

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 75 of 2013

ABDIRATAH SHAFIL OMAR..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

This is an application by way of Notice of Motion under Section 356 (1) and 357 (1) of the Criminal Procedure Code for orders that the court grants a stay of the repatriation order made on 28th February, 2013 in Criminal Case No. 298 of 2013 against the applicant. There is also a prayer that, pending the hearing of the appeal the applicant be granted bail.

The grounds upon which these prayers are made are that, the applicant is a Kenyan citizen and that he did not understand the charge that faced him. If the orders are not granted he may be repatriated to Somalia any time. The application is supported by an affidavit sworn by one Mohammed Suleiman Ibrahim deponing, *inter alia*, that the applicant is a Kenyan citizen.

The record before me shows that the applicant was charged with the offence of obtaining registration by false pretences contrary to Section 320 of the Penal Code in count I, and in count II being unlawfully present in Kenya contrary to Section 53 (1) (j) as read with Section 53 (2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. The record shows that there was interpretation in Kiswahili and in answer to count I the applicant is said to have answered, “**I obtained registration by false pretences**”. With respect to count II ,he is recorded to have answered, “**I am in Kenya unlawfully**”.

The learned trial magistrate did not record a plea of guilty after the applicant responded to the two counts. The prosecutor then set out the facts to which the applicant answered “**facts are true and properly put**”. He was then convicted of his own plea of guilty and asked for leniency in mitigation. He was sentenced to pay a fine of Kshs. 50,000/= or to serve 6 months imprisonment in count I and in count II, he was sentenced to pay a fine of Kshs. 150,000/= or serve 12 months imprisonment. On payment of the fine or completion of prison sentences he was to be repatriated. These orders were made on 28th February, 2012.

The fines were paid on 1st March, 2013 according to the documents annexed to the application. It is now alleged in the affidavit in support of the application that when the fine was paid by the deponent he thought that it was for payment of bail. He was however informed by the court registry that the payment was for a fine. The receipt issued by the court clearly shows that it was for “**deposits fines**” and that could not be mistaken for any cash bail. The sentence of payment of fine cannot be separated from that of repatriation.

The only issue before me is whether or not the applicant should be repatriated. Annexed to the application is a copy of a Kenyan Passport No. A173097 issued on 1st July, 2009. That passport, I believe, could not have been procured without the use of an identity card which the applicant is said to have obtained by false pretences on 16th October, 2007.

Whereas the applicant appears to have admitted the offences, the annexure of the copy of the passport throws some doubt onto the prosecution case. That being the case, the application succeeds to the extent that the repatriation order will be stayed until the intended appeal is heard and finalized.

I am unable to convert the amount paid as fine in fulfillment of the lower court order made on 28th February, 2012. The applicant shall now have to deposit a cash bail of Kshs. 100,000/= or execute a bond of Kshs. 200,000/= with two sureties of equal sum. He shall report to the officer in charge, Kilimani Police Station immediately on his release and thereafter after every two weeks until the order is vacated by the court or his appeal is heard and determined, whichever is earlier.

Orders accordingly.

Dated and delivered at Nairobi this 29th Day of May, 2013.

A. MBOGHOLI MSAGHA
JUDGE