Tedros & 15 others v Republic (Criminal Revision E014 of 2024)
[2024] KEHC 1483 (KLR) (9 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MARSABIT

CRIMINAL REVISION E014 OF 2024

JN NJAGI, J

FEBRUARY 9, 2024

BETWEEN

AZAHIER TEDROS & 15 OTHERS ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an application for revision of the conviction and sentence in Moyale PM`s Court Criminal Case No. E218 of 2023 by Hon.K. L. Matawi, Resident Magistrate delivered on 7/11/2023)

RULING

1. The Applicants have filed an amended application dated 23rd January 2023 seeking for revision of the orders of the trial court issued on 7th November 2023 whereby the court convicted the Applicants on their own plea of guilty for the offence of being unlawfully present in Kenya upon which it fined each one of them a sum of Ksh.10,000/= in default to serve 2 months imprisonment, with further orders that they be repatriated to their home country after serving the sentence or paying the fine.

2. The Applicants contend that they were wrongly convicted of the offence. That the proceedings thereof were conducted in English and Kiswahili languages both languages which the Applicants are not familiar with. That although an interpreter was provided, he erroneously interpreted to the court that the Applicants were pleading guilty to the charge when they were in fact pleading not guilty. The Applicants are contending that they are asylum seekers in the country. They are seeking that the Officers Commanding Industrial Area Police Station Depot and Gigiri Police Station be ordered to hand them over to the Refugees Affairs Secretariat for assessment of their refugee status in the country.

3. The application was supported by an affidavit sworn by counsel for the Applicants, Jacob Wanyonyi. Counsel deposed that the applicants are Eritrean nationals of Tigrinya ethnic group who fled their country of Eritrea due to conflict and fear of persecution in their home country. That they are genuine asylum seekers in Kenya and were arrested upon entry into Kenya on 4/11/2023. That they were not

afforded the statutory period under section 24 of the *Refugees Act* from the date of entry to make their intentions known to the relevant authority that they wanted to seek asylum in the country. That they were charged before the grace period of one month provided by the afore said section was over. Therefore, that the charges were premature and the conviction and order for repatriation are null and void ab initio.

4. Counsel further deposed that the trial court ordered for imprisonment and repatriation of the Applicants despite them being asylum seekers in the country, information which could not be presented to the court by them on account of language barrier. That the Applicants are at the risk of suffering persecution in their home country unless the order for repatriation is lifted. That imposition and deportation order without regard to the merits of their asylum claim will lead to a violation by the Kenyan state of the principle of non-refoulment.

5. The state through the Prosecution Counsel stated that they are not opposed to the Department of Refugee Affairs establishing the status of the Applicants on their claim that they are asylum seekers in the country. However, that the orders of repatriation should remain in place until their status is established. That it is after their refugee status in the country is allowed that the order for repatriation can be revoked.

6. I have considered the application and the submissions by counsel for the applicants and the prosecution counsel. The application is made under the provisions of section 362 of the *Criminal Procedure Code* that provides that:

> " 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."

7. It is clear from the provisions of the section that the powers of the High Court on revision of an order of a subordinate court are confined to revising orders that are irregular, incorrect or illegal. The powers are only be limited to rectifying a manifest error in the proceedings. In *George Aladwa Omwera v Republic*, High Court Milimani Criminal Revision No. 277 of 2015 [2016] eKLR, Wakiaga J. held that:-

> " In exercising supervisory jurisdiction under Article 165(6) the court does not exercise appellate jurisdiction and therefore cannot review or reweigh evidence upon which the determination of the lower court is based, it can only demolish the order which it considers erroneous or without jurisdiction and which constitutes gross violation of the fair administration of justice but does not substitute its own view to those of the inferior tribunals.In *Veerappa Pillai v Remaan Ltd* the Supreme Court of India has this to say:-
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> > "The supervisory powers is obviously intended to enable the High court use them in grave cases where the subordinate tribunal or bodies or officer acts wholly without jurisdiction or excess of it or in violation of the principles of natural justice or refuses to exercise jurisdiction vested in them or there is an apparent error on the face the record and such action, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide and large as to enable the High Court to convert itself into a court of appeal and examine for itself the correctness of the decision impugned and decide what the proper view on the order be made....."

8. In the instant matter, the Applicants allege that they were wrongly convicted of the charge as the court interpreter wrongly interpreted to the court that they were pleading guilty to the offence when they were in fact pleading not guilty. Counsel for the applicants deposed that the Applicants were arrested on the day of their entry into the country. However, the supporting affidavit in support of those allegations was sworn by counsel appearing for the Applicants who was not in court during plea taking and he cannot thereby depose on how the plea was taken. These were not matters that were in the personal knowledge of counsel. It is the Applicants themselves who should have deposed to those facts. Counsel did not file a copy of proceedings to show how the plea was taken.

9. I have had the benefit of calling for the record of the lower court and perused the proceedings. According to the record the plea was taken in Tigrinya language which is the language of the applicants. There was an interpreter from Tigrinya language to English language.

10. The record indicates that upon the charge being read to the applicants, each one of them replied that the charge was "true". The prosecutor then stated the facts of the case to the court. Upon being asked whether the facts as given by the prosecutor were correct, each of them replied that the facts were true. The court then asked each of the applicants to offer his mitigation. Each of them then stated that:

> " I escaped war in my country."

11. The record indicates that at that point the trial court proceeded to sentence the appellants after stating that it had considered their mitigation. The court did not even enter a conviction on the applicants before sentencing them.

12. The manner of taking pleas was explained in the case of *Adan v Republic* [1973] EA 445 where the Court of Appeal laid down the steps which should be followed in taking pleas as follows:

    i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

    ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

    iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;

    iv. if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

    v. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

13. In the instant case, the fourth step of taking pleas as set out in *Adan v Republic* (*supra*) was not complied with. It is clear from what the applicants stated in their "mitigation" that they did not agree with the facts as given by the prosecutor. It should have been clear to the trial court that the applicants were not admitting the charge of being unlawfully present in Kenya. They instead pleaded that they were running away from war in their country. In short, the applicants were stating that they were asylum seekers in the country. The court should then have recorded a change of plea to one of not guilty.

14. In view of the foregoing, the plea taken by the trial court was not unequivocal. There was also no conviction in the matter. It is clear that there was manifest error in the manner the plea was taken that resulted to injustice being visited on the applicants. The sentence imposed by the trial court in the case was therefore un procedural and unlawful.

15. This court has power under section 362 of the *Criminal Procedure Code* to call for and correct any illegality or impropriety of any finding, sentence or order recorded or passed by a subordinate court. As the plea in this case was not procedurally taken, the sentence imposed by the trial court and the order of repatriation are hereby set aside.

16. I have considered that the applicants have either served their sentences or paid the fine imposed by the trial court. I do not consider it to be in the interest of justice for me to order a re-trial in the matter. I instead order that the Applicants be handed over to the Department of Refugee Affairs for determination of their Refugee status in the country.

17. In case that any of the applicants have paid the fine imposed by the trial court, I order that the same to returned.

DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2024

J.N. NJAGI

JUDGE

In the presence of:

Mr. Wanyonyi for Applicants

Mr. Otieno for Respondent

Applicants - Absent

Court Assistant- Abdow

14 days R/A.