



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CR. APPLICATION NO. 235 OF 2016

JOHN OGBEIDE OMOVBUDE.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The Applicant, John Ogbeide Ombude, was charged with two counts. In the first, he was charged with being in Kenya unlawfully 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 charge were that on the 13th May, 2016 the Applicant at Namanga Border Control, within Kajiado County, being a Nigerian national, holder of Nigerian passport number Ao6486052, was found unlawfully present in Kenya in that he did not have a valid pass or permit allowing him to be present in Kenya.

In the second count he was charged with failure to register as a foreign national contrary to Section 56(2) as read with Section 56(3) and Section 60 of the Kenya Citizenship and Immigration Act, 2011 and Regulation 46 of thereto. The particulars of the charge were that on 13th May, 2016 at Namanga Border Control, within Kajiado county, being a Nigerian national, holder of Nigerian passport number Ao6486052, was found to have not registered as a foreign national in contravention of the Kenya Citizenship and Immigration Act, 2011 and Kenya Citizenship and Immigration Regulation, 2012.

On 22nd June, 2016 the Applicant was convicted on his own plea of guilt pursuant to a plea bargaining agreement and was fined Ksh. 50,000 in default serve 3 months in jail for each of the offences. The sentences would run consecutively.

The Applicant paid the fine set out in his sentence and the learned magistrate, on the same day, proceeded to make an order that upon the sentence being fulfilled the Applicant should be deported to his mother country. Being dissatisfied with the order of the court for his deportation he approached this court by a Certificate of Urgency and Notice of Motion both dated 24th June 2016. He is seeking a revision of the sentence, particularly against the order of repatriation.

The grounds as articulated in the pleadings were that the Applicant had paid the fine as required under the sentence but the learned magistrate had proceeded to order his deportation whereas the Applicant being a student at Pan Africa Christian University had a full scholarship from Patriotic Guards Ltd and he was therefore legally, lawfully and legitimately in Kenya pending his regularization of his passport and visa.

The Notice of Motion is supported by the affidavit of Titus Kigen, managing director of Patriotic Guards

Ltd, who deponed that the Applicant had complied with the orders of the trial court by paying the fine and annexed receipts in support thereof. He further deponed that he wrote a letter dated 18th May, 2016 to the Director of Immigration and Foreign Nationals and the Inspector General of Police confirming his company's full sponsorship of the Applicant to Pan African University and annexed documents to the Supporting Affidavit evidencing the same. He concluded by stating that the company was apprehensive that the fees paid and the Applicant's academic future would be wasted if the orders for repatriation were effected. He prayed that the Applicant be granted enough time to regularize his travel documents; the passport and visa.

The Applicant's advocate, Mr. Wachakana, made oral submissions that were mostly based on the content in the Notice of Motion although he did add that there was a Judicial Review case before Justice Odunga that was pending for delivery of Judgment. He submitted that the Petition filed before the Judicial Review Division challenged the legitimacy of impounding the Applicant's travel documents by the Immigration Department. He further stated that given the fact that the Applicant had a sponsor who had agreed to pay his fees at a local university a decision to deport him would be detrimental to the Applicant's ability to continue with his education.

The court then ordered for a copy of the Applicant's passport evidencing the visa permitting his stay in the country and also showing the dates relevant to the issue. The copies were duly submitted. Guided by **Section 362** of the **Criminal Procedure** Code the court also called for the file from the lower court in order to **“satisfy itself as to the correctness, legality or propriety of [the] ...order recorded [and] passed.”**

A look at the court file and the submissions herein shows that the Applicant is seeking that the order for his repatriation be quashed to allow him to continue with his education at Pan African University and that in lieu be granted time to regularize his documents.

The court thinks that a chronological background of the case is necessary as it goes to the heart of the issue raised. The Applicant arrived in Kenya on 31st May, 2015 as evidenced by the copy of his visa. He was issued with his visa on 7th September, 2015, but the effective date was 31st May, 2015. He also received provisional admission to Pan Africa Christian University in September as evidenced by the Applicant's annexure T3. However, his admission was subject to the Applicant gaining a student pass which this court deduces was a student visa. On 13th May, 2016 the Appellant was arrested at Namanga Border Control while he was trying to head out of the country. He was charged and arraigned in court.

The court understands the Applicant's contention that if he is deported it will lead to the opportunity he has gained to study at the university and the scholarship that comes with it a nullity. The court has noted from the letter from the university that the Applicant already lost a year of school due to the fact that he did not have a student visa.

Against this background it is important to note that the Applicant's visa expired on 30th November, 2015 and until his arrest had not bothered or made an attempt to renew the same. Instead, he was leaving the country for purposes unknown to the court. This casts doubt on what his mission to the country was. Indeed, if he intended to study, he would have taken the quickest opportunity to regularize his stay in the country. It also raises an eye brow as to why he intended to leave the country yet he already had an admission to a university in the country. There is clearly a missing link between his entry into the country and the admission to the University. For this reason inasmuch as the court empathizes with him against his need to study I feel he should return to his country and re apply to come in afresh as student.

Accordingly, I decline to revise the order of repatriation. Pursuant to Section 364 of the C.P.C. the application herein is dismissed. The Applicant should forthwith be repatriated to his home country, Nigeria.

DATED AND DELIVERED THIS 19TH DAY OF JULY, 2016

GRACE W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Mr. Wachakana for the Applicant.

2. M/s Kimiri for the Respondent.