



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL MISC. APPLICATION NO. 78 OF 2019**

**MOHAMMED HASSAN HUSSEIN.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. By a notice of motion dated 23/9/2019 he seeks interim orders of the prayers 2 and 3 to wit:

*i. That this Honourable Court be pleased to call for and examine the record of Criminal Case No. 722 of 2019 – Republic vs Mohamed Hassan Hussein; currently pending hearing and determination before the Hon. Chief Magistrate’s Court, to satisfy itself as to the correctness, legality and propriety of the orders issued on the 19<sup>th</sup> day of September, 2019 by the Hon. C. Maundu (CM), dismissing the applicant’s preliminary objection raised on the 16<sup>th</sup> day of September, 2019 seeking to stay proceedings.*

*ii. That this Honourable Court be pleased to issue a stay of proceedings order in Criminal Case No. 722 of 2019 – Republic vs Mohamed Hassan Hussein, pending the hearing and determination of this application.*

2. The same is supported by the grounds on the application namely: -

*a. The applicant is a Somalian national.*

*b. The applicant has fled persecution in Somalia.*

*c. The applicant is an asylum seeker.*

*d. The applicant has previously successfully been granted refugee status in Kenya in the year 2010 and was a refugee resident in Kakuma refugee camp.*

*e. The applicant re-entered Kenya on or about the 10<sup>th</sup> day of September, 2019.*

*f. The applicant was arrested on or about the 10<sup>th</sup> September, 2019, whereupon he expressed his desire to seek asylum to the arresting officer(s).*

*g. The applicant was not granted a chance to seek asylum.*

*h. The applicant was arraigned in court on the 16<sup>th</sup> day of September, 2019 for plea taking on a charge of being unlawfully present in Kenya.*

*i. The applicant through his legal representative informed the trial court that he is an asylum seeker.*

*j. On the first day of court appearance, the applicant’s legal representative made an oral application by way of preliminary objection premised on section 13 of the Refugee Act, Cap. 173 Laws of Kenya, seeking to stay the proceedings, pending refugee status determination.*

*k. The preliminary objection was dismissed vide a ruling delivered on the 19<sup>th</sup> day of September, 2019.*

*l. The applicant took plea on the 19<sup>th</sup> day of September, 2019, whereupon a plea of not guilty was entered and the case fixed for*

hearing on the 19<sup>th</sup> day of November, 2019.

*m. The applicant is currently remanded at Garissa Main Prison and continues to suffer unlawful deprivation of liberty and the risk of refoulement.*

*n. The applicant depones that, the respondent stands to suffer no prejudice if the orders sought herein are granted.*

*o. It is in the interest of justice and fairness that the orders sought herein are granted as prayed.*

3. The application is supported by affidavit of the appellant sworn on 23/9/2019 which states that:

*a. That he is a former refugee resident of Kakuma Refugee Camp under Ration Card No. A3977276.*

*b. That he voluntarily repatriated to Mogadishu, Somalia on the 27<sup>th</sup> day of March, 2018.*

*c. That upon his return to Somalia, he faced constant threat of harm and hostility from unknown people on the basis of having previously fled to Kenya, thereby being considered as a traitor, non-patriot and person wielding information about the Republic of Kenya.*

*d. That the threats of harm and persecution have since increased thereby necessitating his fleeing once again into Kenya.*

*e. That immediately upon his arrest, he indicated that he was seeking asylum and requested to be taken to UNHCR but instead he was detained for 1 week then presented in court to be charged with being unlawfully present in Kenya.*

*f. That on his first court appearance his lawyer informed court that he is seeking asylum.*

4. The application is opposed by the respondent via affidavit by Jonathan Mwenda police officer with ATPU sworn and filed on 30/9/2019 to the effect that:

*a. That the accused was arrested on 14<sup>th</sup> day of September 2019 at Modicare area along Kismayu road within Garissa County while on board a Nairobi bound bus of Diamond Bus Services.*

*b. That, security officers had placed a security lockup at the said place when the said bus came driven by ABDIRAHMAN MOHAMED HASSAN.*

*c. That all the passengers were ordered to come out of the bus and all did so with un-exemption of the applicant who pretended to be sick which led the driver to confront the security officers alleging he was mentally sick.*

*d. That, after further intelligence questions were put across him to test his sanity in which the officers concluded to be of sound mind.*

*e. That after sometime the driver came out of the seat, approached the officers and he produced a voluntary repatriation form showing that the applicant used to be a refugee at Kakuma Refugee Camp vide ration card No. A3977276 marked DNW1.*

*f. That a search was conducted in his bag and a Somalia passport No. P00745834 with no any visa endorsement marked DNW2 and a Somalia identification card No. 28505250108434 were recovered marked DNW3.*

*g. That further investigations conducted indicate that the applicant gave the driver Kshs.20,000/= to facilitate his movement to Nairobi where he could join his relatives.*

*h. That the driver was also arrested and arraigned in court for the offence of smuggling of human beings contrary to section 53(1)(p) as read with section 53(2) of the Kenya Citizenship and Immigration Act vide court file No. 721 of 2019.*

*i. That the driver was convicted and was fined Kshs.100,000/= in default to serve one (1) year imprisonment.*

*j. That the accused had been living into Kenya as a refugee and repatriated back to his mother country voluntarily.*

