AC v Republic (Criminal Revision E318 of 2024)
[2025] KEHC 8815 (KLR) (20 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8815 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E318 OF 2024

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

AC ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. By the Notice of Motion dated 16/06/2024 filed through Messrs AK Advocates LLP, and subsequently amended on 7/01/2025, the Applicant sought orders as follows:

   i. That this matter be certified as urgent and be heard ex parte in the first instance

   ii. That the Honourable Court be pleased to issue interim orders barring and restraining the deportation of the Applicant to the United States of America (USA) pending the inter partes.

   iii. That the Applicant be granted bail or bond pending the hearing and determination of this Application.

   iv. That the Honourable Court be pleased to revise, vary, review, set aside and/quash the Judgment of the subordinate Court delivered on 9/07/2024 in Eldoret Chief Magistrate's Court Criminal Case No 1406 of 2024; between Republic v ACK.

   v. That if prayer 4 herein is granted, the Honourable Court be pleased to quash the charge sheet in Eldoret Chief Magistrate's Court Criminal Case No 1406 of 2024; between Republic v ACK and further acquit the Applicant of the charges thereof.

   vi. That the Honourable Court be pleased to further order that the Applicant be refunded the sum of shillings twenty thousand paid as fine in this matter.

   vii. That costs of this Application be provided for.

2. Prayer (i), (ii) and (iii) are spent, the Court having granted the Applicant an interim cash bail of Kshs 20,000/- and released her into the custody of a reported uncle who was also said to be her ward, and upon whom the Court bestowed the duty of ensuring the availability of the Applicant when required.

3. The Application is supported by the Affidavit sworn by the Applicant, ACK in which she deponed that she was at all times a resident of Langas Estate in Eldoret town within Uasin Gishu County in Kenya, where she was arrested on account of being a child trafficker and was subjected to mob injustice, that the Respondent, through its agents, namely, police officers and the Directorate of Criminal Investigations (DCI) moved to the scene, rescued her from the mob injustice and took her to the Eldoret Central Police Station, where she was interrogated on the allegation of being an alleged child trafficker. She deponed further that on 24/6/2024, she was arraigned in Court under Eldoret Miscellaneous Criminal Case No E364 of 2024; Republic v ACK, in which the Respondent sought to detain her for a further 5 days to facilitate completion of investigations, and that the Respondent was granted 3 days to further hold her in detention. She deponed that she was then charged with the offence of being unlawfully present in Kenya contrary to Section 53 of the Kenya Citizen and Immigration Act, she pleaded guilty to the alleged offence and a guilty conviction was entered against her and the Court then directed that a pre-sentencing report be presented before a sentence could be passed. She deponed further that on 9/7/2024, the trial Court delivered its Judgment whereof the Applicant was ordered to pay a fine of Kshs 20,000/- or in default, serve 6 months imprisonment, and further, be deported to her country of birth. She urged further that on the same date, she paid the fined amount so as to secure her release, and be deported to the USA where she was born and that by reason thereof, the Court issued an order for her release from prison. She then contended that as she was at the immigration cells waiting to be deported, she was issued with a copy of a Certificate of birth of a citizen of Kenya occurring abroad since during her stay in Kenya, she had made an application for issuance of such Certificate to regularize her national status but was yet to be issued with the same due to the systematic delays and that she had not retained a copy of the Application.

4. She urged further that the said Certificate vindicates her position all along during the trial of the case, that she had already made the Application to regularize her status as a Kenyan national which position the trial Court failed to take into consideration, that the Certificate could not be tendered before the trial Court as the same was yet to be issued and that the same further confirms that she is a Kenyan citizen. She therefore urged the Court to revise the trial Court's orders directing that she be deported to the USA, that she be granted treatment accorded to all Kenyans, and that there is thus no need for her deportation despite having paid the fines as directed by the Court as she was never unlawfully present in Kenya. In conclusion, she urged that no prejudice shall be suffered by the Respondent if the orders sought are granted while on the other hand, she stands to suffer substantial loss and harm if she is be deported as aforesaid.

5. In opposing the Application, the Respondent, through Prosecution Counsel Okaka A. Leonard, filed the Grounds of Opposition dated 8/11/2024. The grounds put forward are that the conviction was premised on unequivocal plea of guilty, that the sentence to fine or jail with deportation thereafter was legal, that reweigh of evidence or merit review sought lie not in exercise of the jurisdiction invoked, and that the Application is a misconception of appropriate procedure under relevant law.

