party of the intention to issue the impugned declaration;
- (ii) Accord the Interested Party an opportunity to be heard and to make representations in that regard;
- (iii) Inform of the right to a review or internal appeal against an administrative decision, where applicable;
- (iv) Inform of the right to legal representation;
- (v) Inform of the right to cross-examine where applicable;
- (vi) Avail the information, materials and evidence to be relied upon in making the impugned declaration.

41. The 1st Respondent did not take any of the said steps. The impugned declaration was, hence, unilaterally made. As such, the impugned declaration was in contravention of Article 47(1) and (2) of the Constitution as well as the Citizenship Act and the Fair Administrative Actions Act on account of procedural impropriety.

42. Having so found, it goes that the Interested Party's right to equal protection and benefit of the law was also impugned. The impugned declaration, therefore, infringed Article 27(1) of the Constitution.

43. I have further considered the matter alongside Articles 39(1) and 45(1) of the Constitution. I, however, do not see how any of those rights were infringed by the Respondents. As the Interested Party is a foreigner, then his entry into Kenya must be subject to the laws of the land.

44. The Petitioner has also not demonstrated how the right to recognition and protection of the family by the State under Article 45(1) of the Constitution has been infringed.

45. On Article 53(1)(e) of the Constitution, it is constitutionally provided that a child has the right to parental care and protection which is the equal responsibility of both parents. Given the manner in which the impugned declaration was issued and effected, that right was infringed. Furthermore, the child is a victim of autism condition which according to the medical experts the involvement of both parents is necessary. I believe the said medical condition may have been one of the reasons behind the consent recorded on 4th December, 2019 where the Interested Party was allowed to apply for a Prohibited Immigrant Pass so as to gain entry into Kenya.

46. It is, therefore, the finding of this Court that the impugned declaration also infringed Article 53(1)(e) of the Constitution.

47. In sum, the impugned declaration contravened Articles 47(1) and (2) and 53(1)(e) of the Constitution.

48. Flowing from the foregoing findings and conclusions, the disposition of the Petition is as follows:

(a) A declaration, be and is hereby issued, that the declaration of the Eric Butoyi as a Prohibited Immigrant on 20th February, 2017 by the 2nd Respondent is contrary to Articles 47(1) and (2) and 53(1)(e) of the Constitution as well as the Kenya Citizenship and Immigration Act and the Fair Administrative Actions Act. The said decision is, hence, unconstitutional, unlawful, procedurally unfair and null and void.

(b) An Order of *Certiorari*, be and is hereby issued, calling, removing, delivering up to this Honourable Court and quashing or revoking the 2nd Respondent's decision made on 20th February, 2017 declaring Eric Butoyi as a Prohibited Immigrant.

(c) The 1st Respondent is at liberty to consider any application by Eric Butoyi for entry into Kenya on any other grounds apart from the 2nd Respondent's declaration of Eric Butoyi as a Prohibited Immigrant made on 20th February, 2017.

(d) The 2nd Respondent is also at liberty to consider the suitability of Eric Butoyi's stay in Kenya in accordance with the Constitution and the law.

(e) Each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF NOVEMBER, 2021

A. C. MRIMA

JUDGE

JUDGMENT VIRTUALLY DELIVERED IN THE PRESENCE OF:

MISS. NTHEI, COUNSEL FOR THE PETITIONER AND INTERESTED PARTY.

MISS. MWASAO, LEARNED STATE COUNSEL INSTRUCTED BY THE HONOURABLE ATTORNEY GENERAL FOR THE RESPONDENTS.

ELIZABETH WANJOHI – COURT ASSISTANT.