REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. E020 OF 2021

AS CONSOLIDATED WITH

MISC. CRIMINAL APPLICATION NO. E014 OF 2021, MISC. CRIMINAL APPLICATION NO. E015 OF 2021, MISC. CRIMINAL APPLICATION NO. E016 OF 2021, MISC. CRIMINAL APPLICATION NO. E017 OF 2021, MISC. CRIMINAL APPLICATION NO. E018 OF 2021, MISC. CRIMINAL APPLICATION NO. E019 OF 2021 AND MISC. CRIMINAL APPLICATION NO. E021 OF 2021

SOLIANA MEHARI .....1ST APPLICANT

EKOBY EMANE.....2ND APPLICANT

GEBRIELA ASFEHA.....3RD APPLICANT

FITHAWIT ZERAK.....4TH APPLICANT

SERAIT MENGESTU.....5TH APPLICANT

FASSIKA SHIGUTE.....6TH APPLICANT

LULAWIT BENYENE.....7TH APPLICANT

NATENAE GEBREMARIAM.....8TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Each of the applicants herein moved this court vide individual applications dated various dates but all brought under certificate of urgency and which applications were consolidated by this court vide the orders of 10.06.2021 and wherein Misc. Criminal Application No.E020 of 2021 was made the lead file.

2. The applicants substantially sought for orders that this Honourable Court do exercise its discretion to revise the orders made by the Honourable trial magistrate, Hon. Ndeng'eri J on 10.05.2021 in the respective criminal case files and wherein they were each ordered to serve six (6) months imprisonment and that upon the applicants' completing of the sentence, to be repatriated back to Ethiopia by CCIO Embu County; that this Honourable Court be pleased to release the applicants on condition that they present themselves before the Refugee Affairs Secretariat for registration forthwith; and that any other directions taken as the court may deem just and expedient and in the interest of justice.

3. The said applications were premised on the grounds on their face and each further supported by the affidavit sworn by Samuel Kirimi Guantai - advocate of the High Court of Kenya. In a nutshell, it was deposed that the applicants are Ethiopian citizens and that they were arrested on 19.04.2021 at Kivwe area along Embu- Meru Highway and charged with the offence of being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the Kenya Citizenship and Immigration Act and wherein they pleaded guilty to the charges and further pleaded to be allowed to seek asylum in the country. Further that the applicants were sentenced to serve six (6) months imprisonment and that upon the applicants' completion of the sentence to be repatriated back to Ethiopia by CCIO Embu County.

4. That the applicants fled their country of origin- Ethiopia- under the apprehension of persecution and torture and other human rights violations as their habitual place of abode is Tigray region where there was ongoing war and thus fled to Kenya to seek protection and that when the applicants appeared before the trial court, they expressly indicated that they came to Kenya to seek asylum. That there is a most

likelihood of persecution should they return to their country of origin and wish to seek asylum and benefit from the international protection offered to persons under the refugee protection framework. As such, this court is enjoined to protect the applicants from penalization on account of their unlawful entry to Kenya as they are persons of concern who wish to seek asylum under the refugee network in Kenya.

5. Ms. Mati for the respondent filed grounds of opposition and wherein she averred that the applications are an abuse of the court process as the applicants ought to have approached the court by way of a constitutional petition as opposed to a revision; that the applications are not meritorious as they do not disclose how the trial magistrate's order were illegal, improper or incorrect; that the trial magistrate's decision to order repatriation of the applicants were grounded on the fact that the applicants had not regularized their refugee status with the requisite agency; that the applicants' failure to enjoin the Attorney General as a respondent in this case renders the application nugatory given the constitutional mandate of the respondent; and that the applicants did not attach proof of their having refugee status to buttress their suitability for being asylum seekers.

