



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 188 of 2012

AGNES NEMAKONDE GALAWU .....  
PETITIONER

AND

MINISTER OF STATE FOR IMMIGRATION AND REGISTRATION OF PERSONS....1<sup>ST</sup>  
RESPONDENT

THE HON. ATTORNEY GENERAL.....2<sup>ND</sup>  
RESPONDENT

AND

KITUO CHA SHERIA ..... INTERESTED  
PARTY

JUDGMENT

Introduction and background

1. The petitioner is a non-Kenyan, who is at the brink of being rendered stateless. The matter is a culmination of events both within and outside the country. The petitioner challenges the manner in which she was handled by Kenyan Immigration authorities alleging that the respondent infringed her rights and fundamental freedoms in the process. The petitioner also challenges the constitutionality of certain provisions of the *Kenya Citizens and Immigration Act, 2011(No. 12 of 2011)* (“KCIA”).

2. On 14<sup>th</sup> May 2012, I allowed Kituo Cha Sheria (“Kituo”) to join the suit as an interested party. Kituo is a non-profit making non-governmental organisation committed to the protection, promotion and enhancement of the rights of all human beings through empowering the poor and marginalised people to effectively access justice and realise human rights. Through its *Forced Migration Program*, Kituo is an implementing Partner of United Nations High Commissioner for Refugees (UNHCR) on matters of asylum, refugee, statelessness and internal displacements in Kenya.

3. **Article 18** of the Constitution obliged Parliament to enact legislation to provide among other things,

(a) *prescribing procedures by which a person may become a citizen;*

(b) *governing entry into and residence in Kenya;*

(c) providing for the status of permanent residents;

4. The **Fifth Schedule** to the Constitution provides that Parliament shall with a period of one year enact the legislation on citizenship. Pursuant to the **Article 18**, Parliament enacted the **Kenya Citizens and Immigration Act, 2011** and later the **Kenya Citizens and Foreign Nationals Management Service Act (No. 31 of 2011)**. The **Kenya Citizens and Immigration Act** which is subject of the petition came into force on 30th August 2011 effectively repealing the then **Kenya Citizenship Act**, the **Immigration Act**, and the **Aliens Restriction Act, Chapters 170, 172 and 173** of the laws of Kenya respectively which hitherto addressed immigration and citizenship issues.

### **The Facts**

5. The petitioner's case is set out in the petition dated 7<sup>th</sup> May 2012 and her own deposition sworn on the same date. There is also a supplementary affidavit sworn on 25<sup>th</sup> May 2012.

6. According to material before court, the petitioner claims she was born in Zimbabwe. As a result of political conflicts in Zimbabwe, she was rescued to the United Kingdom (UK). On the 19<sup>th</sup> October 2011, the petitioner was deported by the UK immigration officials to Nairobi Kenya. The Kenyan immigration authorities rejected her on the ground that she was not a Kenyan and she was put on a flight to Lilongwe, Malawi. The Malawian immigration officials informed her that they had established that some of her family members were in South Africa and they transferred her to South Africa. The South African Authorities rejected her and she was returned to Malawi where she was detained at Maula Prison for five days before being brought to Kenya.

7. While in the United Kingdom she made an application for asylum but the application for asylum was rejected by the Secretary of State for the Home Department. She appealed to the Asylum and Immigration Tribunal (Appeal No. AA/03740/2009) and on 18<sup>th</sup> September 2009 her appeal was dismissed. In the decision, the Immigration Judge noted, "*In the circumstances I find that although the appellant was born in Harare, the Malawian passport is in fact genuine and the appellant is therefore a citizen of Malawi. I cannot say whether she is also a citizen of Zimbabwe but it appears to me that if the appellant is, as I find she is, a Malawian citizen, then unless the appellant has a well founded fear of persecution in Malawi which is not claimed, the appellant cannot be found entitled to international protection.*"

8. When the petitioner landed in Kenya, she was taken to Lokichoggio, in Turkana County about 700 km North West of Nairobi where she was charged with the offence of being unlawfully present in Kenya contrary to provisions of the **Immigration Act** in the **Principal Magistrates Court at Lodwar, Criminal Case No. 880 of 2011**. Upon her own plea of guilty, the petitioner was sentenced to a fine of Ksh. 55,000/00 or one year imprisonment in default. The Court also directed that the petitioner be repatriated to her country of origin, Zimbabwe, upon completion of the sentence.

