No.3016
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL REVISION NO.334 OF 2011

MOHAMED SIRAJESH MOHAMED..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING ON REVISION

The applicant, **Mohamed Sirajesh Mohamed** is of Somali Origin. On or about 6th November, 2011 at around 9 p.m. police officers from Isinya Police Station were manning a road block along Isinya-Kajiado road when they flagged down a public transport vehicle. They interrogated the passengers therein. The applicant who was among the passengers was found to have no travel documents. He was then arrested and charged on 7th November, 2011 in the Senior Resident Magistrate's court at Kajiado with the offences under section 53(1) as read with section 53(2) of the citizenship and immigration Act. He pleaded guilty to the charge and was subsequently convicted on his own plea of guilty and sentenced to a fine of KShs.200,000/- or in default to serve one (1) year imprisonment. The learned magistrate further made an order for his removal from Kenya.

The applicant was aggrieved by the conviction and sentence aforesaid. Through **Kituo cha Sheria**, a national NGO that provides legal services to poor and the marginalized in a bid access to justice, took up the case of the applicant on the instruction of the United Nations High Commission for Refugees (UNHCR). By a letter dated 16th November, 2011 addressed to this court, it implored this court to invoke its revision jurisdiction pursuant to section 364(1) and 354(1) of the Criminal Procedure Code and either quash or set aside the conviction and sentence imposed on the applicant. This was on the ground that the applicant shared his intention with UNHCR for recognition as a refugee hence his repatriation offends section 18 of the refugee Act as well as the settled non-refoulment principle of International Law. He also felt that the learned magistrate failed to uphold section 13 of the Refugees Act and Section 34(1) of the Kenya Citizenship and immigration Act and that the applicant was at risk of being deported back to Somalia, a country at war any time against the International refugee Principle of non-refoulment. Finally, he contends that he came to Kenya as an asylum seeker and he is yet to register as such. Had the letter from UNHCR been brought to the attention of the trial court, it would have constituted sufficient proof that the applicant is a person of concern to the UNHCR and hence the trial court would not have adjudged him to be unlawfully present in Kenya at the time of his arrest hence, would not have ordered for his repatriation upon payment of fine or completion of sentence.

The letter was duly acted upon by **Dulu J.** on 17th November, 2011 who directed that the same be served on the state and matter be canvassed interpartes.

On 30th November, 2011, the matter was heard by me in the plenary. Urging the case for revision, **Mr. Kisabit Kiprop** , learned counsel for the applicant submitted that the applicant was a Somali National which is a country at war. He came to Kenya seeking asylum but was instead arrested and charged with the offences. The conviction was thus irregular, null and void because it offended section 13 of the Refugees Act as well as section 34(1) Kenya citizenship and immigration Act. It also offended the principle of non-refoulment. In support of the above propositions, counsel relied on the unreported revision case by **Ochieng J**. in **Criminal case No.137 of 2011 Sheikh Ibrahim Vs. Republic**.

Mrs. Gakobo, learned State counsel opposed the application. She did not see anything irregular in the proceedings in the subordinate court as to attract this court's intervention by way of revision. Since the applicant had a right of appeal on sentence, he could not be heard on revision.

This court can only invoke its power of revision pursuant to section 362 of the criminal procedure code once it is satisfied ex facie that any criminal proceedings before the subordinate court were incorrect, illegal and or irregular. Further in the event that impropriety of any finding, sentence and/or order passed or recorded is noted, this court will intervene by way of revision. These are the well known perimeters by which this court invokes its revisionary jurisdiction.

