REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPEAL NO.47 OF 2011

MAHAMUD MUHUMED SIRAT..……....…….……APPELLANT

VERSUS

REPUBLIC …….....……..……..RESPONDNET

(Being an appeal from the ruling of the Hon. Mr. Mutembei Chief Magistrate in

Nairobi Chief Magistrate's Criminal Case No.272 of 2010

delivered on 09/02/2011)

JUDGMENT

MohamudMuhamedSirat, the appellant herein was on 23rd August, 2010 presented before the Chief Magistrate's Court in Nairobi to take plea for two offences. Miss. Kilonzo, his counsel raised an objection to the plea on account of a defect in the charge sheet. She submitted that the particulars of the charge described the appellant as an Australian national whereas he was not one. She submitted that this was contemptuous of a letter dated 30th July, 2010 from the National Registration Bureau which indicated that the appellant was a Kenyan national. That this letter showed that the appellant was born in Kenya and had been issued with a Kenyan identity card No. ***[particulars withheld].***For these reasons Miss Kilonzo argued that it is malicious to describe the appellant as an Australian National.

The objection by the defence was rejected by the trial court. The court argued that it was only during the trial that the prosecution would be called upon to adduce evidence to prove the particulars of the charge and the defence afforded an opportunity to challenge the evidence. The trial court further ruled that the evidence the defence was adducing to disprove the particulars of the charge at that point was un-procedural. The objection to the plea was accordingly dismissed and that is what gave rise to this appeal.

In a Petition of Appeal dated 16th day of February, 2011, the appellant raised the following grounds of appeal:-

1. **That the Learned Magistrate erred in law and fact in failing to find that the charge sheet dated 9th February, 2010 was defective on its face by dint of describing the Appellant, a Kenyan citizen, as a national of Australia.**

2. **That the learned Magistrate erred in law and fact in failing to find that by reason of the defect in the charge sheet the rights of the appellant to a fair trial would be prejudiced.**

3. **That in dismissing the appellant's application dated 22nd February 2010 objecting to the**

charge sheet the learned magistrate made errors of law and fact in failing to consider, apply and uphold submissions, authorities and provisions of law cited by the appellant, to wit:

a. **Section 89 (5) and 382 of the Criminal Procedure Code.**
b. **Sections 2, 5, 6, 9, 14 and schedule 1 of the Registration of Persons Act.**
c. **The decision of the High Court in Election Petition No.15 of 2008 between MahamudMuhamedSirat and Ali Hassan Abdirahman and two othersgiven on 22nd January 2010. The High Court in this decision decided that by virtue of holding a valid national Identity Card under the Registration of Persons Act the Appellant was prima facie a Kenyan.**
d. **The decision of the High Court in Judicial Review No.318 of 2008 between the Republic and Hon. OtienoKajwang' the Minister for Immigration and Registration of Persons Act given on 9thOctober, 2009 quashing a deportation order issued by the Minister for Immigration and Registration of Persons against the appellant.**
e. **The decision of the Court of Appeal in Muchiri–vs- Republic and Kilome–Vs- Republic.**

4. **That the learned Magistrate erred in law and fact in failing to consider and apply his mind to the Notice of Appeal dated 22nd October, 2009 filed by the Minister for Immigration and Registration of Persons against the decision of the High court Judicial Review No.318 of 2008 between the Republic and Hon. OtienoKajwang'Minister for Immigration and Registration of Persons.**

5. **That the Learned magistrate ought to have found that the matter of the citizenship of the appellant had been determined conclusively by the High Court in Civil proceedings.**

6. **That the learned magistrate ought to have found that the prosecution, through the Minister for Immigration and Registration of Persons, had an appeal pending before the Court of Appeal against the decision of the High Court in Judicial Review No.318 of 2008 between the Republic and Hon.OtienoKajwang' Minister for Immigration and Registration of Persons.**