9. She started serving her sentence at the Lodwar GK Prison until 26<sup>th</sup> January 2012 when a 'good Samaritan' in Lodwar paid the fine securing her release. She was then issued with a form, "**Notice to Prohibited Immigrant**" requiring her to leave Kenya within twenty one (21) days by any means. According to material before court, the petitioner spent a couple of days in the halls of Jomo Kenyatta International Airport.

10. On or around 11<sup>th</sup> April 2012, the petitioner was again arrested by the Immigration Department officials and confined at Kileleshwa Police Station until the following morning when she was taken to Lang'ata Women's Prison pursuant to a directive from the Minister of State and Immigration dated 11<sup>th</sup> April 2012, which declaration read in part;

**DECLARATION UNDER SECTION 43(2) (b) OF THE CITIZENSHIP AND IMMIGRATION ACT, 2011**

**I, HON. OTIENO KAJWANG, Minister of State for Immigration and Registration of Persons responsible for Immigration matters, in the exercise of the powers vested in me by section 43(2)(b) of the Citizenship and Immigration Act, 2011 I do hereby declare that:**

**AGNES GALAWU NEMAKONDE ALIAS RABEKA CHITANGA**

**Remain in custody for six (6) months while arrangements for removal are being undertaken, and this order is sufficient warrant to keep the said AGNES GALAWU NEMAKONDE ALIAS RABEKA CHITANGA in custody.**

11. Following an oral application by both counsel for the petitioner and Kituo on the 4<sup>th</sup> June 2012, I directed that the petitioner be released to the custody of the UNHCR accommodation facility pending further orders of the court.

12. Pursuant to a court order, the UNHCR conducted a refugee status determination interview with the petitioner on 12<sup>th</sup> July 2012 in order to make an assessment as to her refugee status. According to UNHCR, she did not meet the inclusion criteria under the **Refugees Act, 2006**. In a letter addressed to court by the UNHCR office dated 24<sup>th</sup> September 2012, the petitioner withdrew her asylum claim by informing UNHCR that she was not interested in seeking asylum in Kenya. The letter however noted in part that, “*Mrs. Nemakonde is at risk of statelessness. UNHCR has been unable to establish a genuine link between her and the countries she cited during her refugee status determination interview.*”

13. By an application dated 11<sup>th</sup> October 2012, Kituo moved the Court seeking further orders of court for the UNHCR to be released from its undertaking to the Court to accommodate the petitioner pending hearing and determination of the suit as it described the petitioner’s conduct at the accommodation facility as untenable. In that application, it was revealed that after the last court attendance on 25<sup>th</sup> September 2012, the petitioner had refused to go back to the accommodation facility and camped at the UNHCR offices and only resumed accommodation upon persuasion. It also complained that the petitioner had gone on hunger strike and created disturbance and discomfort of fellow residents at the centre and refused to co-operate with administration. The UNHCR urged the court to ‘*give directions as to the suitable and/or alternative place of accommodation for the Petitioner pending judgment in this matter.*’

14. By a ruling dated **6<sup>th</sup> November 2012**, I directed that the petitioner be returned to Lang’ata Women’s Prison where she was previously held prior to the intervention by UNHCR pending judgment.