6. The applications were canvassed by way of written submissions. It was submitted on behalf of the applicants that the trial magistrate's decision was illegal, improper and incorrect as the trial magistrate entered a plea of guilty yet the accused persons were unrepresented and at one point expressly stated that they were asylum seekers and as such, the procedure was defective and fell short of the requirements of section 207 of the Criminal Procedure Code and the case of **Adan –vs- Republic (1973) EA at 446**. That since the applicants were unrepresented, the trial court ought to have taken extra caution during plea taking. Reliance was made on the case of **Simon Gitau Kinene – vs- Republic (2016) eKLR**.

7. It was therefore submitted that the trial court ought to have entered a plea of not guilty due to the fact that the applicants in mitigation pleaded that they had come to the country to seek asylum and reliance made on the case of **Bivamunda Erick –vs- Republic (2014) eKLR**. The applicants further submitted that the decision of trial court ordering return of the accused persons to their country of origin after serving the sentence was in breach of section 18 of the Refugee Act of 2006 and reliance made on the case of **Unknown –vs- Director of Public Prosecution & another (2017) eKLR**, Further that as a result of the illegal and improper finding by the trial court, this court ought to exercise its revisionary powers under sections 362 and 367 of the Criminal Procedure Code and in expounding the effects of the said provisions the applicants relied on the case of **Joseph Nduvi Mbuvi –vs- Republic (2019) eKLR.**

8. The respondent in its written submissions which were filed on its behalf by Ms. Mati submitted that the applicants did not prove that they had made an application to the Commissioner for Refugees so as to be recognized as such and therefore the principle of non-refoulment is not applicable. Further that the application is frivolous, incompetent and an abuse of the court process as there is nothing in the proceedings to prove that the order by the trial magistrate was incorrect, illegal or improper and further that the six month's sentence was legal and justifiable. Further that the procedure of revision is reserved for simple matters of errors of law in the trial proceedings, conviction and sentences and the applicants ought to have moved the court by way of a constitutional petition. Reliance was made on the case of **Abush Tumasake & 5 others (2021) eKLR**.

9. I have considered the pleadings herein together with the written submissions. The applications were brought under Section 362 and 364(1) and (2) of the Criminal Procedure Code.

10. Section 362 of the Criminal Procedure Code provides as follows: -

> ***"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."***

11. The rationale of the revisionary powers of this court was discussed by Nyakundi J in **Republic –vs- James Kiarie Mutungei [2017] eKLR** Nyakundi J held thus:

> ***"The rationale of the High Court as a revisionary authority can be initiated by an aggrieved party, or suo moto made by the court itself, call for the record relating to the order passed or proceedings in order to satisfy itself as to the legality, or propriety, correctness of the order in question. The scope of revision therefore is more restrictive in comparison with the appellate jurisdiction which requires the high court to rehear the case and evaluate the evidence in totality by the lower court to come with a decision on the merits..."***

12. Under Section 364, the exercise of the revisionary jurisdiction can either be upon application by a party or *suo moto* (where the proceedings come to the knowledge of the court). The revisionary jurisdiction of this court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words, parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person.

13. The provisions of section 362 as read with Section 364 of the Criminal Procedure Code are clear that revision jurisdiction is by no means an appeal by the aggrieved party to the High Court. In criminal cases where such orders are being sought under section 364 on revision the court should steer clear from trespassing into the realm of appellate jurisdiction.

14. It is against the backdrop of the above statutory provisions and the case law that I will proceed to consider the applications herein and decide as to the merits of the same or otherwise. The applicants in support of the application for review of the orders deposed that the applicants while taking plea indicated in mitigation that they were seeking asylum and thus the court ought to have recorded a plea of not guilty.

15. Plea taking process is a vital process in a criminal trial and which should be taken in compliance with the legal procedure as provided in law. Where the same is unprocedurally taken, the same can be revised by this court as it is illegal, incorrect and improper. The court can

either upon application or on its own motion call for and examine the record of the criminal proceedings before the 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. As such, it is my view that the application is properly before this court. I therefore disagree with the respondent that the party ought to have moved the court by way of a constitutional petition.

16. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of **Adan vs Republic [1973] EA 445** and as a legal requirement, 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. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded. 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. 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. If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded.

17. In the instant case, the applicants took issue with the trial court having convicted on the plea of guilty and yet in mitigation, they indicated that they were seeking asylum. When the applicants herein were arraigned in court, the record indicates that the charges were read in the language they understood and through the assistance of a translator (Mr. Mukhtar), they replied "nimekubali." The court did not enter plea at that instance as required by law. The facts were then read to the applicants herein and whereby they responded as to the facts being true. The applicants were then invited to mitigate and the record indicates that they responded as thus "seeking asylum." It is this response in mitigation that the applicants submitted that made the plea equivocal.

18. In the case of **John Muendo Musau -vs- Republic [2013] eKLR** the Court of Appeal held as thus; -

> "***We want to add here that if the accused wishes to change his plea or in mitigation says anything that negates any of the ingredients of the offence he has already admitted and been convicted for, the court must enter a plea of not guilty. That is to say that, an accused person can change his plea at any time before sentence. The procedure laid out in Adan -Vs- Republic (Supra) is also provided for under Section 207 of the Criminal Procedure Code."***

19. Asylum is defined under section 2 of the Refugee Act of 2006 to mean "shelter and protection granted by the Government to persons qualifying for refugee status in accordance with the provisions of this Act and in accordance with International Conventions relating to refugee matters referred to in section 16." Asylum seeker on the other hand is defined to mean "a person seeking refugee status in accordance with the provisions of this Act. The applicants faced the charges of being unlawfully present in Kenya contrary to Section 53(1)(j) as read together with Section 53(2) of the Kenya Citizenship and Immigration Act No. 12 of 2011. Section 53(1)(j) creates the said offence by providing that any person who unlawfully enters or is unlawfully present in Kenya in contravention of the Act commits an offence.

20. As such, by the applicants stating that they were seeking asylum, it means that they were justifying their entry into Kenya as being protected by the law. It therefore means that the plea of guilty ought to have been changed to that of not guilty. In **Bivamunda Erick –vs-Republic (supra**) F. Tuiyott J in a case where the prosecution had conceded as to the plea having been equivocal and the conviction being liable for setting aside held as thus;-

> "***The concession by the State is no doubt well made. Although the Applicant had pleaded guilty to the charge, he made the following remarks when invited to mitigate.***
>
> > "***I went there myself, I come to be as a refugee. I come on Saturday." (sic)***
> >
> > ***What the Applicant was saying was that he was an asylum seeker and was therefore not unlawfully present in the country. He was setting up a defence to the offence he faced. At that point, the Learned Magistrate ought to have set aside the plea of guilt and substituted it with one of not guilty. For this reason, I do hereby reverse the conviction entered by the Learned Magistrate and set it aside….."***

21. It is my finding therefore that the applicants having indicated that they were asylum seekers, the same amounted to raising a defense as to the legality of their presence in Kenya. The plea ought to have been changed to that of not guilty. The applicants as such were convicted on a wrong plea and the said conviction is thus illegal and improper. The same was no unequivocal.

22. The applicants further prayed that this Honourable Court be pleased to release them on condition that they present themselves before the Refugees Affairs Secretariat for registration forthwith. It was deposed that the applicants are persons of concern under the Convention relating to the Status of Refugees and under the Refugees Act and they ought to be treated as such and further that they will face imminent danger and are at risk of losing their lives if repatriated back to their country of origin. It was submitted that the decision of the trial court was thus illegal and goes against the principle of non-refoulement.

23. However, having found that the plea was equivocal, it therefore means that the sentence meted on the applicants and the orders for repatriation are thus incorrect, illegal and improper and the same ought to be set aside. The said sentence and orders were based on an illegally and unlawfully taken plea. There is no way the same could be left to stand.

24. Submitting on the principle of non-refoulement, the applicants argued that the sentence is illegal as the court ordered repatriation of the applicants back to their country of origin whereas the conditions that led to them fleeing still persists and which decision it was submitted, was in blatant breach of section 18 of the Refugee Act of 2006.

