



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 19 OF 2014

**IN THE MATTER OF: ENFORCEMENT OF BILL OF RIGHTS AND CITIZENSHIP AND
OTHER**

PROVISIONS OF THE CONSTITUTION AND MORE SPECIFICALLY ARTICLE 2, 12, 13,

14, 15, 18, 19, 22, 23, 25, 26, 27, 28, 39 AND SCHEDULE 6 SECTION 30 AND

SECTION 6 OF CITIZENSHIP AND MIGRATION ACT NO. 12 OF 2011

BETWEEN

MOHAMED ALI MAALIM.....PETITIONER

VERSUS

1. HON. ATTORNEY-GENERAL

2. MINISTRY OF STATE FOR INTERIOR AND

COORDINATION OF NATIONAL GOVERNMENT

3. DEPARTMENT OF IMMIGRATION SERVICES.....RESPONDENTS

JUGMENT

Introduction

1. This is an unusual case. The Petitioner Mohamed Ali Maalim A.K.A. ali Maalim Kidiwa says he was born in or about the year 1990. He filed the Petition in April, 2014 when he was about 24 years of age. He is now about 25 years of age. He is of the age of majority. He pleads he has from childhood worked at various organizations, mostly at Bakeries, namely Fayaz Bakery as a child labourer in Mombasa on night shifts to avoid interaction with the Police, after failing to secure a similar chance at Anglo-Swiss Bakery in Mombasa. He says that he worked for Fayaz Bakers for an uninterrupted period between 1993 to 24th December, 2004. It is unlikely that the Petitioner having been born in 1990 could be working uninterrupted as a three (3) year old child (in 1993). Perhaps he could have been a child labourer from the year 2004, when he was 14 years or thereabout.

2. The Petitioner also says (at paragraph 16 of the Petition) that he attempted to obtain the Kenya

National Identity Card in the year 2001, but having been born in or about 1990, he was at 11 years, not qualified to obtain the Kenya National Identity Card. He says in the same paragraph that he was tossed around from his employer Fayaz Bakery, the Chief of Old Town Mombasa, and to the Registrar of Persons where he was asked for a bribe of Shs. 5,000/=, he was loaned a sum of Shs. 1,500/= which he paid, and then he had his photographs and fingerprints taken and was granted what he calls a “phony” waiting card which he says, he still possesses.

3. The Petitioner also depones that between the years 2005 and 2009, he was employed by **Books First** who also owned a Books and Stationery and Restaurants and Bakery Department within Nakumatt Supermarket outlets throughout Kenya. He says that he was retrenched when **Books First** sold out the Bakery and Confectionery Department but held onto Books First outlets only. After retrenchment, from Books First Bakers, the Petitioner started his own chips vending outlet, and did unknown casual jobs to eke a living.

4. The Petitioner further states that about the year 2009, he was remembered by one Anne Muiruri, the proprietors of Books First, but that as terrorism raged in the country, employers became too scared, lest they are charged for harbouring a terrorist. Anne Muiruri who runs Anne Valley Bakers and Confectioners sold it to **Kenya Airports Services**, and thus he lost employment in that firm.

5. Despite claiming that he suffered untold sorrows, discriminated against, tortured, degraded and suffering inhuman treatment, and getting extra careful and avoided any encounter with authorities, the Petitioner still managed to get an N.S.S.F. Card Number 1133120 which he was later informed belonged to a lady called Makokha. The Petitioner does not explain the circumstances under which he got an N.S.S.F. Card, which would ordinarily be obtained upon production of a National Identity Card. But be that as it may, the Petitioner also obtained N.H.I.F. Card (whose particulars he does not give either in the Petition or Affidavit in support), and used the name of the brother to his adopted father, one Maalim Amri Kidiwa, called **Mohamed Amri Kidiwa**, as he says, “**he was in a game of chance to get an Identity Card**”.

6. In or about 14th May, 2013, the Petitioner was advised by his adoptive parents to go back to their ancestral home to obtain an Identify Card, where he was referred to Vuga, Kwale and where an application for an Identity Card was processed and he received another waiting card.

7. He was subsequently questioned by C.I.D. officers why he had sought an Identity Card in Kwale and on his putative parents who were from **Kikoneni** Msambweni were not involved in his seeking an identity card at Kwale. Despite his explanation that some of his adopted brothers and sisters including the Chief of the area came from Kwale, he is yet to receive his Identity Card.

8. Lastly, the Petitioner says that he is married to one Husna Alo Abdalla and is blessed with one child. He says that he abhors acts of lawlessness, riots, strikes, civil commotion and/or acts of terror or belonging to any prescribed outfit as Al-Shabaab or Al-Quaeda or the like. In fact he says he belongs to a community based organization, ISTQUAMA, responsible for mobilization of young people to be engaged in productive activities and anti-drug addiction and abuse campaign, and he is thus a responsible citizen.

