



REPUBLIC OF KENYA



**Machumu & 15 others v Republic (Criminal Revision E063 & E064 of 2023
(Consolidated)) [2023] KEHC 23822 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23822 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CRIMINAL REVISION E063 & E064 OF 2023 (CONSOLIDATED)**

**WM MUSYOKA, J
OCTOBER 19, 2023**

BETWEEN

**SOPHIA MACHUMU 1ST APPLICANT
NEEMA MURHULA 2ND APPLICANT
ALINE EKSANTI 3RD APPLICANT
JACKLINE KIKA 4TH APPLICANT
ALPHA KULIMUSHI 5TH APPLICANT
ANSIMA KULUMUSHI 6TH APPLICANT
TATU UREDI TATIANA 7TH APPLICANT**

AND

REPUBLIC RESPONDENT

**AS CONSOLIDATED WITH
CRIMINAL REVISION E064 OF 2023**

BETWEEN

**ALINE EKSANTI 1ST APPLICANT
ALPHA KULIMUSHI 2ND APPLICANT
ANSIMA KULIMUSHI 3RD APPLICANT
NEEMA MURHULA 4TH APPLICANT
SOPHIA MACHUMU 5TH APPLICANT
JACQUELINE KIKA 6TH APPLICANT**



ISRAEL MUGISHO	7 TH APPLICANT
YUSUFU BASHIGE	8 TH APPLICANT
RUHAMYA CARMEL	9 TH APPLICANT
ONESHORE KAFAFA	10 TH APPLICANT
VICTOIRE BIBENTYO	11 TH APPLICANT
BENJAMIN CIZUNGU	12 TH APPLICANT
DIEUMERCI MUNGUA KONKWA	13 TH APPLICANT
IMANI MANIUS	14 TH APPLICANT
MARC KAFAFA	15 TH APPLICANT

AND

REPUBLIC RESPONDENT

(Revision arising from convictions and sentences, in Busia CMCCRC No. E1467 of 2023 by Hon. ES Nyaloti, Chief Magistrate, CM, made on 11th September 2023, and in Malaba PMCCRC No. 77 of 2023 (formerly Busia CMCCRC No. E1495 and 1496 of 2023, by Hon. O Momanyi, Principal Magistrate, PM, made on 19th September 2023)

RULING

1. There are 2 revision proceedings herein that were initiated separately, one by a formal application by way of a Motion, and the other informally by way of a letter. The 2 proceedings were handled separately, and 2 separate rulings would have been ideal. However, when I settled to prepare the rulings, I noted that some of the applicants were common in both applications, and I opted to write one ruling.
2. The first application, in time, was that initiated by the Motion, dated 28th September 2023, filed herein on 3rd October 2023. The principal prayers are that the court revise and set aside the convictions and sentences handed out to the applicants in that application, and an order directing that the applicants be handed over to the Department of Refugee Affairs for registration or safe transfer or return to a designated refugee camp or designated urban residence to enable them make an application as asylum seekers. The grounds and facts, as set out on the face of the application and the affidavits in support, sworn by Aline Eksanti and Tatu Uredi Tatiana, are that the applicants were Congolese, from Goma, in the Democratic Republic of Congo, who had fled the war there, and were in Kenya to seek asylum, something that they had disclosed to the police at both the Busia and Malaba border points, but they were arrested, presented in court, convicted, sentenced, with an order for their repatriation. They state that their lives would be in danger, should they be repatriated. They have attached copies of the order of 19th September 2023, signed by Hon. Momanyi, PM, and a warrant of repatriation, signed by the Chief Magistrate, Busia, Kenya.
3. The second case was initiated by way of a letter dated 6th October 2023, lodged herein on 9th October 2023. The letter is addressed to the Judge, and the applicants ask the court to call for the records, in Busia CMCCRC No. E1495 and 1496 of 2023, and to exercise revisionary power to revise, review or set aside the orders of 19th September 2023, and in lieu give such other orders as fit, pursuant to section 18 of the Refugee Act, No. 10 of 2021 and Article 14 of the Universal Declaration of Human Rights.



4. The 2 matters were placed before me on separate dates, and I directed that the applicants serve the papers on the respondent, the Deputy Registrar to call for the trial court records, and that both matters be mentioned on 12th October 2023. At the mention on 12th October 2023, the respondent craved for time, whereupon I adjourned the matter for mention on 17th October 2023. I also granted stay orders, of the enforcement of the repatriation order.
5. At the mention on 17th October 2023, the respondent, through Ms. Chepkonga, indicated that the State did not oppose the revision sought, on grounds that no effort was made, when the applicants were arraigned in court, to ascertain their intentions, and, therefore, section 24(1) of the Refugee Act was not complied with. It was submitted that once the applicants intimated to the court that they were asylum seekers, the trial court ought to have downed its tools, and referred the matter to the refugee agencies, in terms of sections 12 and 14 of the Refugee Act. She cited *Bivamunda Erick vs. Republic* [2014] eKLR (F. Tuiyott, J) and *Fysba Abrba Redae & 2 others vs. Cabinet Secretary Ministry of Interior & Coordination & another* [2015] eKLR (Ngenye-Macharia, J).
6. I have reviewed the Refugee Act, No. 10 of 2021, and other decisions, in addition to *Bivamunda Erick vs. Republic* [2014] eKLR (F. Tuiyott, J) and *Fysba Abrba Redae & 2 others vs. Cabinet Secretary Ministry of Interior & Coordination & another* [2015] eKLR (Ngenye-Macharia, J), that is to say *Unknown vs. Director of Public Prosecutions & another* [2017] eKLR (Ngenye-Macharia, J), *Majid Ali Abdu & another vs. Republic* [2021] eKLR (Njagi, J), *Soliana Mehari & 7 others vs. Republic* [2021] eKLR (Njuguna, J), *Espoir Ndaburuya 7 another vs. Director of Public Prosecution & another* [2022] eKLR (J Kamau, J), and *Serogo Alex & 3 others vs. Republic* [2022] eKLR (Musyoka, J). What emerges is that foreigners, who enter Kenya, whether legally or not, whether with the relevant entry papers or not, have a 30-day window, by virtue of section 24 of the Refugee Act, within which to report to the nearest reception centre or the nearest government administration centre, to express their intention to apply for asylum or refugee status, and to commence the process of registration as refugees or asylum seekers; and, during that window, such persons shall not be treated as illegal aliens or foreigners unlawfully present in Kenya.
7. As the applications herein are not opposed, and in view of what I have stated above, I shall not belabour the point. I, accordingly, find and hold that the proceedings that were conducted in Busia CMCCRC No. E1467 of 2023 by Hon. Nyaloti, CM, on 11th September 2023, and in Malaba PMCCRC No. 77 of 2023 (formerly Busia CMCCRC No. E1495 and 1496 of 2023, by Hon. Momanyi, PM, on 19th September 2023, were tainted by illegality, impropriety, incorrectness and irregularity, and I hereby quash the said convictions of the applicants, set aside the sentences imposed upon them and the repatriation orders, and direct that the applicants be handed over to the Commissioner for Refugee Affairs, or the Department of Refugee Affairs, forthwith, to make their intentions known, and for processing, thereafter, in accordance with sections 12, 14 and 24 of the Refugee Act. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THIS 19TH DAY OF OCTOBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates



Mr. Masiga, Ms. Nabulindo and Ms. Omboto, instructed by Masiga Wainaina & Associates, DK Nabulindo & Company, Advocates, and Kituo Cha Sheria, respectively, for the applicants.

Ms. Chepkonga, instructed by the Director of Public Prosecutions, for the respondent.