6. The Applicant then filed the Further Affidavit sworn on 7/01/2025 in which she basically reiterated the contents of her Supporting Affidavit and added that she should not have been charged with the offence of being unlawfully present in Kenya as she was at all times a Kenyan citizen hence entitled to stay and remain in Kenya, that her plea of guilty was immaterial considering that she is a Kenyan citizen and that she pleaded guilty on the mistaken belief that she would be acquitted. She further urged that

the plea was taken in the absence of her Advocates who were not notified of taking of the plea and thus, she was not well guided.

7. The parties then filed written Submissions. The Applicant filed the Submissions dated 7/01/2025 while the Respondent filed the Submissions dated 19/02/2025.

Applicant's Submissions

8. Mr. Ogutu, Counsel for the Applicant, in lengthy Submissions, insisted that the Applicant is a Kenyan citizen by birth. He submitted that the legal framework on acquisition of Kenya citizenship by birth is contained in Article 14 of the *Constitution* of Kenya, 2010, Section 6 of the *Kenya Citizenship and Immigration Act* whose contents she cited and urged that in light of the said provisions, the Applicant, though born in the USA on 28/08/2000, was at all times a Kenyan Citizen as both her parents, as confirmed by the Probation Report lodged in Court, are of Kenyan origin and that the same is further evidenced by the Certificate of Birth which shows her parents to be Kenyans. He urged that the Applicant was at all material times a Kenyan notwithstanding her birth in the USA, that the Applicant, upon her entry into Kenya, had lodged an application to regularize her status as a Kenyan and as a result, she has now been issued with a Certificate of Birth of a Kenyan occurring abroad, and the same thus confirms her status as a Kenyan. He cited the case *E W A & 2 others v Director of Immigration and Registration of Persons & another* [2018] eKLR and reiterated that the Applicant having been issued with the Certificate is thus a Kenyan citizen. He urged further that the Respondent has not sworn any Replying Affidavit to controvert the facts alleged by the Applicant and thus, the fact of Applicant's citizenship remains uncontroverted. He also cited the case of *Gulleid v Registrar of Persons & another* [2021] eKLR.

9. Counsel contended that the Applicant, in light of Article 14(5) of the *Constitution*, never ceased to be a Kenyan citizen because she acquired the citizenship of another country. He also cited Section 97 of the old Constitution on its provisions on the circumstances when one ceased to be a Kenyan citizen and urged that it is explicit that a citizen of Kenya under the old Constitution could only lose his citizenship status if upon attaining the age of 20 years, he had acquired the citizenship of another county and failed to renounce the citizenship of that other country. He contended that the Applicant had not attained the age of 21 years by the time Section 97 of the old Constitution was still in force, that the old Constitution ceased to be in force on the 27/8/2010 when the new Constitution was promulgated and as at the date, the Applicant having been born on the 23/8/2000, had just turned 10 years and that she was therefore under no obligation to renounce her American citizenship as at the time. He then cited Article 16 of the *Constitution* and submitted that with the coming into force of the *Constitution* 2010, the Applicant being a minor could thus not lose his citizenship by equally being a citizen of another country. He cited Section 10 of the *Kenya Citizenship and Immigration Act*. He submitted further that the Applicant, being at all times a Kenyan Citizen, could thus not be held to be unlawfully present in Kenya which is her motherland. He cited the proviso to Article 37(1) and 12 of the *Constitution* of Kenya 2010. He contended that the Applicant being a citizen is thus entitled to rights and benefits of citizenship and that such rights include the right to enter, remain in and to reside in Kenya and she can thus not be declared to be unlawfully present in Kenya. He also cited the case of *Miguna v Fred Okengo Matiang'i Cabinet Secretary, Ministry of Interior and Coordination of National Government & 7 other* (2018) eKLR. According to Counsel therefore, the Applicant was not unlawfully present in Kenya and the charges against her were immaterial from the onset. He urged that the trial Court convicted the Applicant despite the Probation Report confirming that she was a Kenyan Citizen and had parents of Kenyan origin.

10. Regarding the Court's supervisory powers of Revision, he cited Articles 165(6) and (7) of the *Constitution*, 2010 and Section 362 of the *Criminal Procedure Code*. He also cited the case of *Director of Public Prosecutions v Marias Pakine Tenkewa t/a Naresho Bar Restaurant* (2017) eKLR and also the case of *Johnson Kobia M'Impwi v Director of Public Prosecution* [2020] eKLR.