7. **That the learned magistrate ought to have found that in sustaining two different causes of action, civil and criminal, in three different courts simultaneously, over the same person and matters was a gross abuse of the court process.**
8. **That the learned magistrate erred in law and fact that in failing to find that the Minister for Immigration and Registration of Persons having issued the appellant with a National Identity Card, bringing charges against the Appellant describing him as an Australian was an abuse of the process of court.**

9. **That the learned magistrate erred in law and fact in failing to consider and find that the Appellant was the holder of a valid national identity card and prima facie of Kenyan nationality and that to describe him otherwise was misleading, in breach of law, and an abuse of court process.**

10. **That the learned magistrate erred in law and fact in failing to consider and apply his mind to a letter dated 30th July 2010 from the prosecution, through the Minster for Immigration and Registration of Persons, confirming that the Appellant was a Kenyan citizen. Further,**

a. **That the learned magistrate failed to consider that the prosecution, through the Minister for Immigration and Registration of Persons conceded that this letter, written after the charges had been brought, was a true reflection of the facts and status of the accused.**

11. **That the learned magistrate erred in law and fact in failing to take judicial notice that the appellant was an elected member of parliament for Wajir South, a position he would not hold unless he was a Kenyan citizen.**

12. **That the learned magistrate erred in law and fact by failing to find that admitting the**

charge sheet describing the appellant, a Kenyan citizen, as an Australian National was a breach of the Registration of Persons Act.

13. **That the learned magistrate erred in law and fact by failing to find that admitting the charge sheet describing the Appellant, a Kenyan citizen, as an Australian National would deprive the Appellant of his citizenship and his rights and benefits as a citizen in breach of the law generally and the Constitution of Kenya particularly**.

The appeal was canvassed by way of filing written submissions. Those of the Appellant were filed on 21st August, 2014 by M/S Kilonzo and Company Advocates. The following issues were raised.

First, that the charge sheet was defective. Under this head it was submitted that the appellant was charged under law that was not applicable at the time. That further it was defective to describe the appellant in the particulars of the charges as being anAustralian citizen whereas he was a Kenyan citizen.

Second, that the High Court in **HighCourtMiscellaneousCivil Application No.316 of 2008 Republic – Vs- Hon. OtienoKajwang'** quashed a deportation order by which the appellant was to be deported having been declared an illegal immigrant. An appeal against this order is currently pending before the Court of Appeal.

Third, in High Court **Election Petition No. 15 of 2008 – MuhamudMuhamedSirat –Vs- Ali Hassan Abdirahman** the court found that the appellant held a Kenyan identity card and had therefore provided evidence that, prima facie, he was a Kenyan citizen.

Four, by charging the appellant, he was being denied a right to a fair trial. Specifically, by the prosecution referring to him as an Australian citizen deprived him the right to be a Kenyan citizen.

Five, that since the appellant had elsewhere demonstrated that he was a Kenyan citizen, the appropriate statute under which he would have been charged was the Registration of Persons Act, Cap 107, Laws of Kenya and not the repealed Immigration Act. That the latter applied to illegal immigrants.

Six, that both Article 16 of the Constitution and Section 8 of the Kenya Citizenship and Immigration Act allows a person to retain dual citizenship. In this respect, the repealed Immigration Act and Registration of Persons Act which criminalized dual Citizenship are inconsistent with the Constitution by virtue of Regulation 5 of the Kenya Citizenship and Immigration Regulations, 2012 which allows a party who had lost his citizenship by reason of acquiring citizenship of another country to regain his citizenship.

Learned state counsel, Miss. Aluda, on behalf of the Respondent in opposing the appeal submitted as follows:-

First, that the charge sheet was not defective. That is to say that as at the time the appellant was to be charged, he was not a Kenyan but an Australian citizen. Again this was a matter that ought to have been determined by the trial court.

Second, the decision in the **Election Petition No.15 of 2008** did not bar the prosecution from charging the appellant with the offences he declined to take plea in.

Third, under Article 13 of the Constitution, a person retains citizenship as at the effective date. At the effective date the appellant was an Australian citizen, hence the charges preferred against him. That therefore it is a matter for determination by the court whether or not the appellant was a Kenyan citizen by the time of the date of the offence.