25. I have perused through the Refugee Act. The long title thereof provides that the Act is an Act of Parliament to make provision for the recognition, protection and management of refugees and for connected purposes. Section 3 of the said Act defines "refugee" and in doing so

provides for a statutory refugee and a prima facie refugee. The said section provides as thus;-

> ***"3. Meaning of "refugee"***
>
> ***(1) A person shall be a statutory refugee for the purposes of this Act if such person—***
>
> > ***(a) owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or***
> >
> > ***(b).....***
>
> ***(2) A person shall be a prima facie refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.***

26. On the other hand asylum is defined as shelter and protection granted by the Government to persons qualifying for refugee status in accordance with the provisions of the Act and in accordance with International Conventions relating to refugee matters referred to in section 16. Asylum seeker is defined as a person seeking refugee status in accordance with the provisions of the Act.

27. From the reading of the above sections, it therefore means that an asylum seeker must be a person qualified for refugee status either as a statutory refugee or prima facie refugee.

28. In the instant case, the applicants indicated to the trial court that they were seeking asylum as a result of war in their home country (Tigray – Ethiopia) and it is on this basis that the repatriation order is being challenged as being in contravention of non-refoulement principle and section 18 of the Refugee Act. The question therefore is whether the said principle is applicable in the circumstances herein. In other words, can the applicants be said to be protected by the said principle and the statutory provision (section 18)?

29. Section 18 of the Refugee Act further provides that;-

> ***"No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or to subjected any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where—***
>
> > ***a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or***
> >
> > ***b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or the whole of that country."***

30. This section codifies the principle of non-refoulement. The said principle prohibits not only the removal of individuals but also the mass expulsion of refugees. This principle was well discussed by the court (J.M Mativo J) in **Kenya National Commission on Human Rights & another –vs- Attorney General & 3 others [2017] eKLR** where the Learned Judge held that;-

> ***"In fact, respect for the principle of non-refoulement requires that asylum applicants be protected against return to a place where their life or freedom might be threatened until it has been reliably ascertained that such threats would not exist and that, therefore, they are not refugees. Every refugee is, initially, also an asylum applicant; therefore, to protect refugees, asylum applicants must be treated on the assumption that they may be refugees until their status has been determined. Without such a rule, the principle of non-refoulement would not provide effective protection for refugees, because applicants might be rejected at the frontier or otherwise returned to persecution on the grounds that their claim had not been established.***
>
> ***That the principle of non-refoulement applies to refugees, irrespective of whether they have been formally recognized as such - that is, even before a decision can be made on an application for refugee status - has been specifically acknowledged by the UNHCR Executive Committee in its Conclusion No. 6 on Non-Refoulement. And indeed, where a special procedure for the determination of refugee status under the 1951 Convention and the 1967 Protocol exists, the applicant is almost invariably protected against refoulement pending a determination of his or her refugee status.***
>
> ***Whenever refugees - or asylum-seekers who may be refugees - are subjected, either directly or indirectly, to such measures of return, be it in the form of rejection, expulsion or otherwise, to territories where their life or freedom are threatened, the principle of non-refoulement has been violated. While the principle of non-refoulement is basic, it is recognized that there may be certain legitimate exceptions to the principle.***
>
> ***Article 33 (2) of the 1951 Convention provides that the benefit of the non-refoulement principle may not be claimed by a refugee 'whom there are reasonable grounds for regarding as a danger to the security of the country ... or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country'. This means in essence that refugees can exceptionally be returned on two grounds:- (i) in case of threat to the national security of the host country; and (ii) in case their proven criminal nature and record constitute a danger to the community. The various elements of these extreme***

and exceptional circumstances need, however, to be interpreted....”

