REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL REVISION NO. E095 OF 2021

REPUBLIC ..... APPLICANT

VERSUS

FATUMA ABDULLAHI ISAAQ ..... RESPONDENT

CORAM: Hon. Justice Reuben Nyakundi

Rutto Erica Advocates for the Applicant

Mr. Mwangi for the State

R U L I N G

This matter has been brought to the attention of the Court vide 2.7.2021 by the Office of the Public Prosecutions seeking answers to the following directions; -

a) Whether the Honorable Chief Magistrate has a jurisdiction to uncertain Miscellaneous Criminal Application E57 of 2021 Malindi, given that a Court of equal and competent jurisdiction as present by the Learned Resident Magistrate Hon. Onalo, had become fuctus officio after conviction and sentencing the accused.

b) Whether the order by the Learned Magistrate Hon. O.R.M abasing convict's passport/travel document (after pleading guilty to being unlawfully present in Kenya) is correct and proper given that upon completion of her sentence the repatriation orders given had come into effect for execution by the immigration services.

c) Whether it is correct for the Learned Honourable Chief Magistrate to grant a Stay of Repatriation orders of the convictee and properly proceed to hear the same in exercise of original jurisdiction given that the convictee is dissatisfied with such order and continues to be illegally present in Kenya yet such convictee has an option to issue an appeal/revision against the repatriation orders but has failed/neglected to do so.

d) Whether the order releasing travel documents to a person unlawfully present in Kenya when such travel document is in the custody of immigration services holding valid repatriation orders and expected to execute the said orders is regular.

e) It is proposed that the convictee seeks relief in the form of a revision or appeal to the high Court, whose appellate jurisdiction should not whimsically be usurped by Courts under the Supervisory jurisdiction.

Brief Background

The respondent **(Fatuma Abdullahi – Isaaq)** was arraigned before the session magistrate **Hon Onalo (RM)** on 15.4.2021 charged with the offence of being unlawfully present in Kenya contrary to section 53(1) (j) as read with sub-section (2) of the Kenya Citizenship and Immigration Act No.12 of 2011. The particulars of the Charge were that on the 13.4.2021 at [particulars withheld] Estate within Kilifi County the respondent being a Somalia national was found being unlawfully present in Kenya, without any valid documents contrary to the said Act.

The respondent pleaded guilty to the charge and upon facts being read by the prosecution counsel an order of this effect was made by the trial magistrate; -

a) The accused is convicted on his plea of guilty and sentenced to a fine of kshs.5000 in default 1 week imprisonment thereafter a repatriation order dated 15.4.2021 was issued against the accused.

Strikingly, **Misc Cr Case No. E057 of 2021** was also registered before the session Chief Magistrate **Hon Oseko** on 25th April, 2021 it was premised as a Certificate of Urgency dated 27th April, 2021 accompanied with a Notice of Motion expressed to be brought under Article 49(1) of the Constitution seeking the following substantive orders; -

> ***i. That the applicant herein the Respondent be released on a bond or any other reasonable bond terms as the Court may deem it fit.***
>
> ***ii. That an order do issue directing that the application dated 16th April, 2021 be heard at the earliest opportunity.***

From the record among other things the Chief Magistrate issued a stay of execution of repatriation orders of the respondent and proceeded to exercise jurisdiction over the matter. That did not stop there, travel documents were also released without recourse to the Director of Immigration Services.

Determination

Having considered the letter by the Director of Public Prosecution Kilifi County as corroborated by the trial court record it is pertinent rule on the matter. The first issue is on the jurisdiction of the Court. Supervisory power or authority of the High Court is provided for under Article 165 (6), 87 of the Constitution. The Court exercises that power to regulate the proceedings of inferior tribunals and Subordinate Courts. The law in this area is clear as prescribed under Section 362 of the Criminal Procedure Code. To put the importance of this jurisdiction in context the justification that underlies revision turns the task of the Court to inquire into the record on the justness, correctness, propriety, regularity and propriety of the proceedings or record.

The persuasive authority in the case of **Ram Dass V Ishwar Chauder [1988] 3 SCG 131)** held that the expression legality and propriety enables the High Court in revisionary jurisdiction to reappraise the evidence while considering the findings made by that **inferior tribunal or subordinate Court.**

Further in the case of **Rukmini C V Kallyahi Sutochuna [1993] ISCC 499,** the Court observed that the word propriety does not confer power to the High Court to reappraise evidence to come to a different conclusion of evidence is confined to find out legality, regularity and propriety of the order impugned. Whether or not a finding of fact recorded by the Subordinate Court/tribunal is according to law, is required to be seen on the touch stone whether such finding of fact is based on some legal principles or it suffers from any illegality. Like misleading of the evidence or overlooking the material evidence altogether, it suffers from perversely or any such illegality or such findings has resulted in gross miscarriage of justice (**See also Ram Dass Khwar Chaunder [1988] 3 E SCC 131)** the High Court revisional jurisdiction over Subordinate Court calls for the same reasons to inquire whether the Subordinate exercised a jurisdiction not vested in it by the Constitution or statute or it failed to exercise a jurisdiction vested in it by law or acted in the exercise of its jurisdiction illegally or with material irregularity.

