



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.504 OF 2012

BETWEEN

HASSAN OSMAN

ALI.....PETITIONER

AND

**THE MINISTER FOR IMMIGRATION AND REGISTRATION OF PERSONS.....1ST
RESPONDENT**

**PRINCIPAL REGISTRAR OF PERSONS..... 2ND
RESPONDENT**

**THE HON. ATTORNEY-GENERAL.....3RD
RESPONDENT**

**THE DIRECTOR OF PUBLIC PROSECUTION.....4TH
RESPONDENT**

**THE POLICE COMMISSIONER.....5TH
RESPONDENT**

JUDGMENT

1. The Petition dated 2/11/2012 raises the issue whether the Petitioner, Hassan Osman Ali is a citizen of Kenya and entitled to all documents that would be proof of that fact. Further, whether the exercise conducted in 1989 in which all persons of the Somali ethnic community resident in Kenya were vetted as to the truth of their registration as Kenyans, was unconstitutional.

2. The Orders sought in that regard are as follows;

“(a) A declaration that the Order contained in Gazette Notice No.5320 dated 7/11/1989 issued by the Principal Registrar of Persons and published in the Kenya Gazette of 10/11/1989 requiring only Kenyans of Somali ethnic community to furnish documentary proof or evidence of the truth of their Registration purportedly in pursuance to the Provisions of Section 8 of the Registration of Persons Act Cap.107 Laws of Kenya is unlawful, illegal and an overt act of discrimination on the basis of ethnicity which is prohibited by Section 82 of the old Constitution, and Article 27 of the current Constitution.

(b) A declaration that the subsequent verification of the truth of the Registration of only Kenyans of Somali ethnic Community out of more than 42 ethnic Communities living in Kenya and the issuance of the so called “screening/verification card” only to the said ethnic community was illegal and amounts to discrimination on ethnic grounds which is prohibited by Section 82 of the old Constitution and Article 27 of the current Constitution and the same also amounted to inhuman treatment which is prohibited by Section 74 of the old Constitution, and Article 28 of the current Constitution.

(c) A declaration that Section 8 of the Registration of Persons Act(Cap 107) does not confer Powers and/or authority on the Principal Registrar of Persons to require only a particular ethnic group (that is: Kenyan Somalis) to furnish evidence and/or proof of the truth of their registration and issue a special verification and/or screening paper to only Kenyans of Somali ethnic community, and that the said order is unlawful and void abinitio as it is inconsistent with the provisions of the Registration of Persons Act (Cap. 107 Laws of Kenya) and/or ultra vires the same from which Act it purportedly derives its legitimacy as a subsidiary legislation made thereunder pursuant to the Provisions of the said Act.

(d) A declaration that any action by any government authority and/or body pursuant to the order contained in Gazette Notice No.5320 dated 7/11/1989 issued by the Principal Registrar of Persons and published in the Kenya Gazette of 10/11/1989 is unconstitutional.

(e) A declaration that the decision of the Principal Registrar of Persons refusing to issue the Petitioner herein to wit; Hassan Osman Ali with the “new generational identity card” on the ground that he was declared non-Kenyan by Yussuf Haji task force is illegal and unlawful in that the task force was constituted on a non-existent legal authority to perform an illegal, unlawful and unconstitutional task of verifying the truth of the Registration of Kenyans of Somali ethnic Community ONLY and to issue verification and/or screening papers which amounts to discrimination and/or segregation on the basis of ethnicity and the same offends and/or is ultra vires Section 82 of the old Constitution, and Article 27 of the current Constitution.

(f) A declaration that the Petitioner herein is a Kenyan citizen and that he cannot be declared a non-citizen by Yussuf Haji task force which in any case was illegally constituted on the “authority” of an illegal and unconstitutional order of any other task force as there is no legal provision in law to that effect.

(g) A mandatory order compelling the 1st and 2nd Respondents to issue the Petitioner with a national identity card within fourteen (14) days.

(h) A mandatory order screening and/or vetting of Kenyan Nationals based on ethnicity is unconstitutional.

(i) A permanent injunctive order restraining all the Respondents from arresting and/or preferring any criminal charges against the petitioner in so far as Section 320 of the Penal Code and Section 13(2) of the Immigration Act are concerned.

(j) General, punitive and exemplary damages for continuous breach of the Petitioner's fundamental rights and freedoms.