Looking at the proceedings in the subordinate court, I do not discern any incorrectness, illegality or irregularity. The plea was properly taken. It was not unequivocal. The charge was properly laid and was in accordance with the law. The finding and sentence imposed was not irregular. All that is brought forward to support the case for revision was within the knowledge of the applicant at the time he was arrested, prosecuted, convicted and sentenced. He had all the time to bring them forth for court's consideration but did not. There was present a Somali interpreter, so that the question of language barrier does not arise. To my mind, therefore, what is stated in support of the plea for revision is clearly an afterthought this is why. The applicant had been to Rwanda before he came to Nairobi. He did not say the circumstances under which he left Rwanda. Rwanda is not a country at war. He could as well have sought asylum there. In any event, the order for removal from Kenya does not mean that he will be repatriated to Somalia, rather he will be repatriated to Rwanda, his last country of origin. In those circumstances, the doctrine of non-refoulment would not have been breached.

Having come from Rwanda, he stayed in Nairobi; by his own admission for a month before he ventured out. He could not therefore have been an asylum seeker. There is nothing to show that he had made a bona fide application or surrendered himself to UNHCR as asylum seeker. Section 13 of the Refugees Act in which the applicant seeks solace is in these terms:

"Notwithstanding the provisions of the Immigration Act or Alien Registration Act, no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence in Kenya –

(a) If such a person has made a bonafide 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 person has become a refugee"

In this instance, the applicant has not demonstrated that he did make an application for registration as a refugee. The letter from UNHCR dated 14th November, 2011 in which now the applicant expresses his desire to seek such asylum here was written long after the applicant had been arrested, prosecuted convicted and sentenced. The process cannot be retrospective. That letter cannot be used to fault the proceedings before the learned magistrate. Much as section 11 of the refugees Act allows a refugee or asylum seeker a grace period of 30 days to remain in the country without registering, that period had already been exhausted by the time the applicant was arrested. That was not however, the scenario in the case of **Mahi Sheikh Ibrahim** (*supra*). In that case, the applicant was a person of concern to the UNHCR and demonstrated to the court that he was a registered as a refugee, under a ration card No.587661, which was issued to him by the UNHCR. The UNHCR did on its part certify that the applicant's registration was

dated 19th July, 2010. This was long before the applicant had been arrested and charged. On those grounds, the judge was satisfied that if it had been brought to the attention of the trial court that the applicant was a person of concern to the UNHCR, who had been duly registered as a refugee in Kenya, the said court would not have convicted him for the offence which were basically deemed to arise from his being in Kenya unlawfully. Hence the order of revision by the judge. This is not however the situation obtaining in the circumstances of this case. Here the applicant came from Rwanda, stayed in Nairobi for 30 days without registering or making an application for refugee status. He was arrested aboard a motor vehicle plying Isinya-Kajiado road. He had absolutely no papers on him allowing him to be in Kenya. He was then arrested and charged with being in Kenya Unlawfully. It was only after his conviction and sentence that he apparently contacted UNHCR and became a person of concern. To date he is yet to be registered as a refugee. To this extent, the case of **Mahi Sheik Ibrahim** is distinguishable and indeed irrelevant to the circumstances obtaining in this case. In any event it is not binding on me.

In this case, the applicant having not made an application to UNHCR for asylum or refugee status, there was nothing to bar the police from commencing the criminal proceedings against him in so far as the proceedings were and related to his being in Kenya unlawfully. In the event, the applicant was properly charged and prosecuted. His prosecution was thus, neither illegal, incorrect or irregular. Nor was the sentence imposed improper or smacked of impropriety.

I have said enough to show that this is not a fit and proper case for revision. However, considering the developments in relation to the applicant since his conviction, and bearing true allegiance to the doctrine of non-refoulment, I am inclined to interfere with that part of the sentence requiring that the applicant be repatriated once he pays the fine or serves the default sentence. The applicant has since become a person of concern by UNHCR. It is willing to have him registered under the Refugees Act following a preliminary assessment conducted by **Kituo cha Sheria**. In the circumstances, I set aside the order of repatriation and substitute therefore with the order that the applicant be handed over to UNHCR once he pays the fine or serves the default sentence.

Dated and **delivered** at **Machakos**, this **16th** day of **January**, 20**12**.

ASIKE-MAKHANDIA
JUDGE