



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION 296 OF 2017.

BETWEEN

UNKNOWN alias MEHRTAB KIDANER MARIAM.....APPLICANT.

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT.

DIRECTOR OF IMMIGRATION AND REGISTRATION OF PERSONS..2ND RESPONDENT.

RULING.

Unknown alias Mehrtab Kidanemariam, herein the Applicant, filed the present application by way of Notice of Motion dated 10th October, 2017. The application is brought under Sections 362 and 364 of the Criminal Procedure Code. The Applicant urges the court to exercise its supervisory powers by calling for **file in Milimani Criminal Case 1652 of 2017** for purpose of satisfying itself as to the correctness, legality and propriety of the orders made on 28th September, 2017 by **Hon. Cheruiyot, PM** directing the deportation of the Applicant. It is urged that the court sets aside the said order. The court is also urged to set aside the conviction and sentence imposed against the Applicant.

The Applicant was charged with using a forged passport contrary to Section 54(1)(c) as read with Section 54(2) of the Kenya Citizenship and Immigration Act, 2011 Laws of Kenya. The Applicant was sentenced to pay a fine of Kshs. 50,000/- in default serve one month imprisonment.

The application is based on the grounds that on 28th September, 2017 the Applicant appeared before Hon. Cheruiyot, PM and inadvertently pleaded guilty to the charge in question and was thus convicted and sentenced accordingly. He was to be repatriated after the completion of the sentence. He was of the view that due to a lack of legal representation during the trial he could not bring to the court's attention the fact that he wished to be registered as a refugee. Thus, he was in a peculiar situation due to his unfamiliarity with the Kenyan laws governing the seeking of asylum. The situation was aggravated by the fact that of language barrier. Further, that the continuation of the proceedings in the trial court offended Sections 2, 3, 11, 13 and 18 of the Refugees Act as well as Section 34(1) of the Citizenship and Immigration Act, 2011. He submitted that the deportation order was also in contravention of the fundamental principle of non-refoulment as set out in Article 33(1) of the United Nations Refugees Convention.

He averred that in light of the above the proceedings against him, and therefore the consequent conviction and sentence, were, on the face of it, incorrect, irregular, improper and thus illegal. He urged the court to exercise its revisionary jurisdiction to make a finding that, upon consideration of his bio data and a

verification letter from the United Nations High Commissioner for Refugees, the appropriate order would have been a discharge and directions be issued for his hand-over to the Department of Refugee Affairs and the United Nations High Commissioner for Refugees. Further, that this court should make a finding that an order for his repatriation offends the principle of non-refoulement.

The application was supported by an affidavit sworn of Elizabeth Ochieng, an advocate of this court, and also the Applicant's counsel. She reiterated the issues raised in the application.

The 1st Respondent filed Grounds of Opposition dated 17th October, 2017 in which he sought the dismissal of the application on grounds that the application was incompetent and bad in law, that the burden lies with the asylum seeker to prove that he/she is indeed an asylum seeker, that the order for repatriation is lawful and justified in the circumstances as the Refugees Act as well as international instruments relating to refugees do not protect immigrants who are not asylum seekers and that the application was an abuse of the court process.

The application was canvassed before me on 17th October, 2017 with Ms. Ochieng representing the Applicant, Ms. Nyongesa the Interested Party and Ms. Kimiri the 1st Respondent.

Ms. Ochieng asked for stay of the execution of the sentence and that the Applicant be handed over to the United Nations High Commissioner for Refugees for registration as a refugee.

Ms. Nyongesa submitted that the Applicant was arrested at Jomo Kenyatta International Airport on arrival from Juba, South Sudan. That he expressed an interest to seek asylum with the United Nations High Commissioner for Refugees but was however charged with being in possession of a forged passport which meant that he had no opportunity to apply for asylum as set out under Section 11(1)(5) of the Refugees Act. She submitted that the section provided for a window of 30 days to apply and that that period had not lapsed since the Applicant's arrival. She urged the court to allow the Applicant to be presented to the Commissioner of Refugee Affairs for purposes of lodging the application. Further, that a determination pursuant to his status should be made and the same tabled before the court to determine his asylum claim. In light of the above, she urged the court to set aside the deportation order as it contravenes Section 18 of the Refugees Act and Section 31 of the 1931 United Nations Convention on Status of Refugees.

Ms. Kimiri opposed the application. She submitted that the asylum seeking was an afterthought since the Applicant pleaded guilty even after the facts were read to him. She submitted that an asylum seeker must disclose his intention at the earliest available opportunity when he arrives in the country. She submitted that the Applicant did not inform the immigration officers at the airport that he had entered the country with an intention of seeking asylum. She submitted that he did not also bring the issue up in the trial court and therefore canvassing it in this court was an afterthought and she prayed that the court dismisses the application.