Four, the appellant's constitutional rights to a fair trial have not been violated. That the offences he was charged with are still recognizable by the law as they were committed way before the enactment of the new constitution.

Five, that the application is aimed at preventing the due process of justice to follow.

On 13th April, 2015 respective counsel made brief oral submissions in addition to the written ones. Miss. Kilonzo for the appellant submitted that even if the charge sheet was not defective, the Section of the law relied on is no longer in existence. She referred to clause 7(1) of the Sixth Schedule of the Constitution which is the transitional provision of the existing laws. According to her, although dual citizenship was an offence, it is no longer the case. In any case, the material date that the court ought to have considered that the objection could be raised was the date the charge sheet was presented in court. Hence the question for determination is whether a person holding dual citizenship prior to the 27th August, 2010 (date of promulgation of the new Constitution) can be charged under the Kenya Citizenship and Immigration Act.

In furtherance to the above, Miss. Kilonzo submitted that Section 65 of the Kenya Citizenship and Immigration Act repealed the Immigration Act under which the appellant was charged. That Section 10 of the Act provides that a person who was a Kenyan citizen by birth but seized to be a citizen by acquiring citizenship of another country may apply to regain citizenship.

In rejoinder Miss Aluda submitted that the offences were committed before both the new Constitution and the Kenya Citizenship and Immigration Act were enacted. That the date of the enactment is then the effective date of the offences.

She further submitted that the appellant had made several applications aimed at defeating justice.

I have accordingly considered the appeal and the respective submissions. I formulate the issues for determination to be:-

a. Was the charge sheet defective?
b. Was the appellant charged under the wrong statute. That is to say whether the Immigration Act having been repealed as at the time of taking plea, the charge sheet could not apply.
c. Pursuant to (b) above, when is the effective date of the law that repealed the Immigration Act?
d. Has any other decision of a parallel court barred a criminal prosecution against the appellant?
e. Has the appellant's right to a fair trial been violated?
f. Has the appellant abused the process of the court?
g. Should the appeal succeed?

Defective Charge Sheet

What constitutes a defective charge sheet was defined by the case of **Yusefu& Another –Vs- Uganda (1969) EA, 236 as:**

> **"the charge was defective in that it did not allege an essential ingredient of the offence, i.e. that the skins came fromanimals killed etc, in contravention of the Act."**

Specifically, a charge and its particulars must be spelt out in such unambiguous words as to enable an accused person to understand what he is charged with. A charge must also disclose the offence with which the accused is charged.

In the present case, it was submitted that the charge sheet was defective in that it described the appellant as an Australian as opposed to a Kenyan citizen. It takes me to restate the charges which were drawn as follows:-

Count I

Misleading an immigration officer in the exercise of his powers contrary to Section 13(1) (b) of the Immigration Act Cap.172 Laws of Kenya.

Particulars:-

On the 29th day of November, 2006 at Nyayo House within Nairobi area, knowingly misled William Okello an Immigration officer by not disclosing material facts that he was an Australian national a fact that mislead the said Immigration officer into believing he was eligible for a Kenyan passport.

Count II:-

Being unlawfully present in Kenya contrary to Section 13(2) (c) of the Immigration Act Cap 172 laws of Kenya.

Particulars:-

On the 25th day of May, 2008 at South C estate within Nairobi area, being an Australian national was found being unlawfully present in Kenya in contravention of the Immigration Act in that he had no valid pass or permit authorizing him to be in Kenya.

According to the appellant, the Immigration Act, Cap 172, Laws of Kenya under which he was charged has since been repealed. That contention is of course factual as the said Act was replaced by the Kenya Citizenship and Immigration Act, Act No.12 of 2011 whose commencement date was 30th August, 2011. This question can then only be determined together with issues for determination numbers (b) and (c).

