



IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL REVISION NO.6 OF 2014

BIVAMUNDA ERICKAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. Bivamunda Erick, a Burundi National, was on 28th July 2014 convicted by the Chief Magistrate sitting at Busia on the offence of Being Unlawfully present in Kenya contrary to Section 53 (1) (j) of The Kenya Citizenship and Immigration Act (Act No.12 of 2011 Laws of Kenya) Upon that conviction, the Learned Magistrate ordered that he be immediately repatriated to Burundi.
2. This Court was requested by Onsongo Advocate through a letter of 31st July 2014 to exercise its Revisionary power Under Section 362 of The Criminal Procedure Code and to set aside both the conviction and order for Repatriation. The Advocate based his request on the following reasons:
 1. The Accused was a Burundian National and should not be repatriated back to his volatile country.
 2. The Accused person was an asylum seeker and is a refugee and falls under the meaning of a refugee as envisaged under section 3 of the Refugee Act No. 13 of 2006.
 3. The Accused person was precluded from facing the charge under the Kenyan Citizenship and Immigration Act (Act No. 12 of 2011 Laws of Kenya) by Section 13 (a) of the Refugee Act.

In his oral argument before me, he re-agitated those grounds.

3. When the State Counsel Mr Obiri addressed Court in reply, he conceded that the plea was equivocal and that the conviction should be set aside.
4. The concession by the State is no doubt well made. Although the Applicant had pleaded guilty to the charge, he made the following remarks when invited to mitigate.

“I went there myself, I come to be as a refugee. I come on Saturday.” (sic)

What the Applicant was saying was that he was an asylum seeker and was therefore not unlawfully present in the country. He was setting up a defence to the offence he faced. At that point, the Learned Magistrate ought to have set aside the plea of guilt and substituted it with one of not guilty. For this reason, I do hereby reverse the conviction entered by the Learned Magistrate and set it aside.

- 5) What was not agreed between Counsel is the order that should follow upon the reversal of the conviction. Mr Onsongo asked the Court to order that the Applicant be released to the United Nations High Commissioner for Refugees (UNHCR) for his application for Refugee status to be

processed. Mr Obiri was of a contrary view. He urged this Court to remit the matter back to the Subordinate Court for Retrial.

5. Section 13 of The Refugees Act (Chapter 173 Laws of Kenya) makes the following important provisions,

Notwithstanding the provisions of the Immigration Act (Cap 172) or the Aliens Restriction Act (Cap. 173), no proceedings shall be instituted against any person or any member of his family in respect of his unlawful presence within 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 right of appeal under that section; or

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

6. A Refugee is defined in Section 3 of The Act as follows:-

“(1) A person shall be a statutory refugee for the purposes of this Act if such person-

(a) owing to a well-founded fear of being persecuted for reasons of race, religion, sex, nationality, membership of a particular social group or political opinion is outside the country of his nationality and unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or

(b) not having a nationality and being outside the country of his former habitual residence, is unable or, owing to a well-founded fear of being persecuted for any of the aforesaid reasons unwilling, to return to it.

(2) A person shall be a *prima facie* refugee for purposes of this Act if such person owing to external aggression, occupation, foreign domination or events seriously disturbing public order in any part or whole of his country of origin or nationality is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

(3) If the Minister considers that any class of persons are *prima facie* refugees as defined in subsection (2), the Minister may declare such class of persons to be *prima facie* refugees and may at any time amend or revoke such declaration.

(4) If the Minister under subsection (3) expressly excludes or exempts any person from a declaration that a class of persons to which that person is a member are refugees, such exclusion or exemption shall not preclude the person concerned from applying under subsection (2) for recognition of their status as a refugee.”

7. Mr Onsongo asks me to find that the Applicant is a Refugee and is therefore precluded from Prosecution under the provision of Section 13. But I have a difficulty in accepting that argument. I have looked at the entire Lower Court record and there is no evidence that the Applicant is that person envisaged in Section 3. It may not be enough for the Applicant to merely say “I come to be as a refugee (sic).” That is not sufficient to bring him within the ambit of Section 3. And at the hearing of the Revision no evidence was placed before Court suggesting that he was indeed a refugee as contemplated by the Statute.
8. So could the Applicant be exempted from Prosecution because he has made a *bona fide* application under Section 11 for recognition as a refugee? Put another way, is the Applicant a *bona fide* asylum seeker? Section 11(1) of The Act is relevant and provides:-

“Any person who has entered Kenya whether lawfully or otherwise and wishes to remain within Kenya as a refugee in terms of this Act shall make his intentions known by appearing in person before the Commissioner immediately upon his entry or, in any case, within thirty days after his entry into Kenya.”

Under those provisions a person seeking recognition as a refugee must make his intention known by appearing in person before the Commissioner for Refugee Affairs immediately upon his entry into the country or before the expiry of 30 days.

9. The words of the Applicant in mitigation need to be recalled,

“I was there myself. I come to be as a refugee. I come on Saturday.” (sic)

The Applicant does not state that he has made a *bona fide* application to be recognized as a refugee as contemplated by Section 11(1). Secondly, while he says “I come on Saturday” (sic), he neither says on which Saturday he entered Kenya nor does he state the specific date of entry. So there is no knowing, with certainty, whether he is within the window of 30 days permitted by Section 11(1).

10. It seems clear to me that some inquiry (not a full hearing) must be made so that the Court can satisfy itself that Applicant is either a refugee or has made a *bona fide* application for recognition as a refugee. The proper place for that inquiry would be at the Trial Court. This Court will give the Applicant an opportunity to marshal and place the relevant information before the said Court.

11. For this reason I do hereby remit **Busia Criminal Case No.1793 of 2014 Republic –vs- Bivamunda Erick** back to the Subordinate Court to enable that Court, upon inquiry, to determine whether the Applicant is deserving of the protection afforded by Section 13 of The Refugees Act. The matter shall be dealt with by a Magistrate other than the Learned Magistrate who entered the conviction.

F. TUIYOTT

J U D G E

DATED, DELIVERED AND SIGNED AT BUSIA THIS 8TH DAY OF OCTOBER 2014.

IN THE PRESENCE OF:

KADENYICOURT CLERK

.....FOR APPLICANT

.....FOR STATE