



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARSEN**

**PETITION NO 5 OF 2017**

**ABDULAH LALI MOHAMED.....PETITIONER**

**VERSUS**

**THE DIRECTOR OF PUBLIC**

**PROSECUTION.....RESPONDENT**

**RULING**

1. The notice of motion dated 2/11/2017 was initially filed at Malindi as Miscellaneous Application No. 37 of 2017, the applicant sought orders that the repatriation order dated 13/5/2018 be set aside and that the applicant's biological father be heard in open court to prove that the applicant was a Kenyan citizen. The applicant also sought an order that his father one Lali Mohammed Somo be granted a chance to pay for and undergo a DNA test to prove that Abdullahi Lali Mohammed Somo the applicant herein was his son and therefore a Kenyan by birth.
2. The notice of motion was supported by the affidavit of Lali Mohamed Somo and has averments to the effect that the applicant was his son.
3. The application came at various times before Ongeri (J) and Korir J at Malindi High Court before the matter was transferred here. By orders dated 19/12/2017, the court (Ongeri J) granted the applicant's application to be escorted for a DNA test. Subsequently vide orders dated 23/2/2018 the court allowed the applicant's application for the DNA test to be conducted at Lancet Laboratory and extended the stay of repatriation orders.
4. In the meantime the applicant filed petition No 5/2018 seeking to overturn the conviction and sentence.
5. The background to the petition/application is that the petitioner Abdallah Lali Mohammed Somu was charged before the Principal Magistrate's court in criminal case No. 43 of 2015 with the offence of being in possession of Kenyan document used to establish personal identity contrary to section 54 (2) of the Kenyan Citizenship and Immigration Act 2011. He faced a second count of being unlawfully present in Kenya contrary to section 53 (1) (j) as read with section 53 (2) of the Immigration Act 2011.
6. He pleaded guilty and was sentenced to a fine of Kshs 20,000/= and in default 6 months imprisonment on count 1. On count 2, he was fined 200,000/= and in default to serve 2 years imprisonment. A further order was made for his repatriation to Somalia after paying fine or serving sentence.
7. It appears that the petitioner served sentence and was set for repatriation when he filed the present application and petition. In the petition dated 13/12/2017, the petitioner seeks the following orders:-
  - (a) This honourable court do grant stay of the repatriation order in respect of the petitioner in respect of the petitioner pending the hearing and determination of this petition.
  - (b) This honourable court do grant an order that a DNA test be conducted to establish paternity of the petitioner and Lali Mohamed Lali his biological father who is the holder of Kenyan National Identity Card Number 0750342.
  - (c) Upon establishment that the petitioner is indeed a Kenyan Citizen, the conviction and or sentence be set aside and the petitioner be set at liberty forthwith.
  - (d) Any other order that this Honourable court may see fit to grant

(e) Costs of this petition

(f) Any further or other relief that this Honourable court may deem just and fit to grant to the plaintiff in the circumstances.

8. The supporting affidavit to the petition is sworn by Yusuf M. Aboubakar who is the petitioner’s counsel. He deposed that the petitioner pleaded guilty because he understood the charge to as one of failing to register as a Kenyan and therefore did not challenge the charge. He annexed a copy of the petitioner’s father’s national identity card.

9. When the parties appeared before me on 11/7/2018, they took directions to give viva voce evidence on the question of identity of the petitioner. At substantive hearing of the petition on 26/7/2018, the petitioner’s counsel told the court that they wished to pursue only one aspect of the petition being that the repatriation order be set aside. She relied on the supporting affidavit of the applicant’s father. In addition she presented two witnesses one Athman Mohammed ID No. 21414773 and one Mohammed Mohammed ID No. 30191660 both relatives of the petitioner who stated under oath that they knew the petitioner and his father and that they were Kenyan citizens.

10. The state did not oppose the petition stating only that the order for a DNA had emanated from the court.

11. I have considered the submissions made before me. The same were limited to the prayer for stay of the expatriation order. The evidence given by the two relatives of the petitioner was unsatisfactory as they did not have the Kenyan identification documents of the father of the petitioner. They also were shaky in their testimony on where the petitioner was born. The petitioner’s father did not appear to testify.

12. My appraisal of the material before me is that it is too scanty to lead to a conclusive finding that the petitioner was a Kenyan citizen. I will leave the conclusive determination to the relevant authorities who are sufficiently equipped to investigate the petitioner’s background and issue or decline to issue the relevant identification documents.

13. In the end, I am not persuaded to grant the orders sought in this petition. I am however persuaded to fashion an appropriate order namely:

(i) That the repatriation Order issued by the trial court be and is hereby suspended pending acquisition of the National identification documents by the petitioner in the normal manner.

(ii) There shall be no orders to costs.

Orders accordingly.

***Ruling delivered dated and Signed at Garsen on 7<sup>th</sup> day of November., 2018.***

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**R.LAGAT KORIR**

**JUDGE**

**In the presence of**

.....Court Assistant

.....for petitioner

.....for the Respondent