(k) Such further orders as the Honourable Court may deem fair and just”

Petitioner's Case

3. The Petitioner in his Affidavit sworn on 2/11/2012 has stated that he is a citizen of Kenya having been issued with Identity Card Number 5778998 on 15/3/1984. A copy of that card is exhibited as “HOA-1” and it indicates that the Petitioner was born in Kakamega Township in Kakamega Municipality in 1949.

4. According to him, he held the said Identity Card until sometime in 1996 when he embarked on attempts at replacing it with what is popularly known as “*the new generation Identity Card*”. From 1996 up to 2007 and despite many visits to the District Registrar of Persons offices at Busia, Nairobi and Kakamega, he was never issued with a replacement of the “*old generation identity card*”.

5. That on 1/12/2007, he lost a bag containing his clothes and the “*old generation identity card*” and he reported the loss to the Busia Police Station where a Police Abstract was issued as evidence of loss thereof. He thereafter attempted to apply for a duplicate copy but it was only 21/7/2011 after many unsuccessful attempts at getting one, that he was informed that, by a letter dated 18/10/1991 from one Mohammed Yussuf Haji, then Provincial Commissioner, Rift Valley Province, he had been declared a non-Kenyan Somali by a Task Force headed by the said Haji and that his application for a new identity card had thus been rejected. He was then arrested and charged with attempting to procure false registration by false pretence contrary to **Section 320** of the **Penal Code** and also being unlawfully present in Kenya contrary to **Section 13(2)** of the **Immigration Act, Cap.172, Laws of Kenya**. At the conclusion of his trial (**Criminal Case No.1013/2011 at the Chief Magistrate's Court in Nairobi**), he was found guilty and the following sentence was meted out;

“(i) A fine of Kshs.25,000/- in each Count and in default 12 months' imprisonment per Count.

(ii) That he should regularise his stay in the Republic within 30 days subject to the Minister's acceptance” (sic)

(iii) Right of Appeal explained.”

6. He never filed an appeal against the conviction but it is now his case that the trial magistrate (Hon. Ngenye, Principal Magistrate) in convicting him relied heavily on **Gazettee Notice No.5320 of 1989** which read thus;

“IN ACCORDANCE with Section 8 of the Registration of Persons Act, the Principal Registrar of Persons requires all persons of the Somali ethnic community resident in Kenya who are eighteen (18) years and above to attend before registration officers at the centres specified in the second columns of the schedule and furnish such documentary and other evidence of the truth of their registration between 13/11/1989 and 4/12/1989”

7. It is his further case that the said Gazette Notice is unconstitutional and offends **Section 82** of the **Repealed Constitution** (non-discrimination provision) and **Article 27** of the **Constitution, 2010** (non-discrimination provision).

8. Further, that the Task Force headed by Mohamed Yussuf Haji was also unconstitutional for acting in a manner that was wholly discriminatory of Kenyans of the Somali ethnic group and its findings were ultimately therefore a nullity in law.

9. Other alleged violations of the Constitution cited by the Petitioner are;

“(1) To the extent that the 1st and 2nd Respondents have refused to issue the replacement of the Petitioner's identity card the following provisions of the Constitution have been breached;

(a) Articles 73, 75, 10 and 232 on Principles of governance and conduct of state officers.

(b) Article 27 on equality before the Law and non-discrimination on the basis of Ethnicity.

(c) Article 47 on the right to fair administrative action that is expeditious and lawful.

(d) Article 28 on right to have dignity and have that dignity respected and protected.

(e) Article 39 on right to freedom of movement.

(2) To the extent that the 1st and 2nd Respondents failed to communicate reasons for non-replacement of the Petitioner's national identity card for more than sixteen (16) years the following provisions of the Constitution were violated;

(a) Article 47 on the right to fair administrative action that is lawful and expeditious.

(b) Article 28 on right to dignity.

(c) Article 27 on equality.

(d) Articles 73, 75, 10 and 232 on principles of governance and leadership

(3) To the extent that the Petitioner was only informed of the reasons for non-replacement of his National identity card on the 21/7/2011 and simultaneously arrested and charged by the 2nd Respondent and its officers the following provisions of the Constitution were violated;

(a) Articles 73, 10, 75 and 232 on principles of governance and leadership.

(b) Article 47 on right to fair administrative action.

(c) Article 28 on right to dignity.

(d) Article 48 on right of access to justice.

(4) To the extent that the basis of the decision not to issue the replacement of the Petitioner's national identity card by the 1st and 2nd Respondent is based on Gazette Notice No.5220 dated 7/11/1989 and letter dated 18/10/1991 from the former provisional Commissioner Rift Valley the following provisions of the Constitutions have been violated;

(a) Sections 3, 74 and 82 of the old and repealed Kenyan Constitution that was in force prior from 27/8/2010, and which was in force at that time.

