



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL REVISION NO. 12 OF 2016

HASSAN HAJI ALI

RODA MOHAMED ARALE

IFRA ABDIRISAK HASSAN.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

(From the conviction and sentence in Garissa Chief Magistrate's Criminal Case No. 267 of 2016 – M. Wachira CM)

RULING

In Garissa Chief Magistrate's Criminal Case No. 267 of 2016, Hassan Haji Ali, Roda Mohamed Arale and Ifrah Abdirisak Hassan were each convicted of being in possession of forged visa, forgery of a visa, failing to report entry to an Immigration Officer, and being unlawfully present in Kenya. In addition to the sentence of fines, and default prison terms, they were each ordered by the trial court to be repatriated back to Somalia through the Immigration Department. The above orders of the trial court were made on 16th March 2016.

Thereafter, on 4th April 2016 this court received an application for revision or review of judgment by all the three convicts under certificate of urgency. This court then certified the application as urgent and ordered that it be served on the Director of Public Prosecutions (DPP) office Garissa.

When the matter came up in court on 5th May 2016, Mr. Okemwa the Prosecuting Counsel for the DPP informed the court that the three convicts had already paid their fines and were handed over by the Garissa prison authorities to the Garissa Police Station, but that no documents had been provided confirming compliance with the trial court's repatriation orders. Counsel thus asked for directions from the court.

The matter was thus mentioned thereafter in court a number of occasions to get information from the police at Garissa regarding compliance with the trial court orders of repatriation before this court decides what to do with the request for review of judgment. On 16/09/2016 Mr. Okemwa the Prosecuting Counsel informed the court that the Garissa prison authorities had given him a list of 89 convicts, including the three (3) applicants, who had been handed over by the prison authorities to the Garissa Police Station in 2016 for repatriation to Somalia, but that so far no information had been provided to him by the Garissa Police Station on compliance with the court's orders for repatriation of the three (3) convicts to Somalia. The court then fixed the matter for a further mention.

On 26/10/2016, Mr. Okemwa asked for one more day to file a report from the Garissa police, with regard to compliance with the court's orders on repatriation. The matter was thus put for mention on 27/10/2016 when Mr. Okemwa informed the court that he wrote a letter to the OCPD Garissa to supply him with the repatriation record of the three convicts, but that the OCPD appeared uncooperative to the person who served the letters. He also informed the court that the documents he was availed by the police on the repatriation of the convicts required clarification as he was merely given a letter dated 5th April 2016 addressed to the Camp Manager, Department of Refugee Affairs Dadaab Refugee Camp. He stated that the documents in his possession showed that Roda Mohamed Arale was handed over to the police on 31/03/2016, while Ifra Abdirisak Hassan was released from prison on 6/04/2016 and handed over to Garissa police after 5th April 2016, the date of the letter. Counsel felt that the OCPD, and OCS Garissa Police Station should attend court to tender further explanation on action taken regarding the repatriation orders, as the order from the trial court was specific that the repatriation was to be done through the Immigration Department, and that there was no order requiring the police to hand over the convicts to the Manager of Dadaab Refugee Camp. The court thus put the matter for mention on 10/11/2016 when the OCPD and OCS Garissa were to be summoned to attend court and explain the basis of the police handing over the convicts to the Manager Dadaab refugee camp instead of the Immigration Department. On the 10/11/2016 none of the OCPD and OCS Garissa attended court, though Mr. Okemwa informed the court that both had been served with summons to attend court.

Having considered what has transpired in this court, as above, I will state that, though this matter came to this court for review, I will not grant any review of judgment orders, as the convicts have not attended court, nor is this court sure whether they are in Kenya or were repatriated back to Somalia as ordered by the trial court. I dismiss the request for review of judgment on all the three (3) convicts.

With regard to the compliance with the trial court's repatriation orders, it is apparent that there is a stand off between the DPP's office, and the police at Garissa. It is in my view an act of indiscipline for a police officer to be served with court summons to attend court, and to deliberately defy such court summons. That cannot, and should not be the conduct of a disciplined officer.

I have perused the record of the trial court.

The repatriation orders were made by the trial court to be implemented by the Immigration Department. The orders are in the following terms- ***“on payment of fine or completion of sentence all the accused persons shall be repatriated back to Somalia through the Immigration Department.”***

There is an Immigration Office operating in Garissa. The first complaint in this file emanated from the said Immigration Office in Garissa by way of a letter reference GSA/IMM/ADM/1/7/164 dated 16/03/2016, and that was the reason why the convicts were arraigned in court. The learned trial magistrate must have known why he directed the repatriation to be done through the Immigration Department and that order should have been implemented as such.

In normal circumstances, and in compliance with the rule of law, if there was a problem with the Immigration Department carrying out the court's orders, then they should have come to the trial court or other court with competent jurisdiction through the DPP's office to explain their predicament, for the court to make appropriate orders regarding the repatriation orders. It was not for the police to send the convicts to the refugee camp Manager at Dadaab, in contravention of the court's orders.

From what I gather from this incident, and the submissions of the Prosecuting Counsel, this court forms the view that there is no clear office or Department of government which deals with repatriation of convicts pursuant to court orders. It follows that, it is not easy to know or verify whether repatriation orders from courts are being implemented which, in addition to being a breach of the rule of law, poses a security risk.

In my view, the issue of implementation of repatriation orders issued from courts needs to be addressed and streamlined by the Executive arm of Government in order to ensure compliance with court orders as required under the law, and to address the broader issue of security.

I thus order that the Deputy Registrar of this court supplies a certified copy of this ruling to the Attorney General, the Director of Public Prosecutions and the Inspector General of Police, for their respective action in streamlining the issue of implementing repatriation orders issued by courts against convicts.

Dated and delivered at Garissa this 10th day of January, 2017

GEORGE DULU

JUDGE