### **The Petition**

15. In her petition filed in this Court, the petitioner seeks the following orders:

- a) *A declaration that the 1<sup>st</sup> Respondent’s directive dated 11<sup>th</sup> April, 2012 confining and or imprisoning the Petitioner at Lang’ata Women Prison for six months is illegal.*
- b) *A declaration that Section 43 of the Kenya Citizens and Immigration Act, 2011 is inconsistent with Articles 24(2)(a) of the Constitution and is as such void and invalid*
- c) *A declaration that the Petitioner’s rights as guaranteed under Article 27, 28, 29 and 47(1)(2) of the Constitution have been and remained denied, violated or infringed, or threatened*
- d) *An order for review of the directive dated 11<sup>th</sup> April, 2012 under Section 57 of the Kenya Citizens and Immigration Act, 2011 liberating the Petitioner on less restrictive terms*
- e) *An order that the Respondents do set up holding facilities under section 50 of the Kenya Citizens and Immigration Act, 2011*

f) *An order of compensation.*

16. Mr Chigiti, counsel for the petitioner, argued that provisions of **section 43(2)(b)** of the *KCIA* which empowers the Minister to confine persons such as the petitioner was open-ended and did not provide for a specific duration that the Minister can confine persons who find themselves in the petitioner's position. It is also the petitioner's case that **section 43** of the *KCIA* is inconsistent with **Articles 24(2)(a)** of the Constitution hence null and void to the extent that it did not set out the nature and extent of the limitation as required under the **Article 24**. Counsel further contended that the confinement violated the petitioner's right to fair administrative action under **Article 47** as well as the rules of natural justice as the petitioner was condemned unheard.

17. It was further submitted that **Section 50** of the *KCIA* enjoins the respondent to set up holding facilities and that Lang'ata Women Prison is not gazetted as such. Mr Chigiti contended that confining the petitioner at the Lang'ata Women prison together with other convicts was a breach of her fundamental rights and that she was discriminated against by virtue of her legal status against **Article 27(4)**. In the circumstances, the petitioner urges the court to allow the petition.

### **Respondent's Case**

18. The respondents oppose the petition through the replying affidavit sworn on 16<sup>th</sup> May 2012 by Mr David N. Wambilianga, an Assistant Director of Immigration Services in the Ministry of Immigration and Registration of Persons. It is contended that the petitioner was brought to their offices on or about 20<sup>th</sup> February, 2012 by their officers from Lokichoggio Border Control to effect the removal order by court and that she could not be immediately repatriated since she had refused to disclose to immigration officers her country of origin and attempts to establish her country of origin had proved futile.

19. The respondents aver that they made continuous efforts to ascertain the petitioner's nationality and country of origin from various sources including inquiries from countries the petitioner had indicated as having a connection such as the British High Commissioner and Republic of Zimbabwe but received negative responses. Later, by a letter dated 23<sup>rd</sup> March 2012, the UNHCR agreed to temporarily shelter the petitioner at their transit camp whereupon she would be transported to Kakuma Refugee Camp for registration as an asylum seeker.

20. It is the respondent's case the Minister's action was within the law and aimed at protecting the safety and well-being of the petitioner. Ms. Kamande, counsel for the respondent, submitted that the petitioner was convicted and sentenced and therefore that the Minister exercised his powers in accordance with the law and that the action cannot therefore be said to be arbitrary.

21. Regarding the confinement of the petitioner at a prison facility, the respondent contended that the **section 43(2)(b)** of the *KCIA* provides an alternative to a holding facility and further that there was no evidence tendered to show that she was not accorded a fair hearing in the lower court. It was also contended that the petitioner is a prohibited immigrant and inadmissible person under **section 33(1)(s)** of the *KCIA* and was unlawfully present in the country by dint of **section 34** of the *KCIA*.

### **The Interested Party**

22. Kituo filed an affidavit sworn on 24<sup>th</sup> May 2012 by Priscilla Nyokabi, its Executive Director, in support of the petition and through its counsel, Mr Wasia, it wholly supported the petitioner's position. Mr Wasia contended that the fact that the petitioner's legal status is unclear made her very vulnerable to human rights violations making her in desperate need of legal protection. It is contended that the petitioner was not given a chance to seek legal aid before being imprisoned. Further, that she was not informed of the reason and duration of the imprisonment.

