



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL MISCELLANEOUS APPLICATION CASE E198 OF 2021

ABDIKANI MIRE DUHUL ALIAS ABDIMAJID.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON SENTENCE

The applicant herein **ABDIKANI MIRE DUHUL ALIAS ABDI MAJID ISMAIL HASSAN**, has moved this court by way of Notice of Motion dated 22.6.2021. The substantive and live prayer in the said application is prayer 3, which seeks an order of revision of the orders of the Hon. Andayi W. F., Chief Magistrate in MCCR Case Number E680/2021, issued on 18.6.2021. The aggrieved orders were to the effect that upon payment of the fine imposed or completion of the term of prison, the applicant be deported back to his country of origin.

The applicant has applied for revision of the said orders of deportation on the grounds that the order was made by the Honourable Chief Magistrate in disregard of the fact that the applicant is validly in the country. Mr. Ochieng, for the applicant submitted that he is a possessor of a valid alien identify card No. 857329, issued on 29.8.2016 and due for expiry on 28.8.2021. That had this fact been brought to the attention of the trial court, the said ordered would not have been issued.

Learned counsel, Mr. Kiragu, for the state opposed this application on grounds that the card was never produced before the trial court, and no reason has been given for the failure. Counsel however, confirmed that the card is a genuine refugee card. That in fact had the card been produced in court, the outcome would probably have been different. Finally, that the issue of forgery having been dealt with, the only issue for determination is the legality of the applicant's presence in the country.

I have considered the 2 sets of submissions of the parties. This application is brought under section 164 of the Criminal Procedure Code. The substantive provision, however ought to have been section 362 of the Criminal Procedure Code, which bestows the revisionary powers on this court. The said section declares;

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and in the regularity of any proceedings of any such subordinate court.”

I have considered the record of the proceedings of the lower court of 18.6.2021. The same relate to a plea of guilty entered on the charge of possession of a forged passport contrary to section 54(1)(c) as read with section 54(2) of the Kenya citizenship and Immigration Act, 2011, Laws of Kenya, and the sentence passed on the same. The record does not capture whether or not the applicant was lawfully present in Kenya.

The applicant has now shown his original Refugee card, issued to him on 29.8.2016 and set to expire on 28.8.2021. Counsel for the state has confirmed that this refugee card (alien card) is genuine. If this is so, then the applicant was lawfully present in Kenya. Had this fact been brought to the attention of the Honourable Chief Magistrate, the order of deportation would probably not have issued.

It is for this reason that I find this application for revision meritorious. I accordingly revise the said orders of the trial court issued on 18.6.2021 and order that upon payment of the fine or completion of the imprisonment term as imposed by the trial court, the applicant be released forthwith. Orders accordingly.

D. O. OGEMBO

JUDGE

7.7.2021.

Court:

Read out in court (on-line) in presence of Mr. Ochieng for the applicant and Mr. Kiragu for the state.

D. O. OGEMBO

JUDGE

7.7.2021.