Respondent's Submissions

11. On the issue of unequivocal plea of guilty, Prosecution Counsel Mr. Okaka submitted that the procedural edicts of Section 207 of the *Criminal Procedure Code* were all complied with. On the issue of reweighing of evidence lying not in revision but appeal, he submitted that the law bars revision for a party who could have appealed. He cited the case of *Dahir Hussein v Republic* [2015] eKLR, and the case of *Abubakar Sharif v Republic* [2016] eKLR and *George Aladwa Omwera v Republic* [2016] eKLR. He urged that the offence at hand is known in law, it was procedurally admitted, facts led, and the Applicant's US passport exhibited. Regarding the sentence, he submitted that the procedure was also adhered to since prescribed at Section 53(2) of the Act is a fine not exceeding Kshs 500,000/- or imprisonment not exceeding 3 years, or both. In regard to the procedure adopted, Counsel submitted that post-sentence, ventilating on discovery of material that the Applicant alleges to be "new and compelling" is for a procedure other than Revision, and that for good reasons, opportunity to test source, value, import, and interrogate authenticity is then envisaged. He contended that the Application, not being a Petition encapsulated under Article 50(6) of the *Constitution* could be an unprocedural attempt to re-open the trial, if granted.

Determination

12. The issue that arises for determination in this matter is "whether this Court should exercise its revisionary jurisdiction and review the conviction of the Applicant by the trial Court".

13. The jurisdiction of the High Court in respect to Revision is supervisory and is provided under the *Constitution* in Article 165 (6) and (7) in the following terms:

> " 6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
>
> (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."

14. Section 362 of the *Criminal Procedure Code*, then provides as follows:

> " Revision
>
> 362. Power of High Court to call for records
>
> The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose 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."

15. The operative phrase in considering Applications for revision is therefore "correctness, legality or propriety" of any finding, sentence or order made by the lower Court.

16. The revisionary jurisdiction of the High Court was examined by Odunga J (as he then was) in the case of *Joseph Nduvi Mbuvi v Republic* [2019] eKLR as follows:

> "In my considered view, the object of the revisional jurisdiction of the High Court is to enable the high Court in appropriate cases, whether during the pendency of the proceedings in the subordinate court or at the conclusion of the proceedings to correct manifest irregularities or illegalities and give appropriate directions on the manner in which the trial, if still ongoing, should be proceeded with. In other words, the High Court's revisionary jurisdiction includes ensuring that where the proceeding in the lower court has been legally derailed, necessary directions are given to bring the same back on track so that the trial proceeds towards its intended destination without hitches. Not only is the jurisdiction exercisable where the subordinate court has made a finding, sentence or order but goes on to state that it is also exercisable to determine the regularity of any proceedings of any such subordinate court as well."

17. The operative phrase used by Odunga J above is therefore "to correct manifest irregularities or illegalities".

18. On his part, Nyakundi J, in *Prosecutor v Stephen Lesinko* [2018] eKLR outlined the principles that should guide a Court in exercising its reversionary jurisdiction as;

    (a) where the decision is grossly erroneous;

    (b) where there is no compliance with the provisions of the law;

    (c) where the finding of fact affecting the decision is not based on evidence or it is result of misreading or non-reading of evidence on record;

    (d) where the material evidence on the parties is not considered; and

    (e) Where the judicial discretion is exercised arbitrarily or perversely if the lower court ignores facts and tries the accused of lesser offence.

19. In this matter, the Applicant, as aforesaid, was convicted on her own plea of guilty for the offence of 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.

20. Looking at the trial Court proceedings, I find the criticism of the trial Court by the Applicant's Counsel to be wholly unfair. Before the trial Court, the Applicant had nothing to prove that she was in the country legally. She also pleaded guilty on her own volition and a perusal of the plea-taking process also does not reveal any irregularity or lapse by the trial Court. The language used was fully understood by the Applicant and there is no indication that she was at any time denied the benefit of the due process. Any Judicial Officer in the position of the trial Magistrate would have convicted the Applicant, as he did.

21. Having said the above however, this is a case where a convict has approached the High Court for Review of her conviction, claiming that she is now in possession of material which she could not access at the time that she was arraigned before the trial Court and pleaded guilty, and which material, she believes, had it been available and presented to the Court, would have seen her being acquitted. In this case, the charge that the Applicant was convicted of was being unlawfully present in Kenya and upon

which charge she was sentenced to pay a fine and directed to be deported back to the USA where she was born. The material in issue which the Applicant now claims to be in her possession is a Certificate of Birth indicating that she is a Kenyan born abroad to Kenyan parents. She claims that although she had applied for the Certificate, the same had not been issued and she only received it when she was just about to be deported.