31. My understanding of the above decision is that the principle of non-refoulement does not only apply to refugees but also asylum seekers (persons seeking refugee status). The Learned Author in the **Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol** noted that (page 2 -3; paragraph 6);-

> ***“6. The protection against refoulement under Article 33(1) applies to any person who is a refugee under the terms of the 1951 Convention, that is, anyone who meets the requirements of the refugee definition contained in Article 1A(2) of the 1951 Convention (the “inclusion” criteria) and does not come within the scope of one of its exclusion provisions. Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee. It follows that the principle of non-refoulement applies not only to recognized refugees, but also to those who have not had their status formally declared. The principle of non-refoulement is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status....”***

32. Such persons (either refugees or asylum seekers) cannot be repatriated where such an action will be a threat to his or her life or where the person stands to face imminent danger and are at risk of losing their lives if repatriated. Any order in that respect can only be in breach of the said principle and which has been recognized as a norm of customary international law. (See for instance the Court of Appeal’s decision in **Attorney General –vs- Kituo Cha Sheria & 7 others [2017] eKLR** where the Learned Judges of Appeal held that;-

> ***“Given the widespread, even universal applicability, acceptance and practice of the principle of non-refoulement which States consider to be binding upon them as a matter of law, coupled with its further recognition and protection under international human rights law such as the ICCPR at Article 7; the European Convention for the Protection of Human Rights and Fundamental Freedoms and the 1984 U.N. Convention against Torture, there does exist a firm basis for the argument and conclusion that indeed the principle of non-refoulement is a norm of customary international law. ……..”***

33. The court further held that;-

> ***“Having ourselves reviewed the international instruments, writings of scholars and practice of States in this regard, we are unable to accept the argument that the learned Judge erred in his appreciation of the standing of the principle of non-refoulement. In concluding that the principle is so fundamental that it is considered a customary law norm, he was propounding what is quite self-evident from the materials available on the subject. We would endorse his conclusions without hesitation and even go as far as to say that without the scrupulous enforcement and observance of the principle of non-refoulement, humanity will show itself to have learned nothing from the tragedies of the past which have led to massive displacement of persons from territories where life, limb and liberty are in clear and present peril making the grant of asylum and refuge an imperative and compelling response. We think, in fact, that there is much merit in the argument made by the UNHCR and its Executive Committee that the principle of non-refoulement was in fact progressively acquiring the character and status of jus cogens, a peremptory norm of international law. (see Executive Committee Conclusion No. 25 para (b); U. N. docs. A/AC.96/694 para 21; A/AC.96/660 para 17; A/AC. 96/643 para 15; A/AC 96/609/Rev.1 para 5. See, also, Jean Allain; The Jus Cogens Nature of Non-refoulement Int. J Refugee Law (2001) 13 (4) 533-558 where the author notes that the principle of non-refoulement has acquired the status of jus cogens, as a peremptory norm of international law from which no derogation is permitted and is of critical importance in the contemporary world and is deserving of being maintained in the face of rising attacks on the right of people to seek asylum….”***

34. It is therefore my view that the **non-refoulement** principle as codified in section 18 does not only apply to refugees but also asylum seekers. That is why, in my view Section 18 cannot be said to be protective of persons who have had their refugee status approved but also person who are seeking refugee status.

35. In the instant case, the trial court noted that;-

> ***“The court appreciates that there is an ongoing war in Tigray Ethiopia. However, the distance from Tigray to the Kenya border is to far for refugees. He stated that he was seeking asylum in Kenya.....”***

36. With all due respect to the trial court, having noted that there was war in Tigray, the Learned magistrate ought not to have ordered for repatriation as the same is against the *non-refoulement* principle. This is irrespective of there being no valid travel documents presented. The said order is frowned at by the non-refoulement principle.

37. As such, it is my view that the said order (on repatriation) can only be said to be improper, unlawful. As I already stated, this court in exercising revision jurisdiction is obligated to look at the record and the proceedings and to ascertain as to whether the order made by the court was proper, legal or correct. It is my view that the repatriation order in this regard was not. The same is therefore a candidate for review.

