



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 93 OF 2016

OLAKUNLE EMMANUEL OGUNTADE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Olakunle Emmanuel Oguntade was charged with two (2) counts under the **Kenya Citizenship and Immigration Act 2011**. The first charge is under **Section 54(1)(d)** of the **Act**. The particulars of the offence were that on 11<sup>th</sup> February 2016 at Immigration Headquarters in Nairobi County, the Applicant, being a Nigerian national was found in possession of a blank Nigerian Passport No.A05883324 issued to one Gbenga Abiola Olujobi which he could not reasonably give an account for its possession. The second charge was failing to register as a foreign national contrary to **Section 56(2)** as read with **Section 53(3)** and **60** of the **Act**. The particulars of the offence were that on the same day and in the same place, the Applicant, being a Nigerian national was found not having registered as a foreign national in contravention of the **Act** and the **Kenya Citizenship and Immigration Regulations 2012**. When the Applicant was arraigned before the trial magistrate's court, he pleaded guilty to both accounts. He was convicted on his own plea of guilty. He was sentenced to pay a fine of Kshs.200,000/- in respect of the first count or in default six (6) months imprisonment and Kshs.100,000/- or in default six (6) months imprisonment in respect of the second count. The sentences were ordered to run concurrently if the Applicant failed to pay the fine. The court further ordered that the Applicant be repatriated to Nigeria upon completion of his sentence.

The Applicant moved this court by way of revision seeking the fine that was imposed on him revised to a reasonable sum. The Applicant stated that whereas he is a Nigerian, he is married to a Kenyan and is blessed with a daughter born on 15<sup>th</sup> June 2012. He pleaded with the court to reduce the fine that was imposed on him as he was the sole breadwinner of his family. He further prayed for the order of repatriation to be reviewed or suspended in view of the fact that he is married to a Kenyan. Mr. Swaka for the Applicant reiterated the above sentiments in his submission before court. Ms. Aluda conceded to the application on the grounds that the charges that were brought against the Applicant were non-existent. She however reiterated that the Applicant was illegally in Kenya and his rights were not infringed when the deportation order was made. She stated that the court may release the Applicant on condition that he complies with the law and regularizes his stay in Kenya.

This court has carefully considered submission made by learned counsel. This court agrees with Ms. Aluda that the charges brought against the Applicant were fatally defective. **Section 54(1)(d)** of the **Kenya Citizen and Immigration Act** provides that:

*“A person who knowingly has in his possession a passport, travel documents, certificate of registration, visa, work permit, residence permit, pass, written authority, consent or approval and who cannot reasonably give a proper account of its possession commits an offence.”*

This section states the offence. However, it does not provide the penalty in the event that the person accused is convicted. **Article 50(2)(b)** of the **Constitution** requires every accused person to be informed of the charge that he is facing with sufficient detail that will enable him to answer to the same. It is

imperative that the accused be informed of the penal consequences that he will face should he be convicted. That penalty must be provided in the charge. In the present case, the Applicant was charged under a section that only specified or set out the offence but did not specify the penalty that the accused would suffer if he is convicted. The prosecution was required to have the charge read thus:

***“Being in possession of a passport which he cannot reasonable give a proper account of its possession contrary to Section 54(1)(d) as read with Section 54(2) of the Kenya Citizenship and Immigration Act 2011.”*** (Underlining mine).

In the present application, it was clear that the first count was fatally defective when it did not include the penal section in the charge. The same position applies in respect of the second count. **Section 56(2)** states as follows:

***“Notwithstanding subsection(1), the Cabinet Secretary may at any time by order require foreign nationals residing in Kenya to comply with such provisions as to registration, notification of change of address, traveling or otherwise, and in such manner, as may be specified in the regulations.”***

**Section 56(3)** provides that:

***“A person who contravenes any provision or requirement of an order issued to a foreign nationals commits an offence and liable upon conviction to a fine not exceeding one hundred thousand shillings, or to imprisonment for a term not exceeding three years, or to both.”***

For the prosecution to establish the second count it was required to prove that there was an order which was issued to the accused person, as a foreign national residing in Kenya, requiring him to so register and he failed to do so. An essential ingredient of the charge was missing thus rendering the second count brought against the Applicant also fatally defective.

In the premises therefore, this court holds that the Applicant’s application for revision has merit and is hereby allowed as a result of which the Applicant’s conviction is quashed and the sentences imposed on him, including the order of repatriation set aside. However, in the interest of justice and upholding the law, the Applicant shall be required to comply with the requirement to register as a foreign national in Kenya within thirty (30) days of today’s date. To confirm compliance, the Applicant shall be required to appear before this court on 7<sup>th</sup> June 2016. It is so ordered.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF MAY 2016**

**L. KIMARU**

**JUDGE**