23. Mr Wasia, submitted that confining the petitioner in a prison facility for the duration of six months offended **Article 47** and further that confining the petitioner at Lang'ata Women Prison was

outrightly illegal as **section 50** of the **KCIA** enjoined the respondents to set up holding facilities and that Lang'ata Women Prison is not gazetted as such.

### **Analysis and Determination**

24. I think the prayers sought in the petition clearly delineate the issues for determination by the Court. The first issue concerns the constitutionality of **section 43** of the **KCIA** and its application to the petitioner particularly given that by the directive given by the Minister dated 11<sup>th</sup> April 2012, the petitioner was to remain in custody for a period of six (6) months (see paragraph 10 above) and whether the directive is a violation of the petitioner's rights under the **Articles 27, 28, 29** and **47**. The second issue concerns the position and status of holding facilities required under **section 50** of the **KCIA**.

25. The petitioner supported by the interested party has made attractive and weighty arguments based on the Constitution but I think each case must remain moored on its own facts and it is on this basis that I will determine this case.

26. It is not disputed that the petitioner was convicted by a court of competent jurisdiction of being in Kenya illegally and a repatriation order made. The conviction has not been set aside on review or appeal and the repatriation order issued by the court remains in force. The said order is yet to be enforced and will likely be enforced if the petitioner does not invoke any legal provisions that would enable her remain in Kenya legally. It is on this basis that the Minister exercised the powers bestowed upon him under **section 43** of the **KCIA**.

27. Although I was not addressed on the effect or otherwise of the conviction and removal order, that determination and the consequences that flow from it cannot be ignored. Ignoring it would amount to a collateral attack on that decision of a competent court. In the case of **Chokolingo v Attorney General of Trinidad and Tobago (1981)1 ALL ER 244**, the court cited with approval the decision of **Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385 at 399** where the Privy Council stated in part, ***"In the first place, no human right or fundamental freedom...is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say there was an error..."*** This reasoning was recently adopted by the Court of Appeal in the case of **Methodist Church in Kenya Trustees Registered & Another v Rev. Jeremiah Muku and Another CA, Civil Appeal No. 233 of 2008 (Unreported)**, where the Court of Appeal observed, ***"As the Privy Council said, it is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review."*** (See also **Hunter v Chief Constable of West Midlands Police [1982] AC 529**)

28. The result of the conviction and removal order is that the petitioner was required to leave the country pursuant to the provisions of the country's domestic legislation that governs treatment of prohibited immigrants. **Section 43(2)(b)** of the **KCIA** provides for the confinement in a facility pending removal from the country as follows, ***"(b) if the cabinet secretary so directs, be kept and remain in police custody, prison or immigration holding facility or until his departure from Kenya, and while so kept is deemed to be in lawful custody whether or not he has commenced any legal proceedings in court challenging the Tribunals decision until the suit is finally disposed of."***

29. **Section 43(2)(b)** of the **KCIA** is to be read with the provisions of **section 26A** of the **Penal Code (Chapter 63 of the Laws of Kenya)** which provides as follows;

**26A.** *Where a person who is not a citizen of Kenya is convicted of an offence punishable with imprisonment for a term not exceeding twelve months the court by which he is convicted, or any court to which his case is brought by way of appeal against conviction or sentence may, by directions to the Commissioner of Police and the Commissioner of Prisons (including directions on how the order shall be*

carried out) order that the person be removed from and remain out of Kenya either immediately or on completion of any sentence of imprisonment imposed; but where the offence for which the person is convicted is punishable with imprisonment for a term exceeding twelve months, the court shall, where it is satisfied that the person may be removed from Kenya, recommend to the Minister for the time being responsible for immigration that an order for removal from Kenya be made in accordance with section 8 of [the Immigration Act](#).