38. The question therefore is; what orders should this court issue in the circumstances? Should the applicants be acquitted or retried? The law as to when a retrial should be ordered has long been settled. The Court of Appeal in **Samuel Wahini Ngugi vs. R [2012] eKLR** held as follows in relation to the issue;-

> ***“The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:***

> ***'It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered…In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person....."***

39. Some of the factors which the court ought to consider in determining whether or not to order a retrial include but not limited to illegalities or defects in the original trial, the length of time which has elapsed since the arrest and arraignment of the appellant and whether the mistakes leading to the quashing of the conviction were entirely of the prosecution's making or the court's (See **Muiruri –vs- R [2003] KLR 552).** The court should also consider the admissible, or potentially admissible evidence which is on record (See **Mwangi –vs- Republic [1983] KLR 522).**

40. I have considered the facts herein and further perused the record in relation to the applicants' applications and also the trial court's record. The applicants were sentenced on 23.04.2021 to serve six (6) months imprisonment. From the facts read in the trial court, it was stated that the applicants were arrested while in a motor vehicle registration number KCR 433U a Toyota Probox and which was intercepted at Kivwe in Embu County and that they did not have passports or permits. Considering the said facts it is clear that the same can win a conviction if the applicants are re-tried. There having been no dispute as to the applicants being from Ethiopia, it therefore means that failure to have travel documents while in Kenya is an offence under the Kenya Citizenship and Immigration Act of 2011. However, it is clear that they indicated they are in Kenya as asylum seekers.

41. As the courts have stated, to order or not to order a retrial depends on the particular facts and circumstances of the case. It is my considered view that in the circumstances and bearing in mind that they raised the defence of being asylum seekers (in an attempt to justify their presence in Kenya) but which defense the trial court did not note. If the court had noted, it ought to have recorded a plea of not guilty and offer an opportunity to the applicants to prove that they were asylum seekers and had complied with the law, the right recourse would be to order for retrial so that the applicants can be able to justify their said defense (of asylum seekers).

42. I take cognisance of the fact that the issue of aliens entering Kenya through our borders is rampant and which has been blamed for the various insecurity incidences. It is my considered view that in the interest of justice, a retrial ought to be ordered so that the applicants can indeed prove the legality of their presence in Kenya. This is further bearing in mind the fact that the period the applicants spent in prison will be taken into account in the event that they are found guilty after the retrial and therefore the applicants will suffer no prejudice. The applicants should be produced in court and the trial be conducted by a different court.

43. As for the repatriation order, as I have already noted, the applicants clearly indicated in mitigation that they were seeking asylum. Section 11 of the Refugees Act provides that any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act should make his intentions known by appearing in person before the Commissioner immediately upon his entry or, in any case, **within thirty days** after his entry into Kenya. The said section was amended vide the Section 45 of the Security Laws (Amendment) Act of 2014. The said section was amended to the extent that the words *"or in any case within thirty days after his entry"* were deleted. As such, the current legal position is that any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of the Refugees Act should make his intentions known by appearing in person before the Commissioner immediately upon his entry into Kenya.

44. In the instant case however, the applicants were arrested, convicted and sentenced on 23.04.2021. Having been convicted on their own plea of guilt (which I have already found to have been equivocal), they did not have an opportunity to prove to the trial court as to whether they had appeared in person before the Commissioner immediately upon their entry into Kenya so as to make their intentions known. This court cannot determine as to the said issue. The only court which can determine the same is the trial court and upon evidence having been produced in the re-trial.

45. Having considered all the above, the court finds that the plea by the applicants was equivocal and as such the same is hereby set aside. The applicants to be retried by a different court other than the trial court. Further, upon conviction (if any) the sentence meted out should take into consideration the 2 ½ months they have already spent in custody.

46. It is so ordered.

Delivered, dated and signed at Embu this 8th day of July, 2021.

L. NJUGUNA

JUDGE

……for the Applicant

……..…..for the Respondent