



**BAA v Republic (Criminal Revision 18 of 2020)
[2024] KEHC 15200 (KLR) (Crim) (2 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15200 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL REVISION 18 OF 2020**

**LN MUTENDE, J
DECEMBER 2, 2024**

BETWEEN

BAA SUBJECT

AND

REPUBLIC RESPONDENT

RULING

1. BAA, the subject, was charged jointly with others for the offence of being unlawfully present in Kenya contrary to Section 53(1) (j) as read with Section 53(2) of the citizenship and Immigration Control Act, 2011.
2. Particulars of the offence were that on 15th day of January, 2020 in Kamukunji Sub- County within the Nairobi County being of Somali descent they were found unlawfully present in Kenya without valid pass or visa in contravention of the *[Kenya Citizenship and Immigration Act](#)*.
3. Upon arraignment, the subject denied the allegations urging that she was born in Kenya. To this, the Prosecution rebutted arguing that they had a Birth Certificate from the Embassy of Somalia indicating that the subject is a Somali National. Pending ascertainment of the status the subject was placed under the custody of Child Protection Unit in Pangani.
4. Subsequently, Ms. Sairi Keneto, an officer from Refugee Affairs Secretariat notified the court that the subject was not registered in their database as a refugee contrary to the argument by her Counsel, Mr. Madegwa who alleged that she was currently seeking an asylum and was a holder of a valid pass port.
5. Following the information presented the court ruled that it had ascertained from the Subject’s passport that she entered Kenya and was to exit on 18th August 2018. Since she was from Somalia and not



- registered in the database for refugees, the court ordered her to be repatriated back to her Country of origin through the Embassy of Somalia.
6. It was upon that background that the Subject through the firm of Kakai Mugalo & Co. Advocates approached this court through a Notice of Motion dated 31st January, 2020 seeking; stay of the order of repatriation made by the trial court; the plea was not unequivocal and the whole trial was unprocedural and bordered on an illegality.
 7. That the minor be placed in the custody of her Kenyan-relatives while she awaits to be collected by the mother who is a resident in Germany; and, any other orders that the court would make in the best interest of the minor.
 8. The matter upon being placed before Kimaru J. (As he then was) he ordered the Director Children Services to carry out inquires and report to the court. Following the report dated 24/2/2020 filed by Francis Ogola Ndang'o where it was recommended that the Subject could be released to Fatuma Hassan temporarily up to when her mother would succeed to get a visa. In the result, the court ordered that the Subject's custody be placed with Fatuma pending determination of the Immigration Status. Fatuma was to execute a bond of Ksh. 200,000/- to ensure that the Subject would be availed to the court and she was not to part with the custody of the child until further orders by the court, the court did emphasize that fact which was couched in mandatory terms.
 9. This file remained dormant since 25th February, 2020 until 1st December, 2021 when it was re-activated by Nzioka J, Presiding Judge of the Division, and allocated to Bwonong'a J. who retired. Ultimately the matter was placed before me. At that point in time, 5th February, 2024 a warrant of arrest was issued against the surety, Fatuma Hassan.
 10. That prompted the surety to appear in court represented by Mr. Abdullahi learned counsel who submitted that the Subject was released to the surety pending outcome of the Immigration Report. That a Visa was processed by the International Organization for migration (IOM) but an explanation having not been rendered to the surety, she did not understand the issue of returning to court. The State sought time to respond to the argument by the surety which was not forthcoming. Consequently, the Director of Children Services was directed to file a progress report in the matter.
 11. By a report dated 12th September, 2024, it was established that the minor's mother Muna Osman Moge who was initially a refugee from Somalia acquired citizenship of Germany in 2018. Madam Margaret Kirera the Sub-County Children's Officer, Kamukunji, the author of the report stated that the minor's passport was shared through her WhatsApp platform for confirmation of the subject's entry into Germany. And, that according to the surety, the minor was successfully re-united with her mother in Germany.
 12. It was observed that I.O.M organization were involved in verification of the minor under the re-unification program for refugees. It was therefore the recommendation of the children services that the matter be brought to closure.
 13. Notably, counsel for the applicant/subject did not turn up to pursue/prosecute the application. The order that subsists is the question of repatriation that was varied by the High Court to the extent of the subject having been released on bond pending determination of the subject's immigration status. The matter was to be mentioned on 19th May, 2020. But this was not the case until a later time as captured.
 14. Article 53 (2) of *the Constitution* provides that a child's best interests are of paramount importance in every matter concerning the child. The court found that it would be in the interest of the child to be re-united with her mother in Germany.



15. This is a matter where the surety faltered by not strictly complying with the order of the court. The children Officer Madam Kasera through the report filed recommends that the matter be brought to closure since the minor is with her mother in Germany following a family reunification. That the best interest of humanitarian act is in the best interest of the minor.
16. Evidence missing is proof of exit of the child from Kenya. A copy of a page of the travel document used when the child presented herself to the Immigration Officer where her biometrics were captured and a copy of ticket to the stated destination would be suffice since it is stated that communication was through Whatsapp. This should be supported by a report from the International Organization for Migration (IOM) which was not annexed.
17. In this era where people disappear without a trace it will be imperative for this court to establish that the child is alive. Therefore, it is hereby ordered that the afore mentioned evidence be availed prior to the matter coming to closure.
18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS AT NAIROBI, THIS 2ND DAY OF DECEMBER, 2024.

L. N. MUTENDE

JUDGE

