



RADA HAILE1ST APPLICANT

ABEL BURHAMU..... 2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The two applicants are Eritrean by nationality and were at the time of their arrest asylum seekers, and claim to be refugees within the provisions of Section 3 of the Refugees Act, 2006 (No.13 of 2006).

The applicants were arrested and charged with an offence of being unlawfully in Kenya, and were each on his own plea of guilty convicted and fined a sum of Kshs.20,000/=. They have applied to this court for revision of both their conviction and sentence.

Under Section 362 of the Criminal Procedure Code (Cap.75), Laws of Kenya, the High Court has power to call for and examine the record of any criminal proceedings before a subordinate court for the purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

Section 364(1) of the Criminal Procedure Code confers the court the power in the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, in case of a conviction, to reverse the finding and sentence and acquit and discharge the accused or order him to be tried by a court of competent jurisdiction.

Mr. Kitheka Advocate appearing for the applicants submitted that the applicants at the time of their arrest, were asylum seekers who were running away from their country to evade forceful recruitment in the militia fighting against the Government and are entitled to due process of their status to be determined as provided for by Section 11(3) of the Refugee Act 2006. The Counsel further submitted the applicants fall under the meaning of "Refugee" as envisaged under Section 3 of the Refugee Act 2006. The Counsel also submitted that at the time of the arrest of the applicants they were in the process of complying with Section II of the Refugee Act 2006 as they were arrested on their way to UNHCR offices in Nairobi. That the applicants are Eritrean Nationals who entered Kenya through Ethiopia and the lower court without making necessary enquiries, assumed the applicants to be Ethiopians. The learned counsel for applicants further in his submissions stated that the Somali and Eritrean Refugees are currently enjoying *prima facie* status as per Section 3(2) of the Refugee Act of Kenya. He further submitted the principle of **NON-REFOULMENT** (that is not to forcefully return a person to a place where his/her life would be in danger) is an overriding principle in refugee protection which is clearly established under S.18 of the Refugee Act, 2006 Laws of Kenya and Article 33 of the UN 1951 Convention relating to the status of Refugees to

which Kenya is a signatory.

Mr. Motende learned State Counsel on his part submitted that the applicants were properly convicted. He also submitted that the applicants should be given specific period within which to comply with provision dealing with seeking for asylum.

Section 3(1) of the Refugee Act, 2006 gives the meaning of “ **Refugee**” Act, 2006 gives the meaning of “refugees.” as follows:-

“ 3(1) A person shall be a statutory refugee for the purposes of this Act if such person-

(a) Owing to well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or

(b) Not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons is unwilling, to return to it.”

Section 11(1) of the Refugees Act, 2006 requires any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of the Act, to make his intentions known by appearing in person before the Commissioner immediately upon his entry or, in any case, within thirty days after his entry into Kenya.

Section II(3) of the Refugees Act, 2006 provides that without prejudice to the provision of this Section, no person claiming to be a refugee within the meaning of Section 3(1), shall merely, by reasons of illegal entry shall be declared a prohibited immigrant, detained or penalize in any way save that any person, who after entering Kenya, or who is within Kenya fails to comply with Section 11(1) commits an offence and shall be liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months or both.

The applicants counsel’s letter dated 30th January, 2012, for review of the applicants’ conviction and sentence is silence on when the applicants’ entered Kenya. He did not disclose the date of the applicants’ entry into Kenya in his submissions. The lower court proceeding are equally silent on the date of the applicants’ entry into Kenya. The facts as given before lower court are that police Officers at Isiolo while on patrol within Isiolo Town they were informed by members of public that there were two men suspected to be Ethiopians at Marsabit stage. Police officers proceeded to the said stage and found the two applicants and interviewed them. The applicants could not communicate in English or Kiswahili. That through an interpreter it was established the applicants to be Ethiopians nationals travelling to Nairobi. That they had no documents and were arrested. The applicants’ counsel’s letter for revision show that the applicants were in the process of going to Nairobi to comply with the provisions of Section 11(1) of the Refugees Act, 2006. The facts as given by the prosecution do not disclose for how long the applicants had been in Kenya. The applicants did not immediately upon their entry into Kenya or any case within thirty days after entry into Kenya make their intention known by an Immigration Officer at their entry point to Kenya. Having therefore pleaded guilty to the charge of unlawfully being present in Kenya the applicants were properly convicted and sentenced.

Section 18 of the Refugees Act, 2006 provides:-

“ No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to be subjected any similar measure if, as a result of such refusal, expulsion, return or other measure such person is compelled to return to or remain in a country where –

(a). The person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or

(b) The person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign dominion or events seriously disturbing public order in part or the whole of the country."

Under Article 2 of 1969 OAU Convention Governing, The Specific Aspects of Refugees Problems in Africa, in which Kenya is a signatory provides that member states of the OAU shall use their best endeavors consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

In the circumstances the applicants are entitled to be set free forthwith, be released to the United Nations High Commission for Refugees, Nairobi and/or the Department of Refugee Affairs and remain in Kenya for 90 days to enable them make their intention to remain in Kenya known by appearing in person before the Commissioner for Refugees Affairs or any authorized Officer at the Department of Refugees Affairs and while their refugee status is being considered and regularized by the United Nations High Commissioner for Refugees.

There shall therefore be orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH APRIL, MAY, 2012.

**J. A. MAKAU
JUDGE**

Delivered in open court in the presence of:

- 1.Mr. Kitheka for applicants**
- 2.Mr. Motende for the respondent**

**J.A. MAKAU
JUDGE**