In reply, Ms. Ochieng reiterated the fact that since the 30 days period within which the application should be made was yet to lapse, the Applicant was wrongly charged. Furthermore, the Applicant had not made his intention to seek an asylum due to language barrier. She submitted that refugees and asylum seekers were generally vulnerable persons. She urged the court to take note of the fact that Eritrea is a war torn country. Ms. Nyongesa added that the Applicant was from a war torn country where he faces persecution. She submitted that asylum seekers of such nature usually use invalid travel documents and that the Applicant should not be penalized for this.

DETERMINATION.

It is clear that the subject matter of this application is immigration and more particularly deportation. Courts have held that such matters should be dealt with not just legislatively but also administratively and through the exercise of discretion due to their unique nature. I find guidance in the case of **Ali v. Secretary of State for the Home Department[2016] UKSC 60** in which it was held that;

“Decision-making in relation to immigration and deportation is not exhaustively regulated by legislation. It also involves the exercise of discretion, and the making of evaluative judgments, ... A perennial challenge, in such a situation, is to achieve consistency in decision-making while reaching decisions which are appropriate to the case in hand. The solution generally lies in the adoption of administrative policies to guide decision making: something which the courts have accepted is legitimate, provided two general requirements are met. First, discretionary power must be exercised in accordance with any policy or guidance indicated by Parliament in the relevant legislation: ...Secondly, decision-makers should not shut their ears to claims falling outside the policies they have adopted.”

In the exercise of discretion, courts should be guided by the legislative policy that exists. The Appellant herein has been convicted of a crime which upon perusal of the proceedings was proper and legal. The Applicant contends that notwithstanding his conviction he should be allowed to make an asylum application given that the time for such an application has yet to elapse. He claims protection under Section 11(1) of the Refugees Act. The provision sets out that an asylum seeker may make an application within 30 days of his entry into the State. This pertains to seekers who enter the country legally or illegally, as in the case of the Applicant. The asylum application should be determined within a period of 90 days as set out under Section 11(5) and during the subsistence of the application the Applicant is entitled to residency in Kenya pursuant to Section 12 awaiting a determination under Section 11(6). The Applicant is also granted a right of appeal under Section 10.

The Applicant arrived in the country on 26th September, 2017. Therefore, the time limit set out in the act is yet to elapse. What remains to be determined is whether the Applicant is entitled to a stay of his repatriation pending the application for asylum status. It is clear that although the Applicant is currently incarcerated, he retains his rights under Article 51 of the Constitution (rights of persons detained, held in custody or imprisoned). The same provides that such person is entitled to rights and fundamental freedoms in the Bill of Rights except to the extent that the particular right is clearly incompatible with his detention. The application for his asylum status falls within Article 47 as the same entails an administrative action which should be expeditious, efficient, lawful reasonable and procedurally fair. In that case, the Applicant ought to be facilitated to apply for asylum before 30 days elapse. Under Section 3(1)(b) of the **Fair Administrative Action Act, 2015** the execution of fair administrative actions is applicable to all State organs performing judicial or quasi-judicial functions under the Constitution or any written law. It is my view that the Commissioner of Refugee Affairs when receiving and processing applications for refugee status is such an organ. The Applicant is therefore entitled to fair administrative action with respect to his intention to apply for a refugee status/asylum. The application will thus partially succeed with the following orders;

- a) The Applicant be escorted to the Department of Refugee Affairs to make his asylum application.
- b) That pending the conclusion of the asylum application, which includes a possible appeal, that the Applicant be granted residency in Kenya after the completion of the sentence meted out by Hon. Cheruiyot, PM in Milimani Criminal Case 1652 of 2017.
- c) The Officer In charge of Industrial Area prison do facilitate the escort of the Applicant to the Refugee Affairs Secretariat, Shauri Moyo where the Applicant shall lodge his application.
- d) The court declines to set aside the sentence based on the fact that the offence does not touch on failure to register but the use of a forged passport contrary to Section 54(1)(c) of the Kenya Citizenship and Immigration Act, 2011.
- e) Should his application for asylum not succeed within the period provided by the law, the Department of Refugee Affairs shall deport him to his home country, Eritrea.

Dated and Delivered at Nairobi This 24th October, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

- 1. Miss Ochieng for the Applicant.**
- 2. Miss Sigei for the Respondent.**
- 3. Miss Nyongesa for the Interested Party.**