

Federal Court



Cour fédérale

**Date: 20230213**

**Docket: IMM-1361-22**

**Citation: 2023 FC 201**

**Toronto, Ontario, February 13, 2023**

**PRESENT: The Honourable Madam Justice Furlanetto**

**BETWEEN:**

**DAVID WOKABI NENE**

**Applicant**

**And**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of a January 18, 2022 decision [Decision] of the Refugee Appeal Division [RAD] affirming the decision of the Refugee Protection Division [RPD] and determining that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The determinative issue was credibility.

[2] As set out further below, it is my view that the application should be allowed as the RAD took an unreasonable approach to the affidavit evidence submitted by the Applicant and his education documents.

I. Background

[3] The Applicant, David Wokabi Nene, is a citizen of Kenya who claims a fear of persecution and risk of harm from the Mungiki criminal gang on the basis of his work as a pastor.

[4] In January 2017, the Applicant allegedly received death threats from the Mungiki saying they would kill him if he did not stop preaching against them. In July 2017, the Applicant relocated to Muranga. He claims that in December 2017, he was attacked by a group of armed Mungiki; however, he was able to escape and sustained only minor injuries, although the Mungiki allegedly set fire to the church van the Applicant was using.

[5] In April 2018, ten Mungiki allegedly came to where the Applicant was staying in Nanyuki and beat him. He was taken to hospital by his neighbours. The Applicant says he reported the attack to the Nanyuki police, but did not believe that they would help him.

[6] The Applicant fled Kenya for Canada. On December 24, 2020, Mungiki members allegedly forced their way into the Applicant's family home where they had relocated. The men searched the house for the Applicant and attacked the Applicant's wife and children.

[7] On August 16, 2021, the RPD refused the Applicant's claim for refugee protection. The RPD had credibility concerns regarding the Applicant's profile as an ordained pastor due to inconsistencies regarding his stated religious denomination, his educational background, religious training, and his supporting affidavit evidence. The RPD also raised credibility concerns regarding the alleged death threats and attacks.

[8] On January 18, 2022, the RAD dismissed the Applicant's appeal. While the RAD found the RPD had erred in some of its credibility findings, it maintained that the errors were not fatal to the decision. The RAD agreed with the RPD regarding the inconsistencies in the Applicant's educational background and the concerns with the affidavits submitted. The RAD also found that the Applicant's claims regarding his attacks were not credible and found his failure to take precautionary measures to be inconsistent with what would have been expected from someone who feared for his life.

## II. Issues and Standard of Review

[9] The sole issue on this application is whether the RAD committed reviewable errors in its credibility findings.

[10] The parties assert and I agree that the standard of review is reasonableness. None of the situations that would rebut the presumption that all administrative decisions are reviewable on a standard of reasonableness are present in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at paras 16-17.

[11] A reasonable decision is “based on an internally coherent and rational chain of analysis” and is “justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision will be reasonable if when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

### III. Analysis

[12] The Applicant raises a number of concerns with the RAD’s handling of the evidence. In my view, the RAD erred in its approach to the Applicant’s educational background and the affidavit evidence submitted, which was critical to the RAD’s finding of whether the Applicant was a pastor. As the Applicant asserts being targeted because of his work as a pastor, in my view the determination of whether he was a pastor is central to the claim. As such, I find these errors determinative of this application.

[13] As noted by the RAD, sworn testimony is presumed to be true unless there are reasons to doubt its truthfulness: *Maldonado v Canada (Minister of Employment and Immigration)* (1979), [1980] 2 FC 302, [1979] FCJ No 248 (FCA) (QL). Such reasons may include contradictions, inconsistencies, omissions, and implausible information.

[14] A failure to produce corroborating documents cannot support a finding that an applicant lacks credibility without having regard to the evidence about why such evidence is not available: *Mohideen Osman v Canada (Citizenship and Immigration)*, 2008 FC 921 at para 37.

[15] The RAD made an adverse credibility finding against the Applicant on the basis that he provided inconsistent and insufficient evidence as to his educational background. The RAD concluded that the Applicant had therefore not presented credible evidence that he was a pastor.

[16] In making its credibility finding, the RAD relied on the Generic Application Form completed by the Immigration Officer at the port of entry, which stated that the highest level of education completed by the Applicant was high school, as compared to the Schedule A form completed by the Applicant, which indicated that he had completed a degree at Mt Kenya University. The RAD noted that the Applicant's disclosure included a certificate from Kiambu Bible College, but did not include the university diploma, and the Bible college certificate was not mentioned in either the Generic Form or Schedule A.

[17] The Applicant asserts that there is no inconsistency in the Applicant's evidence as it was the Immigration Officer and not the Applicant that completed the Generic Application Form. The Applicant stated that he no longer had a copy of his diploma from Mt Kenya University as it was kept in the church van, which was burned during the 2017 Mungiki attack. He stated that he did not seek to obtain another copy as he was fearing for his life and once he arrived in Canada he did not do so, as it required personal attendance at the institution. He further testified that the Bible college certificate was not listed in his Schedule A because it was only part-time studies directed at making him a better pastor.

