



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL REVISION NO. 97 OF 2016

BILAL AHMED KELIK.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Pursuant to Section 362 of the Criminal Procedure Code, the original trial court proceedings in **Nairobi Cr. Case No. 339 of 2016 Immigration Officer Vs Bilal Ahmed KeliF** was forwarded to this court with a view to the court satisfying itself as to the correctness, legality or propriety of the sentence imposed therein and as to the regularity of the said trial record.

The applicant herein was charged with two counts.

Count I: Being unlawfully present in Kenya contrary to Section 53(1)(j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act, 2011, Laws of Kenya. The particulars of the offence were that on 29th day of February, 2016 at Immigration Head Office, Nyayo House within Nairobi County, being an Ethiopian National, was found to be unlawfully present in Kenya in that he did not have a valid pass or permit allowing him to be lawfully present in Kenya.

Count II: Failure to register as a foreign national contrary to Section 56(2) as read with section 56(3) of the Kenya Citizenship and Immigration Act 2011, and regulation 46 thereto. The particulars of the offence were that on the 29th day of February, 2016 at Immigration Head Office, Nyayo House within Nairobi County, being an Ethiopian National, was found to have not registered as a foreign national in contravention of the Kenya Citizenship and Immigration Act, 2011 and the Kenya Citizenship and Immigration Regulations, 2012.

The Applicant was convicted on his own plea of guilty. In both counts he was sentenced to pay a fine of Kshs. 100,000/= in default serve six months imprisonment respectively. The sentences were to run consecutively. In addition, upon payment of the fine or serving the sentences, the Applicant was to be repatriated to her home country.

By a Chamber Summons dated 7th March, 2016 the Applicant contends that she was a registered refugee under Ration Card number 782070 issued on 28th April, 2015. That she inadvertently pleaded guilty and apart from the penalty imposed, was ordered repatriated back to her home country. According to the Applicant, the learned trial magistrate failed to give regard to Section 3(2) of the Refugee Act, 2006 which recognizes an immigrant's prima facie refugee status. It was also in contravention of Section 18 of

the said Act regarding the principles of non- refoulement of refugees under the International Refugee Law. In that regard, it is contended that it was irregular, unlawful and unconstitutional to have found the Applicant guilty as charged. Annexed to the application is a copy of a letter dated 10th August, 2015 from Harun Komen, Commissioner for Refugee Affairs in Kenya and a Refugee ID Card No. 782070 of the Applicant.

In court, her counsel Mr. Abdulkakim submitted that the Applicant pleaded guilty because she was not represented. Unfortunately, the charges offended Section 13(b) of the Refugees Act. Ms. Atina for the Respondent opposed the application. She submitted that the plea was unequivocal and did not avail the Applicant the privilege of a revision. She stated that on the date of the plea, the Applicant showed to the court an Ethiopian passport number EP2293734 as prove that she was an Ethiopian. She could not therefore turn around to claim that she was a Somali refugee. Furthermore, Section 4(e) of the Refugee Act disqualifies a person with more than one nationality from being a refugee. The Applicant having admitted to possessing an Ethiopian passport could not at the same time claim to be a Somali Refugee. Ms. Atina further submitted that Section 18 of the Refugee Act could also not aid the Applicant because the same refers to non-return of refugees to their home country and of protection of a person on account of discrimination. In the present case, the Applicant has not demonstrated that she suffered or was likely to suffer persecution or discrimination if she were repatriated. In any case, under Section 13 of the Act, she had not demonstrated that she was in the process of obtaining a refugee status. Thus, the documents she presented to this court indicating that she was a refugee was an after-thought and aimed at legalizing her illegal stay in Kenya. She should therefore be deported to Ethiopia. Finally, Ms. Atina submitted that the sentence imposed was legal.

In rejoinder, Mr. Abdulkarim submitted that the question in issue was whether if the Applicant had presented the documents in the trial, a different finding would have been arrived at. It was a non-issue that Ethiopia was not at war as the fact of the Applicant's refugee status had been demonstrated. Under Section 18 of Refugee Act, Mr. Abdulkarim submitted, it was difficult for the Applicant to prove the existence of fear or persecution. He urged the court to take into account that the Applicant who is an elderly woman was arrested while seeking asylum.

