



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL REVISION NO. 183 OF 2015

ABDULATIIF ISSAA BARE

MOMAMED ISSA BARE.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. A revision is sought herein vide and application by way of Notice of Motion dated 30th December, 2015 by M/s Chala and company, Advocates for the applicant.
2. The application seeks to have the repatriation orders issued by the trial magistrate in Criminal case No. 8890 of 2015, at Shanzu Law Court, Abdulatiff Issa Bare and Mohamed Issa Bare reviewed and quashed and set aside.
3. The application is anchored on the grounds on the face of the application and affidavit of M/s Natasha Chala, advocate for the applicant.
4. The grounds upon which the application is premised are as follows:
 - (a) that the applicants, who were charged in Criminal case No. 880 of 2015 at Shanzu with the offence of being unlawfully present in Kenya and fined, which fine they paid and face deportation back to Somalia despite a letter issued by the Department of Refugee Affairs dated 3rd December 2015, confirming that they had been duly registered as refugees and their alien cards processed and ready for collection;
 - (b) that the issue was raised before the Honorable Senior Principal Magistrate, Shanzu, for determination vide a letter dated 3rd December 2015 but the ruling on the same which was set to be delivered on 23rd December, 2015 is yet to be delivered due to the Honorable magistrate having been involved in a road accident.
5. The powers of revision are donated to the High Court by Section 362 of the Criminal Procedure Code which provide that;-

“The High court may call and exercises the record of any criminal proceedings before any subordinate court for purposes of satisfying itself as to its correctness, legality or propriety of any findings, Sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court”

6. I have perused the record of proceedings in the instant case and it shows that the applicants were arrested and charged with the offence of being unlawfully present in Kenya contrary to Section 13 (2) of the Immigration Act, Cap 172, Laws of Kenya on 3rd November, 2015.
7. They were arraigned before the Resident Magistrate's court at Shanzu on 4th November 2015, where they pleaded guilty to the said charged whereby they were each convicted and fined Ksh 20,000/= or serve four (4) months imprisonment in default. It was also ordered that after paying such fine or serving sentence, they be repatriated back to their home country.
8. A further perusal of the court record shows that M/s Chala, advocate for the applicants proceeded before the Senior Principal Magistrate at Shanzu law courts with an application that the said magistrate sets aside the order of repatriation by the Resident Magistrate on ground that the Applicants were registered refugees and persons concern to Kenya.
9. M/s Chala has requested that the Applicant be handed over to the Department of Refugees affairs so that they can collect their documents.
10. The senior Principal Magistrate proceeded to direct that an officer from the Department of Refugee Affairs appears in court to explain the Applicants status with them to court.
11. And on 14th November, 2015 one Mercy Santa Baya, a Protection officer with the Department of Refugee Affairs and stationed at Bamburi attended court and confirmed that the applicants were registered urban refugees at Malindi in 2012, awaiting their passes.
12. In perusing the lower court's record of proceedings, I noted that the matter had been placed before the Senior Principal Magistrate's in Shanzu for an application to set aside the resident magistrates order of repatriation. This tantamount to an application for revision.
13. I wish to state that this was irregular since the Senior Principal Magistrate's court, under Article 165 (b) of the Constitution and Section 362 of the Criminal procedure Code, has no power or jurisdiction to set aside or vary the orders of another subordinate court. As such, the proceedings before the Senior Principal Magistrate are therefore irregular, null and void.
14. I have looked at the proceedings in the subordinate court in relation to the plea that was taken by the trial magistrate on 4.11.2015 and noted that the language which was used when the plea was taken is not clearly indicated. The accused persons were of Somali origin and the question of language as a barrier should have been interrogated to establish which language they understand and can easily communicate in. The plea was therefore equivocal.
15. There was no response by the Respondents with regard to this application for revision.
16. I find that this is a good case for revision in view of the short comings I have pointed out in the proceedings before the trial court.
17. The applicants were convicted and sentenced under the provisions of the Immigration Act, Cap 172 Laws of Kenya
18. In their application, M/s Chala, their counsel, has annexed a certified copy of a letter from the Department of Refugee Affairs dated 3.12.2015 by the Protection officer, Marceline Baya, Mombasa (where original is in the lower court record.) confirming that the applicants had been registered as refugees by their said office and their alien cards, which had been duly processed were ready for collection.
19. Also annexed to the application are;
 - a. NC3 (1) Extract of registration of Applicants where serial numbers are reflected as BARE

MOHAMED ISSA – 501316316 and BARRE ADDULLATIF ISSA 501316317;

- b. NCB (2) Copy of the alien card of one BARRE ADBUDLLATIF ISSA
- c. NCB (3) Copy of registration and screening form
- d. NCB (4) COPIES OF Asylum seekers passes for the Applicant
- e. NC3 (5) Copy of Department of refugee Affairs Referralship.

20. These documents, which have not been disputed to by the respondent, are a clear demonstration to this court that the Applicants are registered as urban refugees and therefore, persons of concern.

21. Had these documents been brought to the attention of the trial court or had the said court interrogated the applicants in a language they understand so as to prompt such information, I believe it could not have convicted them for the offence as they did and would have handed them to the relevant authority with due regard to the provisions of section 13 of the Refugees Act; which states;-

“ Notwithstanding the provisions of the immigration act on Aliens Restriction Act, no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence in Kenya;-

(a) 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 rights of appeal under that section; as

(b) if such person has become a refugee”.

22. The applicants in this instant case, having demonstrated that they had an application for registration as refugees which had been considered by the Department of Refugee Affairs, fall within the provisions of section 13 of the Refugees Act and should not have been charged and prosecuted (see Decision by Ochieng, J in Criminal case No 137 of 2011, Sheika Ibrahim vrs Republic) as it happened. Their prosecution was therefore unlawful.

23. In exercise of the jurisdiction and powers conferred upon this court by Article 165 (6) of the Constitution Sections 362 and 264 both of the Criminal Procedure Code, I quash the conviction of the applicants and also sent aside the sentence that were handed down by the trial court. And if the applicants have paid the fines, the same should be refunded to them, forthwith.

I also direct that the applicants be handed over to the Department of Refugee Affairs for further action.

Ruling delivered and signed his 8th day of September 2016.

D. O .CHEPKWONY

JUDGE

In the presence of:

M/s Mutua for state- Present

Mr Oreni holding brief for M/s Chale for Applicants

C/clerk- Kiarie