30. **Section 26A** of the *Penal Code* refers to **section 8** of the *Immigration Act (Repealed)* which provisions has been replaced by **section 43** of the *KCIA* and by virtue of **section 23** of the *Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)*, the reference to the repealed Act is therefore reference to **section 43** of the *KCIA*. A consequence of the conviction and removal order made under **section 26A** of the *Penal Code* was that the Minister was entitled to exercise his power under the *KCIA*. In the circumstances, I find and hold that the order issued by the Minister on 11<sup>th</sup> April 2012 was in accordance with the law and it did not violate **Article 47** or **Article 29** in so far as it was effecting the petitioner's removal within a fixed period of time. In the circumstances it is not necessary for me to consider whether **section 43** of the *KCIA* is unconstitutional as contended by the petitioner and interested party as the facts of the case do not call for such an inquiry.

31. The issue for consideration then is what is the most suitable and appropriate means to deal with the petitioner's case bearing in mind that she is a person who is in vulnerable circumstances and is entitled to human dignity under the Constitution. The petitioner is now at Lang'ata Women's Prison. She contends it is contrary to the provisions of **section 50** of the *KCIA* to hold her in Prison as it is not a holding facility within the meaning of that provision. **Section 50** of the *KCIA* provides as follows;

*50. The Service shall establish a holding facility at ports of entry and exit and any other immigration operation areas which shall be used for holding persons ordered to be removed to their countries under section 26A of [the Penal Code](#), ordered deported under section 43 of this Act, persons whose citizenship has not been established, deportees in transit, and persons denied entry awaiting return and who are not under carrier liability.*

32. The provisions of **section 50** must be read in light of the entire Act. **Section 50** is prospective in nature and it requires the Kenya Citizens and Foreign Nationals Management Service established under the *Kenya Citizens and Foreign Nationals Management Service Act, 2011* to establish such facilities. Such facilities are not established overnight and may indeed take some time. That is why the Minister is empowered under **section 43(2)(b)** of the *KCIA* to direct that a person, such as the petitioner, who is to be deported or against whom a removal order has been made may be kept in "**police custody, prison or an immigration holding facility.**"

33. I must add though that even where a person who is subject to the provisions of the Act and who is subject of orders under **section 43(2)(b)** is kept in prison, he or she must be separated from ordinary criminals or convicts. The petitioner has already paid her fine and is the subject of a removal order. The tenor of **section 50** is to recognise this fact that persons who fall afoul of immigration law are not necessarily criminals in the ordinary sense so that even where they are remanded in a prison they should be separated from the general prison population to protect their dignity.

34. I am empowered under **Article 23** to grant an appropriate relief as to ensure that the ends of justice are met. In giving my orders, I have taken into consideration the uncontested fact that the petitioner voluntarily withdrew her asylum claim which was being considered with the assistance of the UNHCR. However, the UNHCR has noted that petitioner is a person of concern to the UNHCR and she is entitled to take advantage of any legal provisions under the law that would regularise her stay in the country.

### **Disposition**

35. In light of what I have stated, I hereby make the following orders;

- a) The petitioner shall continue to be held in Lang'ata Women's Prison or such other place as may be designated by the Minister in terms of **section 43(2)(b)** of the ***Citizenship and Immigration Act, 2011*** pending her removal from Kenya or pending such time as any claim lodged by her, within 30 days from the date hereof, is determined by a competent authority under relevant legislation.
- b) The Prison authorities shall ensure that the petitioner is segregated from the general prison population.
- c) The petitioner be at liberty to apply for further and other orders.
- d) I make no order as to costs.

**DATED** and **DELIVERED** at **NAIROBI** this 7<sup>th</sup> day of December 2012.

**D.S. MAJANJA**  
**JUDGE**

Mr Chigiti instructed by Chigiti and Chigiti Advocates for the Petitioner.

Ms Kamande, Litigation Counsel, instructed by the State Law Office for the respondents.

Mr Wasia, instructed by Masitsa, Kisabit Kiprop Advocates for the Interested Party.