But before I dive into that, it is important that I comment on the applicability of Section 89(5) of the Criminal Procedure Code. The rationalefor this is that the ruling giving rise to this appeal arose from dismissal of an objection raised under Section 89(5) which provides as follows:-

> **"Where the magistrate is of the opinion that a complaint or formal charge made or presented under this section does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for the order."**

The provision places the onus upon the magistrate to satisfy himself or herself that the charge is brought under the correct provision of the law and that further the charge discloses an offence. If an accused is of the view that the charge has not satisfied this threshold then he/she has the discretion of raising an objection under the Section. And so, what the appellant did in raising the objection was within the confine of the law.

Was the appellant charged under an existing law?

As earlier stated, the Immigration Act was repealed by the **Kenya Citizenship and Immigration Act, Act No.12 of 2011.** The commencement date of the latter was 30th August, 2011. The charge sheet was presented to court on 9th February, 2010whilst the objection herein was raised on 23rd August, 2010. This means that as at the time the appellant was charged, the Kenyan Citizenship and Immigration Act had not become operational.

The applicability of the latter statute to the present case is in relation to the aspect of the dual citizenship. According to Miss. Kilonzo, for the appellant, dual citizenship under the Kenyan Citizenship and Immigration Act is legal and that under Section 10 a person who was a Kenyan citizen by birth and seized to be a citizen because he has acquired the citizenship of another country may apply to regain the Kenyan citizenship. She submitted that the material date that the court should consider in determining whether the offences the appellant was charged with were provided by the law is the date the charge sheet was presented in court and the date the appellant was due to take the plea. That further the court ought to determine whether a person holding dual citizenship prior to the 27th August, 2010 can be charged under

the new Kenya Citizenship and Immigration Act (thereafter the new Immigration Act).

Suffice to say, the new Immigration Act was enacted with a view that the immigration laws, that is to say, **The Kenya Citizenship Act,The Immigration Act** and **TheAliens Restriction Act** could conform with the New Constitution. These statutes were effectively repealed under Section 65 of the Act.

In the respect of this case, the issue of dual citizenship refers.

Under Article 16 of the Constitution

> **"A citizen by birth does not lose citizenship by acquiring the citizenship of another country.**

And under Article 13(1),

> **"Every person who was a citizen immediately before the effective date retains the same citizenship status as of that date."**

It is then important that I determine the effective date under Article 13(1). The Sixth Schedule of the constitution outlines the transitional and consequential provisions of the laws in force before the promulgation date. Clause 7 of the schedule that is relevant to the instant case provides as follows:

> **"7(1)All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptions, qualifications and exceptions necessary to bring it into conformity with this Constitution.**

(2) If, with respect to any particular matter:-

> **(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular state organ or public officer; and**
>
> **(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict."**

In effect, the Immigration Act, Cap.172, Laws of Kenya remained in force until such a time that a law was enacted to bring it in conformity with the Constitution. In the meantime, if any of its provisions was inconsistent with the Constitution, the Constitution prevailed. That law is the New Immigration Act. As at the date the charge sheet was registered and the appellant was called upon to plead to the charges, being the 9th February, 2010 and 23rdAugust, 2010 respectively the New Constitution had not been promulgated. And bearing in mind the dates of the commission of the offences were before the promulgation of the Constitution (27/08/2010) ultimately implies that the old Immigration Act, Cap.172 was still in force. Nothing then barred the prosecution from drafting the charges under the old Immigration Act. Therefore, even if the court were to buy the appellant counsel's arguments that the date for consideration as to the legality of the charges is the date of the presentation of the charges and taking of plea, this court's finding that the old Immigration Act was still operational obtains. In effect, the appellant was obliged to take the plea on either date.

Further, my understanding of clause 7 of the Sixth Schedule is that the new constitution did not stay or make illegal any proceedings that were filed under an old law or before its promulgation save for any law that was held as inconsistent with it (Constitution) or was specifically invalidated upon its promulgation. Factually so, the appellant had already been charged before the promulgation date. The charge sheet was also duly registered. No fresh charges will be filed. The same proceedings will continue in the same file. All that the appellant will be required to do is to plead to the charges.

