

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO. 14 OF 2016

D M M.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Through an application by way of Notice of Motion dated 25th July 2016 brought under section 13 (b), 16, 23 (1) (2) and (4) of the Refugee Act 2006, section 4 (3) and section 7 of the Fair and Administration of Justice Act as well as Article 50 and 159 of the Constitution of Kenya, this court has been asked to set aside judgment in Garissa CM Criminal Case No. 162 of 2016 in which D M K also known as D M M was convicted of being in Kenya illegally contrary to section 53 (j) of the Kenya Citizenship and Immigration Act No. 12 of 2011 and fined Kshs. 100,000/= in default to serve 1 year imprisonment and also ordered to be repatriated to Somalia on 15th February 2016.

The application is premised on the fact that the applicant is a minor and was registered as a refugee at Hagadera Refugee Camp but was found outside the refugee camp and charged. At the trial the minor girl did not bring this position of facts to the trial court. However it was later discovered that in fact she was such a registered refugee and as a consequence the Refugee Consortium of Kenya filed the application on her behalf. Annexed to the application is a document of proof of refugee registration of the applicant with UNHCR in August 2002. Her name is listed as No. 2 as D M K a female child born on 1st January 1998.

As such, other than being a minor aged below 18 years, the applicant was also a registered refugee as at the time of trial and conviction and sentencing.

I am mindful of the fact that the applicant was recorded as having pleaded guilty to the charge. She also did not bring to the attention of the court that she was a registered refugee. However Article 50 of the Constitution of Kenya 2010 requires that in matters to do with children the best interests of the child be paramount.

On the facts and documents before me, I am convinced that the applicant is a child as defined under Children Act of Kenya. From the documents placed before me, I am also satisfied that the applicant was a registered refugee as at the time she was convicted.

Though there is no specific provision allowing this court to review the orders of a trial court simply on the basis that some information which should have been disclosed there was not disclosed by the convict, the Constitution of Kenya 2010 requires that special treatment be given to children. As the High Court is also the Constitutional court in this country, I am of the view that where there is a clear violation of Constitutional provisions by a subordinate court, this court can intervene in order to correct the situation.

In the circumstances of this case, I quash the conviction for the applicant for being unlawfully present in Kenya. I substitute thereto a finding that she was illegally outside the refugee camp contrary to section 25 (f) of the Refugees Act of 2006 as requested by the Prosecuting Counsel.

The applicant paid the fine of 100,000/= imposed on her. The Children's Act does not prohibit the imposition of a fine on a child offender. However the maximum sentence of a fine for being outside the refugee camp without lawful authority is 20,000/=. I thus set aside the fine of Kshs. 100,000/= and the default prison sentence and order that the applicant will pay a fine of Kshs. 20,000/=. In effect the extra

Kshs. 80,000/= which she has paid will be refunded to her so that the State remains with Kshs. 20,000/=.

The repatriation order is inappropriate. I thus set aside the order for repatriation to Somalia imposed by the trial court. The applicant will instead be handed over to the UNHCR and relevant Government of Kenya authorities which deal with refugees.

It is so ordered.

Dated and delivered at Garissa this 2nd day of September 2016

GEORGE DULU

JUDGE