(b) Article 27 of the current Constitution on right to equality and freedom from discrimination particularly on the basis of ethnicity.

(c) Article 47 on right to fair administrative action.

(d) Article 2, 3, 10, 75, 73 and 232 of the Constitution.

(e) Article 12 on the rights of citizen and citizenship.

10. All the above violations are also argued to be continuous and the Petitioner seeks orders elsewhere set out above.

Respondents' Case

11. I have perused the record herein and although all the Respondents were served, no response by way of an Affidavit or Grounds in Opposition to the Petition as is required by **Rule 15 of Legal Notice No.117 of 28/6/2013** was ever filed by any of them. The 4th and 5th Respondents however filed written Submission on 22/11/2012 and the arguments made in them are that;

(i) The Petitioner has failed to spell out with precision and elaborately, what of his rights has been violated and a mere setting out of the Articles of the Constitution without substantiation cannot suffice.

(ii) That the Petitioner was properly arrested on suspicion of having committed an offence and in so doing the 4th and 5th Respondents were executing their mandates under the Constitution and did not in any way breach the Petitioner's constitutional rights. Once he was convicted of the offences for which he had been charged, the 4th and 5th Respondents' duty had been executed and no fault can be attributed to them in doing so.

That for the above reasons, they pray that the Petition should be dismissed.

Determination

12. I have taken into account the Submissions by the advocate for the Petitioner and I deem it fit to dispose of one issues that was raised by learned Prosecution Counsel in her Submissions which issue was framed thus;

“What is the import of the Petitioner's prosecution, conviction and sentence for the twin offences relating to the identity card that he claims was lawfully obtained before he lost it?”

13. There is no doubt that the Petitioner was arrested, charged and convicted of offences relating to his attempts at getting a Kenyan Identity Card. The Petitioner and his advocate, with respect, failed to note that although he was given the opportunity to appeal that conviction and sentence, I see no evidence that he did so and so the decision of the Court is still standing.

14. In that regard, **Section 47A** of the **Evidence Act** provides as follows;

“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”

15. The above **Section** is titled “*proof of guilt*” and applying it to the Petitioner's case, it means that he is guilty of the following offences;

(a) *Attempting to procure registration by false pretences contrary to Section 320 of the Penal Code*

and

(b) *Being unlawfully in Kenya contrary to Section 13(2) of the Immigration Act, Cap172 Laws of Kenya.*

16. Both offences would indicate that the Petitioner was not a citizen of Kenya and was not entitled to such citizenship except by processes known to law. In addition, he attempted to procure registration by false pretences and the evidence in that regard was given at the criminal trial by PW1, Abraham Kamau, a finger print officer at the National Registration Bureau. In his evidence, he stated as follows;

“The original records in relation to the Applicant couldn't be traced in the Finger Prints Bureau and archives. On further scrutiny to ascertain why the records were missing I noted that the quoted identity card number being 5778998 was amongst identity cards prohibited in 1989 after it was discovered that their holders weren't Kenyans”

This evidence is still on record and without the conviction in **CM's Court Criminal Case No.1013/20122** being overturned by a higher Court, the facts are against the Petitioner and they cannot be contested and in that case, he ought to have heeded the trial Court's advise and “*regularise his stay in the Republic [of Kenya]*” or appeal against his conviction and thence clear his name of criminal culpability.

17. The above findings would have disposed of the Petition but there is the other issue to address; whether **Gazette Notice No.5320** dated 7/11/1989 was unconstitutional by fact of discrimination against

members of the Somali ethnic group. I should begin by noting that by letter dated 18/10/1991, Mr. M.Y. Haji, Provincial Commissioner, Rift Valley Province wrote to W.F.N. Kiarie, Registrar of Persons and author of the Gazette Notice aforesaid and stated as follows;

“Mr. W. F. N. Kiarie

Registrar of Persons

P.O. Box 57007

NAIROBI.

DE-REGISTRATION AND CANCELLATION OF IDENTITY CARDS OF CONFIRMED ALIENS

Enclosed, find a list of persons who were netted and confirmed as Non-Kenyans in screening centres during the special Task Force operation. They were consequently charged and deported from the Country.

With the current Somali refugee crisis, most of them might have found their way back into the County as refugees, and might even try to obtain back their identity cards by reporting their loss to unsuspecting Registration officials.

Since these were confirmed as Non-Kenyans who had obtained Kenyan identity cards illegally, I would appreciate if you could note and de-register them accordingly. All the identity cards are well secured for transfer to you when you deem it necessary.