This far, I think I have said enough to demonstrate the fact that although the offences with which the appellant was charged are no longer offences under the new Immigration Act is not a bar under the

transitional clause in the Constitution for the appellant to plead to the charges filed against him. In that regard, it is my view that he ought to plead to the charges, unless for any other reasons, the prosecution does not wish to proceed with the prosecution.

Again, a look at count I in which he was charged with misleading an immigration officer in the exercise of his powers is a charge by which the prosecution shall tender evidence to demonstrate whether the appellant acquired the Kenyan citizenship through non-disclosure of material facts which if the same were brought to the attention of the immigration officer, he would not have been granted the Kenyan citizenship. This is an issue which cannot be determined in this appeal but by adduction of evidence in the criminal charges.

Do other decisions of parallel courts bar criminal proceedings against the appellant?

In the written submissions, the appellant argued that the **High Court MiscellaneousCivil Application No.316 of 2008, Republic –Vs- Hon. OtienoKajwang'** quashed a deportation order issued on 23rd May, 2008 which described the appellant as an illegal immigrant.

The appellant herein was the ex-parte applicant whereas the Minister for Immigration and Registration of Persons and Attorney General were the 1st and 2ndrespondents respectively. The application was in the nature of a Judicial Review seeking orders of certiorari to quash a deportation order dated 23rd May, 2008 issued under Section 3 of the Immigration Act, Cap 172, Laws of Kenya (now repealed) classifying the appellant as a prohibited immigrant and ordering his deportation from Kenya for being a threat to national security. The application also sought an order of prohibition prohibiting the respondents from removing the appellant from Kenya pursuant to the 1st Respondent's order dated 23rd May, 2008- see judgment from page 34 of the appellant's written submissions filed on 26th February, 2014.

One of the issues before the court for determination was whether the 1st Respondent acted within his statutory power to issue the order. In finding for the appellant, the court observed as follows:-

> **"Therefore, in my view, to be a prohibited immigrant one has to go by the definition under Section 3 of the Act. It has to be clear, first of all that the affected person is not a Kenyan citizen. In the present case, the citizenship of the applicant appears to be a contested issue. I have not been shown any law that gives the minister (1st respondent) powers to determine who is and who is not a citizen, where there is a contest. Therefore, in my view, the issue of citizenship of the ex-parte applicant having not been finally and conclusively determined, the 1st Respondent had no powers to issue a deportation order of the ex-parte applicant under Section 3 of the Act".**

It is my view that the issue of the applicant's citizenship can only be settled by enquiring into how he acquired the citizenship in the first place. That is why the court observed that unless that issue was settled, it was unlawful for the Minister to issue a deportation order. Effectively, in count I evidence must be adduced in respect of whether the appellant gave misleading information leading to his acquisition of the Kenyan citizenship.

Although an appeal is pending (as alluded by the appellant) against this judgment, the same is not a bar to criminal prosecution against the appellant.

The court was also referred to **Nairobi Election Petition No.15 of 2008** in which the appellant was the Petitioner and Ali Hassan Abdirahiman Ibrahim, Hish Adan (ReturningOfficer) and the Electoral commission of Kenya were the 1st, 2nd and 3rd Respondents respectively. According to the appellant, the court held that since the appellant had a valid Kenyan identity card, he had, prima facie established that he was a Kenyan citizen and could only be charged under the Registration of Persons Act, Cap 107, Laws of Kenya.

The ruling in the Election Petition is on page 54 of the bundle of authorities filed on 26/2/2014. The

ruling was pursuant to a Notice of Motion by the 1st Respondent under Sections 35(1), 43(1), 44(1) of the Constitution (old), Section 4A of the National Assembly and Presidential Elections Act and Section 3A of the Civil Procedure Act seeking to have the Election Petition herein dismissed with costs essentially on the ground that the Petitioner was not a Kenyan citizen. Basically, the applicant argued that since the Respondent (appellant herein) had voluntarily acquired the citizenship of Australia, he had seized to be a Kenyan citizen. He thus wasnot eligible to be registered as a Kenyan voter or offer himself for nomination to be elected as a member of parliament in Kenya or seek any elective post.