I have considered the rival submissions and I take the following view of the application. I have looked at trial court proceedings and it is clear that the plea was unequivocal. Therefore, under Section 348 of Criminal Procedure Code, which provides that no appeal is allowed in the case where an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence, the Applicant is stopped from seeking a revision of the trial court's verdict. To buttress this point, in count I, the charge was drafted under Section 53(1)(j) as read with Section 53 of the Kenyan Citizenship Immigration Act of 2011. Under the penalty provision, the Applicant was liable to a fine not exceeding 500,000 or to imprisonment for a term not exceeding 3 years or to both. In count II, the penalty provision is Section 56(3) of the Act which provides for a fine not exceeding Kshs. 100,000/= or to imprisonment for a term not exceeding 3 years or to both. It follows then that the fines imposed were legal and prima facie, the Applicant cannot benefit from a request for a revision of the sentence. Be that as it may, the court must address itself on whether under the Refugee Act, 2006 the learned trial magistrate ought to have rejected the charge under Section 89(5) of Criminal Procedure Code. This is in view of the submission by the applicant that she held a refugee status by the time she was arrested and charged. In that case, she had not committed any offence as a result of which the trial magistrate ought not to have admitted the formal charge.

This court was referred to various provisions of the Refugee Act of 2006 which I will refer to as under:

Section 3(2) provides as follows;

“(2) A person shall be a prima facie refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Section 13 on the other hand provides as follows:

Notwithstanding the provisions of the Immigration Act or the Aliens Restriction Act, no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within Kenya-

- a. ***If such a person has made a bona fide application under sections 11 for recognition as a refugee, until decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal under that section: or***
- b. ***If such person has become a refugee.***

At this point, it is important to evaluate whether Section 13 would aid the Applicant. A look at the facts of the case attests that upon her arrest on 29th February, 2016, she produced a copy of an Ethiopian passport No EP2293734. She did not have an original of it as a consequence therefore her migration status could not be established. In her mitigation, the applicant was candid that she had a valid Ethiopian passport of which the original had been lost. In the current application, the documents she annexed to it purporting to demonstrate her refugee status indicate that she is a Somali National. These are a copy of a letter from the Commissioner of Refugee Affairs as well as a copy of her Refugee ID Card. It then follows that the applicant is an Ethiopian but by misleading the Immigration Office under the Commissioner of Refugee Affairs misrepresented herself as a Somali. She thus gave misleading information for purposes of entitling her to a refugee status in Kenya. That notwithstanding, the original letter from the Commissioner for Refugee Affairs was not produced in Court. But even if the same had been tendered, this court nevertheless takes cognizance of the fact that the applicant admitted that she was an Ethiopian National and holds a valid Ethiopian passport. She must therefore have withheld the same passport for purposes of gaining advantage in acquisition of a refugee status. In that respect, she cannot hide under the provisions of Section 13 of Refugee Act to warrant the revision of the sentence and the entire trial court proceedings. Furthermore, under Section 4(e) of the Refugees Act, 2006, a person shall not be a refugee for purposes of the Act if such person has more than one nationality and has not availed himself/herself of the protection of one of the countries of which the person is a national, and has no valid reason, based on well founded fear of persecution. In the respect of the applicant herein, the evidence that the court can rely on as prove of her nationality is the copy of the passport she showed to the arresting officers which attests that she is an Ethiopian National.

Turning on to Section 18 of Refugee Act, the same provides for non- return of refugees, their families or other persons where the person demonstrates that he or she is compelled to stay in Kenya subject to persecution on account of race, religion, nationality membership of a particular social group or political opinion or 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. The applicant herein has not demonstrated that she would not return to Ethiopia on account of any of the aforestated reasons. She does not therefore qualify to remain in Kenya under the non- refolement principle.

In the premises, I find that the learned trial magistrate properly admitted the charges before him as well as properly convicted the applicant. This court takes cognizance for the fact that the offences are quite prevalent in Kenya and must be discouraged at all costs. However, with regard to court II, the learned trial magistrate imposed the maximum fine which was not prudent as the Applicant was a first offender. On noting that in any event, the applicant shall be repatriated, it is only justiciable to review the sentence downwards. The application thus partially succeeds with the following orders:

1. I hereby set aside the fine of Kshs. 100,000/= imposed and substitute it with an order that the applicant shall pay a fine of Kshs.50,000/= in respect of each of the counts, in default serve 3 months imprisonment respectively.
2. Upon either paying the fine or serving the sentence, the applicant shall be repatriated back to Ethiopia.

It is so ordered.

DATED and DELIVERED this 31st day of MARCH, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Abdulkarim for the Applicant*
- 2. M/s Aluda for the Respondent.*