The Petition

9. In his Petition dated 4th April, 2014 and filed on 7th April, 2014, the Petitioner seeks the following orders –

- (a) a declaration that he is a citizen of Kenya by presumption and birth;
- (b) that the Government do issue the Petitioner with an Identity Card;
- (c) that the denial of the issuance of an Identity Card was an act of discrimination and violation of his unalienable rights as citizen of Kenya;

(d) that he be paid exemplary damages;

(e) costs and interest.

The Issues

10. The Petition herein raises one primary issue whether the Petitioner is a citizen of Kenya by presumption of law, the subsidiary issue is whether the Petitioner has been discriminated against by virtue of denial of the issue of Identity Card is a violation or infringement of the Petitioner's rights as a "citizen of Kenya".

Determination

11. The starting point in the determination of this Petition is consideration of the relevant provision of the Constitution of Kenya 2010 (the Constitution), and the Kenya Citizenship and Immigration Act 2011.

12. Article 14(2) of the Constitution provides as follows –

"14(1) A person is a citizen by birth if on the day of the person's birth, whether or not the person is born in Kenya, either the mother or father of the person is a citizen;

(2) Clause (1) applies equally to a person born before the effective date, whether or not the person was born in Kenya, if either the mother or father of the person is or was a citizen;

(3) Parliament may enact legislation limiting the effect of clauses (1) and (2) on the descendants of Kenyan citizens who are born outside Kenya;

(4) A child found in Kenya who is or appears to be, less than eight years of age, and whose nationality and parents are not known, is presumed to be a citizen by birth;

(5) A person who is a Kenyan citizen by birth and who has ceased to be a Kenyan citizen because the person acquired the citizenship of another country is entitled on application to regain Kenyan citizenship."

13. And section 9 of the Kenyan Citizenship and Immigration Act 2011 provides –

"9(1) Any person who finds a child who is or appears to be less than eight years of age, and whose nationality and parents are not known shall present the child to the Government department dealing with matters relating to children and where there is no such department, present the child to the nearest Government Department or agency."

14. Section 9 of the said Act continues to provide –

"that in the event a child's origin and identity is unknown, the government department responsible for matters relating to children should present the child to the Children's Court and take out proceedings for determination of the age, nationality and parentage;

That it is only the Children's Court which has jurisdiction to determine and make orders of presumption of a child's nationality;

where the court makes an order that the child be presumed to be a citizen by birth, it may direct the Director [of the Kenya and Foreign Nationals Management Service Act, 2011] to register the child in the register of children presumed citizen by birth;

Upon an order of presumption that a child is a citizen by birth, that child shall be entitled to a passport as of right in terms of Article 12 of the Constitution, and section 24 of the Kenya

Citizenship and Immigration Act 2011.”

15. The Petitioner herein is an adult, he is well above the age of eight years, and I agree entirely with the submission by the Hon. Attorney-General that the Petitioner is not eligible for consideration for presumption of citizen by birth within the ambit of the provisions of the Kenya Citizenship and Immigration Act, 2011 enacted pursuant to Article 14(4) of the Constitution.

16. For those reasons, the Petition fails, and must consequently be dismissed. This however does not solve the Petitioner’s problem of obtaining a Kenya National Identity Card, and indeed Kenya nationality. He is no longer a child, but says he was adopted by a family in Old Town Mombasa who originally came from Kwale County.

17. In my view, the Petitioner is a person who may be regarded as stateless person. He claims he has no parents, he neither knows his mother or father, but believes they were both Kenyans and that he is more like a baby who was allegedly dumped along Digo Road Mombasa, and grew up in the streets until he was taken in by the Imam of the Konzi Mosque, one **Maalim Amri Kidiwa** and his wife **Mwanahamisi Amri Kidiwa**, who was then in charge of the Mosque. He was taken by the said Imam and his wife because he used to play with his sons, and other worshippers. He says that apart from having meals at the Imam’s house at Saragoza Mzizima area next to Coast General Hospital he otherwise slept at the mosque until he commenced work as a child at various bakeries in Mombasa, and in particular Fayaz Bakers.

18. In the circumstances, I direct the Petitioner to Petition the Director of the Kenya Citizens and Foreign Nationals Management Service pursuant to section 15 of the Kenya Citizenship and Immigration Act. The Petitioner should include all previous applications for issue of a National Identity Card. The Petitioner must also obtain Affidavits from Imam Maalim Amri Kidiwa, his wife Mwanahamisi Amri Kidiwa, and persons like the Imam’s sons who the Petitioner says he played and grew up with to back the Petitioner’s claims that he grew up at Konzi Mosque.

19. Upon being satisfied with the bonafides of the Application as aforesaid, the Applicant shall be eligible for registration as a citizen of Kenya. The Deputy Registrar shall forward a certified copy of this Judgment to the Director of the Kenya Citizenship and Immigration Service.

20. Save as otherwise stated in the immediately foregoing paragraph, the Petitioner’s Petition dated 4th April, 2014 and filed on 7th April, 2014 is dismissed with a direction that each party bears its own costs.

21. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 4th day of December, 2015.

M. J. ANYARA EMUKULE

JUDGE

In the presence of:

No Appearance for Petitioner

Miss Luta for Respondents

Court Assistant Silas Kaunda