The election court dismissed the application on noting that, since the appellant demonstrated that he possessed a Kenyan identity card, then prima facie, he was deemed to be a Kenyan citizen. It referred to Sections 5,6 and 9 of the Registration of Persons Act by which if one is a holder of a Kenyan identity card, he is deemed to be a registered person under the Act.

A more important observation by the court (see page 12 of the ruling) was that, at that point, the court did not have a duty of looking into how the appellant acquired his identity card and that if indeed the 1st Respondent had a complaint in that respect, he should have made a complaint to the appropriate authorities to enable the petitioner be charged with a criminal offence under the relevant provisions of the Registration of Persons Act. The court then observed that it had no jurisdiction to invalidate or declare as invalid the national identity card issued to the appellant.

I wholly concur with the observationsof that court which ultimately vindicates the position of this court, that is to say, that it is only in a criminal trial that it shall be establishedwhetherthe appellant legally acquired his national identity card. It is the outcome of the said criminal proceedings that shall determine whether or not he was genuinely registered as a Kenyan citizen.

It follows then that the charges facing the appellant could not be brought under the Registration of Persons Act as the Act deals with registration of persons and issuance of identity cards whereas the charges seek to dig into whether the appellant failed to give material disclosure of important information that led to his registration as a Kenyan citizen. As such, the charges could only be drawn under the Immigration Act, Cap 172 which provided for the relevant elements of the offences.

Has the appellant's right to a fair trial been violated?

The appellant's counsel submitted that by charging the appellant under a repealed law denies him the right to the presumption that he is a Kenyan citizen, yet he holds a Kenyan identity card. That in any case he is presumed innocent until proven guilty.

I have said enough to demonstrate why I think, in my view, the charges preferred against the appellant are not inconsistent with the Constitution. And as rightly submitted by his counsel, an accused is presumed innocent until proven guilty. This cardinal rule to criminal justice proceedings shall only be satisfied if the appellant goes through the criminal trial to its full course after which the verdict will deliver his innocence or otherwise. In that case, no prejudice will be occasioned by trying him. Instead, failing to try him will avert the cause of justice as it is important that it be determined how he acquired his national identity card and therefore became a Kenyan citizen.

Has the appellant abused the process of the court?

The Respondent submitted that the appellant has deliberately delayed this appeal and more so made numerous applications which have delayed his taking of the plea.

I agree that this appeal has taken long to be heard. But it must be borne in mind that every party has a right to seek redress in the interest of justice. As earlier noted elsewhere in this judgment, the objection raised before the trial court was within the law and cannot therefore be deemed as frivolous. And the appellant having been dissatisfied with the outcome in its ruling had a right of appeal. I cannot thus conclude that he has abused the process of the court.

Is the appeal merited?

The appeal narrows down to the constitutionality and applicability of the Immigration Act, Cap 172. This law has been repealed but the constitution by the Transitional Schedule has not rendered proceedings filed before the promulgation date (27/8/2010) null and void. This position has not also been declared unconstitutional by a higher court. In that case proceedings filed under the Immigration Act prior to the 27/8/2010 are valid and should continue as filed. It is also in those proceedings that the appellant shall demonstrate that he has complied with Section 10 of the Kenyan Citizenship and Immigration Act and Regulation 5 of the Kenya Citizenship and Immigration Regulations, 2012.

In the end, this appeal must fail. The same is dismissed. The appellant must plead to the charges in **Nairobi Chief Magistrate's Criminal Case No.272 of 2010 – Republic –Vs-MuhamudMuhumedSirat**. He must present himself before the said court on 4th May, 2015 for this purpose. In this regard, I order that the original file in the said Nairobi Chief Magistrate's Criminal Case No.272 of 2010 be forthwith forwarded to the respective court.

It is so ordered.

DATED and **DELIVERED** in NAIROBI this 23rdday of April, 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Miss. Kilonzofor the Appellant.

2. Mr. Mureithifor the Respondent.