



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

REVISION NO. E095 OF 2021

REPUBLIC.....APPLICANT

VERSUS

KHADIJA ABDIKADIR HASSAN.....RESPONDENT

RULING

1. Through an undated letter received by court on the 5th of November 2021 the Office of the Director of Public Prosecution sought to have the decision of the trial magistrate in **Chief Magistrate Court Case No. E1234 of 2021 – Republic vs Khadija Abdikadir Hassan** revised so that the accused in the said case is repatriated back to Somalia as opposed to the Hagadera Refugee camp within Dadaab.

2. In the above case the accused faced three charges; making a document contrary to Section 357 of the Penal Code. Secondly uttering a false document contrary to Section 357(b) of the Penal Code. Thirdly, being unlawfully in Kenya contrary to Section 53(2) of the Kenya Citizenship and Immigration Act.

3. The accused pleaded guilty to all the three counts. She was fined Kshs.20,000 in default 1-year imprisonment on Count 1 and 2. On Count 3 the trial Magistrate directed that accused be escorted back to Hagadera Refugee Camp on completion of the sentence in counts 1 & 2.

4. The court being desirous of more information on the accused having noted from the proceedings that the accused had informed the trial court of her wish to go back to the Hagadera Refugee Camp, directed for a background check on the accused. A report was prepared by Probation and Aftercare Services and accordingly filed in court.

5. According to the report the accused person's parents came to Kenya as refugees in 1992 and lived in Hagadera Refugee Camp as refugees. They came with their 4 children the accused being the 3rd born. When the family relocated the accused was 1 year old. She is now 26 years.

Her mother and siblings all live at the Hagadera Refugee Camp. She left the camp upon getting married. She has since separated with her husband and has 2 children aged 3 and 10 months.

She is a registered refugee.

She has no family in Somalia.

6. Over a period of time Kenya as a country has hosted refugees from neighbouring countries, some of which include Sudan, Ethiopia, Eretria, Rwanda, Burundi and Somalia.

7. As was stated in **Kenya National Human Rights Commission and Kituo Cha Sheria vs The Attorney General & 4 Others Constitutional Petition No. 227 of 2014**. The main treaties governing the issue of refugees are the 1951 Convention Relating to the Status of the Refugees and the 1967 Optional Protocol Relating to the Status of Refugees. There are also a host of other international instruments that discuss this subject.

Kenya as a State acceded to the 1951 United Nations Convention on the status of refugees on 16th May, 1966 and the 1967 Protocol in 1981. Kenya is also a State party to the Organization of African Union (OAU) now AU Convention on Specific aspects of Refugees in Africa which it signed in 1969 and ratified in June 1992. Kenya also acceded to the convention against torture and other cruel, inhuman and degrading treatment in February 1997.

8. The major principle in the protection of refugees which is addressed by the various conventions is the non-refoulment principle which

speaks to the obligation by States actors not to return refugees back to a place that threatens their freedom or lives.

9. Kenya went further as a country beyond ratification of the instruments mentioned above to enacted the Refugee Law on the 30th of December 2006, which Act commenced operation on the 15th of May 2007 and which act was necessitated by the influx of the refugee population in the country and **“for the recognition, protection and management of refugees....”**

Section 18 of the Refugee Act encompasses the principle of non-refoulement as follows.

“ Non-return of refugees, their families or other person.

No person shall be refused entry into Kenya, expelled 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 or remain in a country where

a) The person may be subject to prosecution on account of race, religion, nationality, membership of a particular social group or particular 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 of the whole of that country.”

10. Refugees are subject to the Laws of the host country which explains why the court punished the accused for Count 1 & 2

11. The accused was not unlawfully in Kenya as she is a registered refugee but was not within the confines of the refugee camp. The trial court in its wisdom ordered repatriation to the camp upon payment of the fine or having served the 1-year sentence.

12. As it were, Kenya is under an obligation to protect and treat refugees humanely. It is not a secret that though Somalia as a nation is slowly returning to normalcy it is still volatile and hundreds of its nationals still being held at the refugee camps.

The accused did not tell the court that she wishes to return to Somalia in the current state of that country. She expressed her wish to go back to the refugee camp. On what basis would Kenya be repatriating her back to Somalia?

13. This Court is totally in favour of the trial court’s decision that the accused be returned to the Hagadera Camp where her family has been for years as that is the only human, prudent and reasonable thing to do in the circumstances.

14. The revision is therefore declined.

DATED, SIGNED AND DELIVERED IN GARISSA THIS 24TH DAY OF NOVEMBER,2021

ALI-ARONI

JUDGE