22. I have agonized on how to handle this matter considering that no outright "irregularities" or illegalities" have been demonstrated against the trial Court, which generally, is what the High Court's supervisory jurisdiction of review is meant to check. However, this is a case in which a young 24-year-old lady, claiming to be Kenyan by right and by law, risks being deported for being unlawfully present in Kenya. To make it even more complicated, the material that may very well vindicate her, a Certificate of Birth, if genuine, is an official document issued by, and in the name of the Government of Kenya. Assuming the Applicant is indeed Kenyan and the Certificate if indeed genuine, should this Court, as the supervisory organ, "close its eyes to this reality" and rigidly stick to the principle that new evidence may only be allowed in an Appeal which this is not? I think not.

23. Although it was no doubt established that the Applicant holds American citizenship, I find that her claim of also being Kenyan merits being looked at afresh. As recognized by the Kenyan Constitution, a citizen's right of nationality as a Kenyan is one that ought to be very jealously guarded and protected and should never be casually handled. It must also be appreciated that dual citizenship is now permitted under our laws. Citizenship is a birthright that cannot be taken away. It will therefore be wholly unjust to deport the Applicant out of Kenya and treat her as an outright alien before giving her the opportunity to establish the truth of her claims of citizenship. As correctly submitted by her Counsel, Mr. Ogutu, the pre-sentence Report presented to the trial Court already indicated that the Applicant was Kenyan, with both parents also being Kenyans who relocated to the USA in the 1990s. I do not find any prejudice that shall be occasioned to any person if the Applicant is given a chance to demonstrate her claims of Kenyan citizenship as this is not one of those offences where there is a private person as a complainant and who has been aggrieved and seeks retribution. The Applicant's allegation that she pleaded guilty because she had no proper guidance and because she believed that pleading guilty would lead to her acquittal is not far-fetched in my view. She deserves the benefit of doubt.

24. A reading of the Ruling on the sentence imposed also vindicates the Applicant's submission that she had indeed notified the trial Court that she had applied for a Kenyan Certificate of Birth and was thus in the process of regularizing her stay in Kenya. This is so because the trial Magistrate has captured this submission in the Ruling.

25. In view of the foregoing, I find this to be a deserving case for invoking the exercise of this Court's supervisory revision jurisdiction. I do not believe that it will be just to crucify the Applicant for choosing the path of Revision, rather than Appeal, considering the circumstances of the case. In my considered view, the best option will be to order for retrial as a matter of "interest of justice".

26. Regarding the circumstances under which a retrial may be ordered, the Court of Appeal, in the case of *Pius Olima & another v Republic* [1993] eKLR, guided as follows:

> " Our attention was drawn to authorities that deal with the principles that should be applied when considering whether a retrial should be ordered or not. These are:- *Ahmed Sumar v Republic*, (1964) EA 481; *Manji v The Republic*, (1966) EA 343; *Mujimba v Uganda*, (1969); and *Merali and others v Republic*, (1971) 221. The principles that emerge are that a retrial may be ordered where the original trial, as was found by the High Court and with which we agree, is defective, if the interests of justice so require and if no prejudice is caused

to the accused. Whether an order for retrial should be made ultimately depends on the particular facts and circumstances of each case."

27. Applying the above principles, I find the "facts and circumstances" of this case to merit a retrial. The trial Court may still well convict the Applicant if sound grounds still exist for doing so. I cannot rule that out. However, I feel that the trial Court ought to reach a verdict after having the benefit of the full and correct state of facts, which the alleged Certificate of Birth, if genuine, will, after scrutiny, no doubt bring out.

Final Order

28. The upshot of the above is that I order as follows:

    i. The Applicant's Notice of Motion amended on 7/01/2025 is allowed, the conviction of the Applicant in Eldoret Chief Magistrate's Court Criminal Case No E1406 of 2014 set aside, and the matter referred back to the trial Court for re-trial.

    ii. To avoid any perception of "an already clouded judicial mind", the Appellant shall be retried before a Magistrate of competent jurisdiction other than Hon. N. Barasa (PM) .

    iii. The Police and/or the Prosecution are therefore at liberty to present the Applicant before the Magistrate's Court for commencement of the retrial.

    iv. Regarding the cash bail deposited with this Court, the Applicant shall be at liberty to make any appropriate Application thereon before this Court, and regarding the fine paid by the Applicant at the trial Court upon her earlier conviction and sentence, she is at liberty to similarly make any appropriate Application thereon before that trial Court.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20 TH DAY OF JUNE 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

The Applicant

Mr. Ogutu for the Applicant

Ms. Muriithi for the State

C/A: Edwin Lotieng