



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL RIVISION NO. 275 OF 2015

FYSHA ABRHA REDAE.....1ST APPLICANT
FILMON GEBREZGABINER GEBREGRIS.....2ND APPLICANT
SIMON ASHMELASH.....3RD APPLICANT

VERSUS

HON. C. SECRETARY MINISTRY OF INTERIOR & COORDINATION....1ST RESPONDENT
HON. ATTORNEYGENERAL.....2ND RESPONDENT

RULING

Pursuant to Section 362 of the Criminal Procedure Code, the Lower Court record in the Chief Magistrate’s Court at Milimani Criminal Case No. 1918 of 2015, was forwarded to this court for purposes of examination of the criminal proceedings so that this court can satisfy itself as to the correctness, legality, or propriety of any finding, sentence or order recorded on passed, and as to the regularity of any proceedings of the record.

The request was made by Notice of Motion dated 2nd December, 2015. The court is requested to review and or revise by setting aside the orders of Hon. D. Ogembo (Chief Magistrate) made on 24th November, 2015. The court is requested to set aside the conviction and sentence of that court mainly on the ground that the Applicants who were the accused persons therein did not understand the language of the court. Under paragraph 4 of the Notice of Motion, it is contended that the interpretation of the language of the court was done by an interpreter whose understanding of the local language was not good thereby rendering a possibility of miscommunication of the proceedings to the Applicants. Further, it is premised that the Applicants who are Eritrean by origin came into Kenya on 18th November, 2015 to seek asylum and were arrested on the date before they had an opportunity to access and express their intention to the Department of Refugees Affairs. In that case, it is intended that the court makes an order that the Applicants be handed over to the Department of Refugees Affairs for registration as asylum seekers.

In support of the application, the court was referred to Section 11 and 13 of Refugees Act 2006 which provides as follows:

“11. Any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act shall make his intention known by appearing in

person before the Commissioner (for Refugee Affairs) immediately upon his entry, or in any case, within thirty days after his entry into Kenya.

13. Notwithstanding the provision of the Immigration Act or the Alien Restriction Act (now the Citizenship and Immigration Act (2011), 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 section 11 for recognition as a refugee, until a 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 a person has become a refugee.”

I have accordingly called for the original record of the trial court. The three Applicants were each separately charged with the offence of being unlawfully present in Kenya contrary to Section 53(1)(j) as read with Section 53(2) of the Citizenship and Immigration Act of 2011. The particulars of the offences were that on 18th November, 2015, at Kabete Area along Nairobi Nakuru Road within Nairobi County being Eritrean Nationals were found being unlawfully present in Kenya in that they did not have valid permits, visas or passes to allow them remain in Kenya. They were convicted on their own plea of guilty.

Facts of the case were that the Applicants had travelled from Eritrea through Sudan and Egypt to Isreal for greener pastures. In Isreal, they were threatened with arrest but given the option to leave the country. They left for Rwanda on 13.11.2015 via Turkish Airline. They were not able to trace the Eritrean Embassy in Kigali and they travelled to Kenya by road via Malaba border. They were stopped by police while in a vehicle in Nairobi along Waiyaki Way. They were handed over to the Anti Terrorism Police Unit and were charged accordingly. All the documents related to their previous travels were produced in court as exhibits.

From the statement of the offence, it is clear that the Applicants were arrested in Kenya on 18th November, 2015. Section 11 of the Refugee Act, 2006 (supra) provides that a foreigner who enters Kenya with the intention of being a refugee should make his intention known to the Commissioner of Refugee Affairs within 30 days of his entry into the country. From the facts of the case it is clear that the Applicants entered the country purely with the intention of being refugees. Their eligibility status would then be a matter for determination by the Department of Refugee Affairs or the United States Higher Commissioner For Refugees (UNHCR). The 30 days window given to them by the Refugee Act within which they should have registered as refugees had not lapsed. Effectively, their arrest and arraignment in court was premature. Although by virtue of Section 13 of the Act, the Applicants had not yet made known their intention to be refugees, it is worth noting that they were arrested on the date they entered into the country. They had not therefore, had sufficient time to appear before the Commissioner of Refugee Affairs to make known their intention.

Given the facts above, the learned trial magistrate ought to have rejected the charge as being defective under **Section 89(5) of the Criminal Procedure Code**. Under this provision a magistrate is donated with the powers to reject a charge if, in his opinion, it does not disclose an offence. Upon making such a finding, he should make an order rejecting the formal charge and record the reason for so doing. In the present case, it was in order that the learned D. Ogembo, C.M. refused to admit the charge in respect of the Applicants and recorded that the same was pursuant to Section 11 of the Refugee Act, 2006.

It is important that I point out another error occasioned by the learned trial magistrate. He convicted the Applicants on their own plea of guilty. After their mitigation and upon the court noting that they had admitted their mistakes, he failed to pass a sentence before ordering that they be repatriated. An order for repatriation is not a sentence and, although in their mitigation the Applicants had pleaded that they intended to seek refugee status that, of itself, was not a reason why sentence should not have been passed. Were this court to find that the charges were properly before the trial court, I would have referred the file back to the learned trial magistrate for purposes of imposing a sentence.

Let me also note that the plea was taken in the presence of the Applicant's counsel. He did not raise a concern that the Applicants were not comfortable with the court interpreter provided to them. They properly gave the counsel instructions as he even mitigated on their behalf. I hold therefore, that the proceedings were properly interpreted in a language the Applicants understood. The concern raised in this revision that the Applicants did not understand the proceedings of the court is not merited. At the very best, it would constitute a ground for an appeal and not revision.

In the result, I find the request for the revision is merited. The charges against the Applicants were null and void *ab initio*. I set aside the entire proceedings in the **Chief Magistrate's Court at Milimani Criminal Case No. 1918 Of 2015** and order that the Applicants be and are hereby set free. It is important that they report to the Department of Refugee Affairs before expiration of 30 days since their entry into the country before they find themselves on the wrong side of the law.

DATED and DELIVERED this 16th Day of **December**, 2015.

G.W.NGENYE-MACHARIA

JUDGE