In considering the situations presented in this revision both courts have concurrent jurisdiction to simultaneously exercise power and authority over the criminal and civil cases. Referring to both records referenced as **Cr Case No. E349 of 2021, E059 of 2021**. These orders passed by the Courts in both Courts emanated from a concurrent jurisdiction.

As observed by the Principal Prosecution Counsel the initial jurisdiction on the criminal charge was properly exercised in admitting the plea of guilty and thereafter a conviction order followed by a fine of Kshs.5,000/- in default 1 week imprisonment. The fact that the criminal charge was concluded the session magistrate **Hon. Onalo (RM)** became *functus officio*. What is perplexing comes from the nature of the proceedings in E057 of 2021 in which the Chief Magistrate entertained a Notice of Motion filed on 27.4.2021 with the very scheme and object of the proceedings in E349 of 2021. The trial of the Respondent in E349 of 2021 commenced in earnest on 15.4.2021 and the same time a trial order on that sentence and committal warrant to prison issued the same day.

Apparently, the trial court also issued a further order on repatriation of the respondent dated 15.4.2021. As indicated in the record of the concurrent Court in E057 of 2021 power was exercised to entertain a Notice of Motion to release the Respondent on bond on reasonable terms. A reading of the two case files satisfies that criteria for this Court to invoke Article 165 (6) and (7) of the Constitution as considered together with section 362 of the Criminal Procedure Code on revisional jurisdiction. There was no other situation that is contemplated for second proceedings to be initiated by the respondent in E057/2021 after the fact in Criminal Case NO. 349 of 2021. Suffice it to say the Court is cognizant of the controversial nature of the decision by the two session Magistrates their handling of the case betrays the trial nature and extent of the predetermination of issues in much the DPP has raised some concerns.

Having regard to all the circumstances, I find it appropriate to echo **Lord Diplock** guiding principles in **Council of Civil Service Unions v Minister for The Civil Service [1985] AC 374 – at 410 – 411** where he summarized them as follows:

> ***"By "illegality, as a ground for judicial review I mean that the decision-maker must understand correctly the Law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. An administrative decision is flawed if it is illegal. A decision is illegal if: (1) it contravenes or exceeds the terms of the power which authorizes the making of the decision; or (2) it purports an objective other than that for which the power to make the decision was conferred. The task for Courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the power in order to determine whether the decision falls within its "four corners." In doing so, the Courts enforce the rule of law, requiring administrative bodies to act within the bounds of the powers they have been given. They also act as guardians of Parliament's will –seeking to ensure that the exercise of power is what Parliament intended. By irrationality, I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture House Ltd v Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be***

decided could have arrived at it. Whether the decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong without judicial system…. I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility of judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

It is clear that any further proceedings in 057 of 2021 was tainted with illegality, irregularity and or impropriety that obviously resulted in a failure of justice.

The respondent case in essence involved a determination on the validity of her passport or travelling documents and cession of rights as a point in *limine* to be determined by the trial Court. Why do I say so? Justice is the idea of giving each person his or her own fair due as a matter of right. In this system involving our Immigration Laws a distinction must be made between those aliens who have come to our shores seeking admission and those who are within our borders after an earlier entry following compliance with the Law. It is trite aliens who have passed through our gates/borders even though illegally should be afforded the full panoply of procedural due process protections and may be expelled only after proceedings conforming to the constitutional standards of fairness. In the same vein those who have never entered Kenya have no such cognizable rights. The immigration proceedings, although not subject to the full range of constitutional guarantees and protections must nevertheless conform to the right to a fair hearing under Article 50 which simply embodies the procedural canons of due process.

From the record, in the instant case, the respondent was entitled to a full and fair hearing on deportation proceedings. She ought to have been given a reasonable opportunity to present evidence through legal counsel or on her own behalf on removal proceedings from Kenya to the Republic of Somalia. The refusal by the session Magistrate to consider evidence relevant to her entry and residence status in Kenya compounded the harm of the case which may have been different had the Court weighed the impact of the deportation order. The failure by the Court to advise the respondent of apparent eligibility to apply for relief with the Director of Immigration Service or an appeal to a Superior Court against the deportation order was a due process violation. Similarly, the failure to advise the respondent of apparent eligibility for relief from removal from Kenya, including voluntary departure violated her due process rights with exceptions an automatic deportation order of a non-citizen after a criminal process borders in many of the context a denial of natural justice. It is implied in the statute that parliament did not authorize the exercise of powers by the Judicial Officers on the decision making involving deportation of aliens after criminal process to act in breach of the principles of natural justice.