(M. Y. HAJI)

PROVINCIAL COMMISSIONER

RIFT VALLEY PROVINCE”

18. In that letter, exhibit “HOA-4”, a list is attached indicating persons confirmed as Non-Kenyans and No.22 is one “*Hassan Osman Ali ID No.5778998*” All the details refer to the present Petitioner and going by the contents of that letter (*which was produced by the Petitioner*), it follows that he was deported after the screening exercise because his Kenyan identity card had been unlawfully obtained and had been taken away during the screening exercise. *Is it a coincidence that Haji was warning that the holders of the illegal identity cards which had been repossessed would later claim that their identity cards had been stolen so that they could obtain new ones just like the Petitioner later did leading to his arrest, conviction and sentence?*

19. The Petitioner has also sought Orders that “*the Yussuf Haji Task Force*” be declared unconstitutional. I have combed the record in this matter and I do not see that such a body exists. Reference is made in the letter of 18/10/1991 of a special Task Force but its membership, legal status and mandate are unclear to me and I will say nothing more about it.

20. The other matter raised by the Petitioner is in regard to **Gazette Notice No.5320 of 7/11/1989** which I have also reproduced above. It is argued that it is discriminatory of the members of the Somali ethnic group and should be so declared. What I have on the record and relating to the Gazette Notice, is information that it existed and was the basis upon which the Petitioner was found criminally culpable. I have addressed the latter aspect of the issue elsewhere above. As to whether it is discriminatory of the Somali ethnic group at a *prima facie* level that is not in doubt. It is addressed to “*all persons of the Somali ethnic Community resident in Kenya who are over eighteen (18) years*” and they were required to “*furnish such documentary or other evidence of the truth of their registration*” as citizens of Kenya. To that extent therefore an element of discrimination can be discerned but in the Petition before me, the

only evidence I have of the exercise is as relates to the fact that through it, the Petitioner was found to be a non-Kenyan who had obtained registration unlawfully and was subsequently convicted of criminal offences related to that fact. *Where then is the justiciable issue around **Gazette Notice No5320?*** The exercise happened in 1989 and the Petitioner completely failed to show that he participated in it and that he was unlawfully discriminated against. In fact in the Petition, there is a huge gap between the time the Petitioner acquired his identity card and when he was arrested. It is not enough to allege that there is a violation of fundamental rights when no particulars thereof are given. It is also not enough to merely quote **Article 27** (on non-discrimination), refer to an event and say that discrimination has been proved.

21. This Court recalls the anger of the Somali Ethnic Community in 1989 when the “*Pink Card*” was issued to them alone but the present Petition is, sadly, the wrong vehicle to address the alleged injustices committed then. The Petition is filed by a convicted person whose crimes were unearthed during the exercise and I am not able to find sufficient material to interrogate the exercise and perhaps in other proceedings, the issue will be better canvassed.

22. Lastly, it is obvious that I see no merit in the Petition before me but before I make final orders, I should only say this; the Petitioner has made a spirited case that he is a Kenyan citizen who has been unlawfully declared a Non-Kenyan. I expected more than he gave this Court; if he was born in Kakamega in 1949, surely, there must be some record of that fact. If he was born in 1949, why did he only obtain his identity card in 1984 when in fact most “*old generation identity cards*” were obtained in 1979 or thereabouts. *If he was born in Kakamega where is the record of his initial application made in Kakamega for an identity card and why are his finger prints missing from the Finger Prints Bureau?*

23. I have seen a letter dated 5th December of an unclear year. It is written by the Assistant Chief, Busia Township and in it he states that the Petitioner “*hails from 48-Estate, Mauko “B” Village, Township Sub- location, Township Location of Busia District*”. This information does not tally with that contained in the suspect identity card which indicates that he hails from “*Township Sub-Location, Municipality Location, Kakamega District*”.

24. All the above anomalies only raised doubts as to the Petitioner's claim that he is a Kenyan entitled to citizenship by birth.

25. If any advice is needed, let the Petitioner, as advised by Hon. Ngenye, Principal Magistrate, “*regularise his stay in Kenya*”, otherwise he will remain legally a Non-Kenyan convicted of being in Kenya unlawfully.

26. It is obvious that I see no merit in the Petition and the same is dismissed with no order as to costs.

27. Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF MARCH, 2014

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court Clerk

Miss Kiget for 4th and 5th Respondents

Mr. Mohamed for Petitioner

Mr. Maimbo for 1st, 2nd and 3rd Respondents

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE