REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION 400 OF 2016

ABDIRIZACK MOHAMUD MOHAMED…….APPLICANT

VERSUS

REPUBLIC…….....…….....RESPONDENT

RULING

Abdirizack Mohamud Mohamed, the Applicant, by way of Chamber Summons, invoked this court's powers of revision as set out in Articles 19,20,21,22,24,50,53,159,165(6) and 165(7) of the Constitution of Kenya as well as Sections 362 and 364 of the Criminal Procedure Code. He prayed the sentence imposed on him on 19th October, 2016 in respect of the two he was charged with be set aside. He was charged vide Milimani Criminal Case No 121 of 2016 with the offences engaging in business without a work permit contrary to Section 53(1)(m) as read with Section 53(a) of the Kenyan Citizenship and Immigration Act and also being in possession of a waiting card for registration of a Kenyan National Identity card contrary to Section 54(1) as read with Section 54(2) of the Kenya Citizenship and Immigration Act. In count 1 he was sentenced to a fine of Kshs. 200,000/= or in default imprisonment for eighteen (18) months and in count 2 a fine of Kshs. 500,000/= or in default imprisonment for twenty four (24) months. In addition, the trial court ordered that upon completion of the sentence, the Applicant be handed over to ATPU for forwarding to the Refugee Camp.

Mr Abdulhakim, for the Applicant based the application on the following grounds that the Applicant was a registered refugee of Somali origin under ration card No. 562490 issued on 17th June, 2011. He submitted that being unfamiliar with the Kenyan Court system and procedure the Applicant inadvertently pleaded guilty. He submitted that the sentence was manifestly excessive, harsh and unreasonable considering that the Applicant pleaded guilty and in his mitigation expressed remorse and asked for leniency.

He submitted that the learned magistrate erred in relying on an incurably defective charge sheet which rendered the trial a nullity. He submitted that the learned magistrate in making his consequent ruling failed to uphold Section 3(2) of the Refugee Act which gave a foreigner a *prima facie* refugee status.

He also submitted that the arrest and prosecution of the Applicant was irregular, unlawful and unconstitutional as Section 13 of the Kenya citizenship and Immigration Act allows a person who has attained the age of majority and has been a lawful resident in Kenya for a continuous period of seven years to apply for citizenship. He further submitted that the learned trial magistrate failed to consider the Applicant's mitigation. He submitted that the health of the Applicant had deteriorated during his incarceration. He urged the court to set aside the conviction and sentence.

In the supporting affidavit by counsel for the Applicant, it is deposed that the Applicant is 22 years of age and has been living in Kenya for 10 years. He deponed that upon being registered as an alien under certificate No. 562490 he had sought and obtained permission from the Refugee Camp Officer to leave the camp. He deposed that the Applicant became an adult in 2006 and applied for registration as a Kenyan citizen, but which application was rejected. He submitted that on 13th October, 2016 he escorted his cousin to the Jomo Kenyatta International Airport, JKIA, who was accompanying his cargo which was to be exported. That while at the airport, a police officer approached him and told him that he looked funny and arrested him. That before he could explain what he was doing there he was arrested, manhandled and locked in police cells at the airport without being informed of the offence he had committed. He deponed that after a week, on 19th October 2016, he was arraigned in court on the offences charged. Being unfamiliar with the Kenyan court system he pleaded guilty. He deposed that he does not work for a living and was wholly dependent on his uncle who was also impecunious and he could therefore not raise the fines imposed.

The Respondent, represented by learned State Counsel Ms. Aluda conceded to the revision. She agreed that the Applicant was a registered refugee and he should have therefore been charged as an alien. She submitted that under Section 17 of the Kenya Citizenship and Immigration Act it was provided that a person upon attaining the age of majority could apply to be a citizen which the Applicant had done. In regard to the second count the specific subsection was not quoted making the charge sheet defective. She submitted that the court should revise the order that the Applicant should be handed over to the ATPU as the ATPU does not have any mandate to deal with refugee matters which are handled by the department of refugee affairs. She concluded by submitting that the prosecution did not demonstrate that the loading of *miraa* was an occupation requiring a work permit.

In response, Mr. Abdulhakim submitted that the Applicant was not aware that his registration had been rejected until after his arrest. Further that the Applicant had not been charged with any terrorism offence that would mandate his handing over to the ATPU.

I have considered the respective submissions and I take the following view of the application. Notwithstanding the concession to this application by the Respondent, it is trite that under Section 348 of the Criminal Procedure Code, no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. I entirely agree that the Applicant has raised weighty issues in this revision application but which in my view would constitute grounds of appeal. I say so because some of the issues would require the calling and admission of additional evidence which is unprocedural at this stage.

I have read the facts preceding the conviction of the Applicant. They were read to him in a language he understood. He conceded that he did not have work permit to work while he was a refugee. He also conceded that his application as Kenyan Citizen had been rejected. In the latter case, he knew he had applied to be a citizen. The onus then lay on him to follow up on his application to confirm if the application had been allowed or not. It may be true that he was not conversant with the Kenyan court system. But he was made to understand what charges he was facing and he pleaded guilty.

I would wish however to comment on the submission that the charge was defective. The fact that the correct sub section of the provision of the law that the Applicant was charged under was not cited does not render the charge defective. I am hesitant to evaluate this reasoning for the obvious reason that I would be determination issues that would constitute grounds of appeal. The same case applies to the submission of whether or not the dealing in *miraa* and loading them amounted to engaging in work without a permit.

In regard to the sentence, the fines imposed are lawful under the law. But given the circumstances of this case and more particularly that the Applicant is a refugee, this court will temper the revision of the sentence with mercy. The best I can do is find that the Applicant he has serves sufficient sentence. He is however warned to live and stay in Kenya under the mandate expected of a refugee. I also note that he was not arrested in connection to terrorism related offences. The order that he be handed over to the APTU was unwarranted.

In the end, I set aside the sentence imposed and substitute it with an order that the Applicant has served sufficient sentence and is hereby forthwith set free. He shall be escorted to the Immigration department for purposes of forwarding him to the refugee camp. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH NOVEMBER, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

Abdulhakim for the Applicant

M/s Akuja for the Respondent.