I take notice that not long ago, this Court was faced with a perplexing question on deportation of a Zambian citizen found to be unlawfully present in Kenya. The hearing given to the alien resulted in a conviction of the offence. Thereafter, as the Law stood a deportation order was issued empowering the Director of Immigration to regulate safe passage from the Republic of Kenya to his home country. Thus, the alleged order was never complied with expeditiously rendering him to be falsely detained at the police station for a period spanning more than two (2) months. The failure to enforce the statutory requirement meant that the decision to withhold and continuous detention was made outside the Court Order, unjustified by Law and therefore *ultravires* occasioning prejudice and a failure of justice on the part of the alien. Even in cases of this nature, at the end of the spectrum the Courts have reason to be flexible and act fairly in conformity with the scheme of the principles of natural justice. In such a case like the one of the respondent the normal presumption that a hearing must be given for rebuttal of the alleged immediate deportation of an alien from his adoptive county of residence is necessary. **Lord Bridge** spoke profoundly on this legal proposition in **Llyod v McMahon [1987] AC 625 at 702**:

"My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the Courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

I would stress, for it seems to me that there is an unfortunate tendency which has developed within the state actors involving penalizing innocent aliens and infringement of their fundamental rights and freedoms under the guise to perform a statutory duty expressed in objective terms which allow no discretion in enforcement of the deportation order. Painful dilemma can equally arise where an authority which has discretionary power not to apportion limited resources in funding the compellability of removal of unlawful aliens upon a declaration by a Court of Law. The rule of reason in this category of cases is the principle of fairness and legitimate expectation not to deprive an alien of his or human rights unless the position on assessment involves national security of the Republic. Faced with varying forms and levels of human insecurity individuals and communities of Somalia origin find Kenya to be a safe haven. Therefore, the involuntary repatriation order by the trial Court must ensure a safe and dignified return which complies with the Refugee Act and international standards treaties and conventions. One of the primary purpose of our Courts is to promote and encourage respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language or religion. **(See the UN Charter)**. The **1993 World Conference on Human Rights** put it more succinctly as follows:

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." (Vienna Declaration and Programme of Action, Part 1, para 5).

Unfortunately, these were not the circumstances prevailing in the proceedings before the trial Court.

I have no hesitation in concluding that the Chief Magistrate Court had the jurisdiction, but now such power was exercised in total disregard of law and the rules of procedure. Though available to her she over stepped the jurisdictional lane. The wisdom of legislature and the object of our systems of Courts is to avoid conflicting decisions from the same subject matter emanating from concurrent jurisdiction. Consideration of the matter on release of the respondent could have been meticulously examined by the Resident Magistrate Court presided over by **Hon. Onalo**. The Chief Magistrate Court had a duty to find out whether, the material claim against the applicant in **E057 of 2021** was sufficient to delineate the original Court of jurisdiction for it to proceed to rehear the cause of action involving the same parties to the proceedings. The matter was resjudicata.

This was a case of patent illegality or of jurisdiction on the subject matter entertained as a fresh cause of action. Thus, I declare the orders issued in **E057 of 2021** *void abinito* irrespective of the label of the Notice of Motion expressed to be brought under Article 49 (1) of the Constitution.

As a consequence, a declaration is hereby made that an alien who faces removal from the country of his or her residence is entitled to a full and fair removal hearing under both the Act and the due process Clauses in Article 50 of the Constitution. In the case at bar, there was a violation of the respondent's rights for there was a deficiency on the procedural due process and interpretation of the provisions before a deportation order was issued. The trial Court never set any deadlines and application for related documents of travel to the authority concerned or to the Director of Immigration to set clear guidelines on removal of the respondent from her country of residence. She was never given an opportunity to explain to the Court whether she missed any application deadlines for renewal of her status and rights of domicile in Kenya. My review of the Court's record shows some lack of understanding or confusion on the respondent's part on due process clauses and specifically the Constitutionality of the implementation of the order of removal from Kenya. Consequently, the respondent has not waived the right to apply for relief against removal with the relevant authorities established by our Constitution to accord her fair hearing on this issue. This Court therefore reviews and quashes the decision by the session Magistrate to order for her repatriation deportation and shall be entitled to be heard by the Immigration Directorate or the Department of Refugee Affairs within a reasonable time. Holding the due process in line with Asylum seekers entitles her a right of appeal to the High Court. In sum I partially agree with **Mr. Jamii**, the Senior Principal Prosecution Counsel that this Revision must be allowed and because of the nature of the case it will be right for this Court to also quash the deportation order. In compliance with the Ruling, the Deputy Registrar is hereby directed to serve this order upon the relevant government agency tasked with the duty on Registration of aliens/grant of visas to non-citizens of the Republic.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER 2021

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Mwangi for DPP