Abdo & 3 others v Republic (Criminal Revision E125 of 2024) [2024] KEHC 12258 (KLR) (24 September 2024) (Ruling)

Neutral citation: [2024] KEHC 12258 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT LODWAR

CRIMINAL REVISION E125 OF 2024

PJO OTIENO, J

SEPTEMBER 24, 2024

BETWEEN

YAMINE MAGDI ABDO .... 1ST APPLICANT

HASA ABDO YAMI EISSA .... 2ND APPLICANT

HAMADA ABDO YAMI EISSA .... 3RD APPLICANT

MOHAMMED JAMO TAHA .... 4TH APPLICANT

AND

REPUBLIC .... RESPONDENT

RULING

1. This ruling regards a petition for revision pursuant to the supervisory jurisdiction of the High Court in criminal cases under sections 362 to 366 of the *Criminal Procedure Code*. Section 362 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.

2. The applicants herein were charged and convicted of the offence of unlawfully being present in Kenya contrary to section 53(1) (j) as read with section 53(2) of the Kenyan *Citizenship and Immigration Act* No. 12 of 2011. Under Section 53(1) (j) of the *Kenya Citizenship and Immigration Act*, it is an offence for any person to unlawfully enters or be unlawfully present in Kenya in contravention of this Act and if convicted shall be liable to pay a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding three years or to both;”

3. The particulars of the offence were that the Applicants Hassan Abdo Yami Eissa, Hamada Abdo Yami Eissa, Magadi Yami Eissa and Mohamed Jamo Taha on 5th May 2024 at around 1830hrs at Lokichoggio-Sudan matatu stage within Turkana West sub-county in Turkana County, being Yemen and Syrian

nationals and not being excluded persons were found unlawfully present in Kenya without valid entry or permit.

4. Evidence by the prosecution revealed that on 5/05/2024 at around 1830hrs, police officers from Lokichoggio police station while on patrol, spotted the applicants looking suspicious. The applicants then identified themselves to the police by their names and when asked to produce their travelling documents, they all issued their passports. Following the information on their foreign passports, the police discovered that 1st, 2nd and 3rd applicants were Yemen nationals while the 4th applicant was a Syrian national. However, the four passports that were uttered by the applicants were found not to have been stamped to allow them be in Kenya with the consequence that, the four were retained by the police.

5. The applicants also had bags which upon being searched by the police were found to contain mobile phones and other items which were as well retained for further investigations to ascertain whether they were linked to any terror group. The accused persons were then handed over to Kakuma Administrative Traffic police officers for further investigations. The four passports were forwarded to the immigration departments and were determined genuine but were not stamped with entry Visa stamps. The accused persons were arraigned and charged in the Magistrates Court at Kakuma, CRC No. E248/2024.

6. On further investigation, the 4th applicant indicated that the group was enroute to Sudan for work but never gave an explanation on how they entered the country and why their passports were never stamped. To ascertain their claim of being refugees in Kenya, the investigation officer wrote a letter dated 07/05/2024 to the Director of Refugee Services whose findings revealed that the 1st, 2nd and 3rd applicants were not refugees in Kenya while the 4th accused had an asylum registration card no. 23/09/41/196385 having been an asylum seeker registered in Rwanda but never completed the registration exercise in kenya. No explanation was given by him on why he never completed the registration process. The 4th applicant revealed to have been in Kenya from 15/01/2023 until when he was arrested on 5/04/2024 and had not presented himself to the authority.

7. The trial court in addressing itself on the matter after considering the evidence tendered before it convicted all the applicants and sentenced each to pay Ksh.400, 000 (Four hundred Kenya Shillings only) and in default to serve two years each, in prison. Further it was ordered that upon paying the fine or serving the sentence, each convict to be repatriated to their respective countries of origin.

8. Being aggrieved by the decision, the applicants moved the court by the Notice of Motion dated 5th June 2024 seeking revision or setting aside the conviction and sentence passed by Hon v Shivega (RM) on 31st May 2024. They also pray that they be handed over to the United Nations High Commission on Human Rights to determine their refugee/asylum status. The Applicants' case was that they fled persecution from raging civil armed conflict in Syria and Yemen and from other countries and hostile borders and territories until they arrived in Kenya, being one of the peaceful countries in East Africa to apply for refugee status.

9. It is their contention that they met in Nairobi and were in the process of applying for refugee status KHCR in Nairobi offices, before they were arrested and transported to Turkana County where they were charged with an offence of unlawfully present in Kenya contrary to Section 53(1)) as read with section 53(2) of the Kenyan *Citizenship and Immigration Act* No. 12 of 2011. They faulted the respondents for incarcerating the 4th accused, a minor, in adults' prison thus violating provisions of article 2(6) of the *Constitution* of Kenya. It is for this that they urge that this court do invoke its supervisory powers under article 165(6) & (7) and grant to them the prayers sought. The gist of this revision application is grounded on severity of sentence by the trial court.

10. The principles upon which this court will act in exercising its jurisdiction in revision of sentences or other orders is now settled to be that the interference should only be a resort for purposes the court ensuring that that which was done by the lower court was correct, legal and proper.

11. In this matter, applicants unequivocally pleaded guilty to the charge and are not contending about their plea of guilt nor the conviction. When the charge was read over to them, they admitted the offence and a plea of guilty was entered for each applicant. The prosecutor then said that the facts were as per charge sheet. The accused said that the facts were true. They were then convicted on their own plea of guilt. It is thus manifest that no impropriety, irregularity or illegality presents itself in the procedure and substance of the proceedings.

12. There is no allegation nor proof of incorrectness, impropriety nor illegality in the order made and the sentence passed by the trial court. There is equally there is no complaint in the manner in which the proceedings were taken and recorded. As presented, the request is purely that the sentence be ignored and an order made that the applicants be handed over to the applicants to the United Nations High Commission on Refugees in accordance with an unnamed international law and on the allegations that the conviction and sentence affront Article 53(2) of the *Constitution* as regards the 4th applicant.

13. The court finds that section 53(1) of the *Kenya Citizenship and Immigration Act* remains the law creating the offence of being unlawfully present in Kenya. It is a penalty provision that only applies where an immigrant has failed to meet his legal obligations of presenting self for registration within set timelines under the Act. What the trial court did was to apply the law as it is for that is the duty of the court. Handing over a convict under the Act is not one of the penalties provided under the statute. A court of law cannot usurp the legislative mandate of parliament by craft of creating a penalty not deemed appropriate by parliament. Accordingly, there is no satisfaction that a basis for revision has been met by the applicants. The request does not lie as revision and the request for revision must fail.

14. The application is determined to lack merit and as thus dismissed.

15. Because the 1st, 2nd and 3rd applicants separately filed Revisions Applications Nos E127, E128 and E129, whose effects would be the same, this decision is made to bind those three files with the consequence that the three applications are also dismissed.

16. Let all the four files be closed.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 24TH DAY OF SEPTEMBER, 2024

PATRICK J O OTIENO

JUDGE