*k. That the accused person entered into Kenya through Liboi to Ifo Refugee Camp within Dadaab Sub-County.*

*l. That if the accused person his willingness was to re-register as a refugee or as an asylum seeker, he could have submitted his case to the nearest office in UNHCR Dadaab for consideration or processing.*

*m. That the allegations that the accused came to Kenya as an asylum seeker is an afterthought which he wants to use it as a defence against his arrest and the charge he is facing before court.*

*n. That, Somalia is a terrorist designated country vide Kenya Gazette Notice No. 200 of 2015 and allowing persons of Somalia*

*national coming as asylum seekers will be compromising and exposing the country in a great security threat.*

*o. That the court should take into consideration of judicial notice on the Westgate terrorist attacks, the Garissa University terrorist attack and the Dusit-2 terrorist attacks where scores of Kenyans lost their lives in the hands of terrorists.*

## ISSUES

5. After going through the proceedings pleadings and the submissions I find the issues are; ***whether this is an appropriate case for revision? If above in negative, what is the appropriate order?***

## ANALYSIS AND DETERMINATION:

6. Under **Article 165(6) and (7) of the Constitution** confers upon this Court supervisory jurisdiction over subordinate courts and empowers this Court to make any order to give any direction it considers appropriate to ensure fair administration of justice. The said provisions are couched in the following terms:

***“(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) for the purpose of clause (6), the High Court may call for the record of any proceedings before any court or person, body of authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”***

7. As regards the Criminal Procedure Code, the correct legal provision ought to have been 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.”***

8. Section 367 of the Criminal Procedure Code, on the other hand, provides as hereunder:

***“When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.”***

9. It is therefore clear that the powers of revision under section 362 of the Criminal Procedure Code are only to be invoked to enable this Court satisfy 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 subordinate court.

10. Therefore, if out of anger the Court makes a decision which wanting in its correctness, legality or propriety or the proceedings are irregular, this Court no doubt will step in and correct the same.

11. Under Refugees Act No. 13 of 2006 section 11;

***“Any person who has entered Kenya, whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act shall 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.***

***(2) In the case of a person who is lawfully in Kenya and is subsequently unable to return to his country of origin for any of the reasons specified in section be declared a prohibited immigrant, detained or penalized in any way save that any person, who after entering Kenya, or who is within Kenya fails to comply with subsection (1) commits an offence and shall be liable on conviction to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding six months, or to both.***

***(4) Any appointed officer to whom an application is made under subsection shall, if he is not himself the Commissioner, refer the application to the Commissioner.***

***(5) The Commissioner may consider all applications referred to him under subsection (4) within ninety days of the application being so referred and may, within ninety days, make such inquiry or investigation as he thinks necessary into any such application and shall call upon the applicant to make an oral presentation.***

***(6) After considering the application referred to in subsection (4), the Commissioner—shall either grant refugee status to the applicant or reject the application; and***

***(b) shall, within fourteen days, notify the applicant concerned in writing of the decision and in the case of a rejection the applicant shall be informed of the reasons therefor.”***

12. The state's case is that the accused had been living into Kenya as a refugee and repatriated back to his mother country voluntarily. He entered into Kenya through Liboi to Ifo Refugee Camp within Dadaab Sub-county. If his willingness was to re-register as a refugee or as an asylum seeker, he could have submitted his case to the nearest office in UNHCR Dadaab for consideration or processing.

13. Thus the allegations that he came to Kenya as an asylum seeker is said to be an afterthought which he wants to use it as a defence against his arrest and the charge he is facing before court.

14. This court takes the view that since he is said to have been on 14th September 2019 allegedly arrested at Modicare area within Garissa township and subsequently charged, he has to demonstrate why he came several Kilometres from the Kenya – Somalia border without showing his intention to apply for refugee status. He should have presented his case at Refugee Affairs Secretariat (RAS) Offices in Dadaab.

15. Instead the applicant is said to have given the driver of a motor vehicle Kshs. 20,000/= to facilitate his movement to Nairobi where he could join his relatives.

16. In line with section 11 of refugees Act, he should have made 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. He has not made his intentions known in line with cited provisions.

17. That is the factor which made the trial court reject the application to stay proceeding sought. It is not demonstrated that the trial court order is illegal, unconstitutional or irregular to warrant this court review it. The applicant stands charged with the offence of being unlawfully present in Kenya.

18. Thus the court will not stay the proceedings of the trial court at this stage.

19. However, the court is aware of the content of the provisions of section 13 of the Refugees Act to wit; Stay of proceedings:

***“Section 13: Notwithstanding the provisions of the Immigration Act (Cap. 172) or the Aliens Restriction Act (Cap. 173), no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within Kenya —if such a person has made a bona fide application under section 11 for recognition as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal under that section; or (b) if such person has become a refugee.”***

20. Thus under the afore said provisions the court directs that ***the applicant via facilitation of his advocate, court and prisons to make his application under section 11 of the refugees Act and once that has been done, can seek stay of the proceedings at whatever stage they will have reached to await the processing or refusal of the application under the relevant provisions of the law. The same stay can be sought in trial court or this court.***

**DATED, DELIVERED AND SIGNED AT GARISSA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2019.**

**C. KARIUKI**

**JUDGE**