



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL REVISION NO. 27 OF 2014

FATUMA ISMAIL & 30 OTHERS APPLICANTS

VERSUS

1. DIRECTOR OF IMMIGRATION
2. DIRECTOR OF PUBLIC PROSECUTION.....RESPONDENTS

RULING

The application before this Court is brought under Section 362 and Section 364 of the Criminal Procedure Code.

The orders sought:-

1. *Spent*
2. *Pending hearing and determination of this application, the Applicants be handed to the Department of Refugee Affairs for safe custody at their holding facility.*
3. *That pending the hearing and determination of this application the Officer In charge Shimo La Tewa main prison and Shimo La Tewa Women prison be restrained temporary from handing over the Applicants to Immigration officers for purposes of removing them from Kenya in execution of the orders of Honourable Njagi – Resident Magistrate in Kwale Criminal case NO. 273 of 2014 and 277 of 2014 made on 17th March, 2014.*

The Court is requested to call for the original files above mentioned for purposes of satisfying itself on the correctness, legality and propriety of the orders made and in particular to that part of the Sentence directing that the Accused persons be repatriated to their country of origin upon payment of fine and or completion of their Sentence.

The orders sought are for the setting aside of the order of repatriation and the refund of fines already paid and that the Applicants be handed over to the Department of Refugee Affairs or UNHCR for onward transmission to the Refugee Camps.

The grounds are that the applicants who are all of Somali origin were arrested and charged in Court on 17th March, 2014 for the offence of being unlawfully present in Kenya contrary to Section 53(1) as read with Section 53(2) of the Citizenship and Immigration Act.

They pleaded guilty and were Sentenced to a fine of Ksh. 40,000/= in default six months Imprisonment.

It is contended that the learned trial magistrate failed to uphold Section 3(2) of the Refugee Act which recognizes prima facie Refugee status. That there was no evidence that the Applicants had been in Kenya for more than thirty (30) days period within which they were to regularize their stay in the country.

Further it is argued that some of the applicants had applied to the Department of Refugee Affairs for recognition as refugees and had been issued with Refugee certificates hence their repatriation is contrary to the provisions of Section 18 of the Refugee Act No. 2006 as well as the settled non-refoulement principle of International Refugee law.

It is further contended that the prosecution of the applicants for unlawful presence under Section 53 (I) (j) and Section 53 (2) of the Citizenship and Immigration Act was irregular and unlawful.

Further that the applicants stand to be repatriated back to Somalia a country at war and against the International refugee protection principle of non- refoulement.

This revision is in respect of Kwale Principal Magistrate's Criminal case No. 273 of 2014, Kwale Criminal Case No. 275 of 2014 and Kwale Principal Magistrate's Court Criminal Case No. 277 of 2014 wherein the thirty (30) applicants were charged with the offence of unlawfully being present in Kenya contrary to Section 53(i) (j) as read with Section 53(2) of the Kenya Citizenship and Immigration Act.

They pleaded guilty to the charges preferred against them and were Convicted and Sentenced each to a fine of Ksh. 40,000/= in default six (6) months Imprisonment. In addition an order for repatriation was made.

An application was made before Hon. Usui Macharia – Ag. Senior Principal Magistrate whereby she declined to have the matter referred to the High Court and she did give her reasons.

She was satisfied that the Sentence was legal, proper and the proceedings were regular.

In this case it is contended that some of the applicants had applied to the Department of refugees Affairs for recognition as refugees and had been issued with Refugee Status and the order for repatriation offends Section 18 of the Refugees Act.

While noting that this was not proper case for revision but in recognition of the International principle of non-refoulement, the Court will only interfere with that part of Sentence which orders repatriation and vacate/revise the orders in the following terms;

That pursuant to powers vested upon this Court by article 165 of the Constitution and Section 364(1), Section 354(3) (1) of the Criminal Procedure Code it is ordered that the applicants be handed over to the Department of Refugees Affairs for their further action.

The order for repatriation is hereby revised.

Ruling delivered dated and signed this **17th** day of **June, 2014**.

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M. MUYA

JUDGE

17TH JUNE, 2014

In the presence of:-

Miss Mbogo holding brief Mr. Nyange for the applicant.

M. MUYA

JUDGE

Court: The applicants be furnished with copies of the Ruling.

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M. MUYA

JUDGE

17TH JUNE, 2014