[18] In the Decision, the RAD refers to the Applicant's evidence as being inconsistent, but does not consider that the Applicant was not the person that completed the Generic Application

Form or the Applicant's explanation as to the Officer's error. The reasons instead focus on the RAD's finding that it was not plausible that the Applicant would have only had one copy of his university diploma or that he would not have taken any steps after the alleged 2017 attack to obtain another copy of this document.

[19] While the RAD is entitled to make reasonable findings based on plausibility, which are grounded in common sense and rationality, I agree with the Applicant that implausibility findings based on speculation are not acceptable: *Chen v Canada (Citizenship and Immigration)*, 2012 FC 510 at para 48. Implausibility findings should only be made in the clearest of cases and must be sensitive to the realities of a claimant's cultural context: *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7.

[20] In the Decision, the RAD did not find it plausible that the Applicant would only have one copy of his diploma from Mt Kenya University or that he would not have taken steps to try to produce a copy to establish his refugee claim, because he indicated he had kept a copy of the document with him while he was preaching to young men who were recruited to the Mungiki. The RAD inferred from this that the Applicant felt he had to prove his education with a formal document and would have taken some steps to replace the diploma if it had been burned in the fire.

[21] The problem I have with the RAD's analysis is that the first premise lacks foundation and in the remainder of the analysis the RAD does not fully engage with the Applicant's explanation.

Rather, the focus of the RAD's analysis is on the steps the RAD presumes that the Applicant should have taken.

[22] The Applicant explained in testimony that it was hard for him to take any steps after the fire as he could not move freely because of his fear for his life. Once he was out of the country, he believed he could not obtain the document because he would have to appear in person and provide identification. The RAD does not engage with the Applicant's circumstances or with the veracity of his evidence. In my view, it was unreasonable for the RAD to make an implausibility finding without considering this full context.

[23] Further, I find that the RAD erred by not considering the content of the statutory declarations submitted in support of the claim because the declarations contained irregularities and did not comply with all of the formal requirements under Item 9.2 of the National Documentation Package for Kenya. The evidence included two sworn declarations from the Applicant's wife; one from the Applicant's cousin; and one from a pastor who had worked with the Applicant while he was in in Nanyuki.

[24] I do not find the irregularities on these documents to be so extreme as to justify the RAD giving these documents no substantive review in its analysis.

[25] In particular, the RAD asserts that the second declaration from the Applicant's wife should be given no weight because it does not contain a national identity number on its face, although a national identity card including the national identity number of the declarant was

attached. The RAD raises the same issue with the sworn declaration of Pastor Peter Kamau Kariuki, additionally highlighting that the notary stamp on the declaration includes a space for the date, but includes the notary's initials instead.

[26] Likewise, the RAD failed to consider the substance of the first declaration from the Applicant's wife on the basis that her declaration was not sworn properly as it was sent to her by mail and was admittedly not signed in the presence of the notary as she was asserted to be in hiding. I agree with the Applicant, the substance of the evidence should have nonetheless been considered even if it was ultimately afforded less weight and treated as an unsworn document.

[27] Similarly, the RAD's failure to engage with the explanation given by the Applicant as to the inconsistency between the formal name on the identification card and the name that appears on his cousin's declaration was, in my view, unreasonable. The RAD's explanation that the Applicant did not submit any specific arguments against this observation does not relieve it from considering the Applicant's testimony on this issue, especially where the credibility of the affidavit evidence remained in issue.

[28] While the RAD went on to consider the impact of the second declaration from the Applicant's wife on its credibility findings as to whether the Applicant was a pastor, it did not do this for the other declarations submitted. Rather, it concluded only that this sole document was insufficient on its own to overcome the credibility concerns on the record regarding the Applicant's profile as a pastor. In my view, this does not indicate a consistent chain of analysis.



[29] First, it employs circular reasoning in that the RAD's earlier finding on the Applicant's education documents appears to have influenced the RAD's view of the credibility of the declarations, even though the earlier finding included that the Applicant had provided insufficient evidence to establish that he was a pastor. Second, it failed to consider the evidence as a whole, all of which was directed at the Applicant's alleged profile as a pastor.

[30] The RAD refers to the updated country evidence, which states that fraudulent and false affidavits are fairly common in Kenya, although not prevalent. The RAD states that this indicates it is possible to access fraudulent affidavits, although it concludes that the irregularities in the documents are what caused it to doubt their credibility and give them no weight.

[31] However, the RAD in effect treats the declarations as if they are not genuine. It does not engage with the Applicant's testimony on the documents nor does it make any assessment on the content of the declarations.

[32] In my view, the RAD provides insufficient justification for the credibility findings on these documents and as such, I find that the Decision is also unreasonable because of this.

[33] For all of these reasons, the application will be allowed.

[34] None of the parties raised a question for certification and I agree that none arises in this case.

**JUDGMENT IN IMM-1361-22**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed, the decision set aside, and the matter is referred back for redetermination by a different member of the Refugee Appeal Division.
2. No question of general importance is certified.

"Angela Furlanetto"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1361-22

**STYLE OF CAUSE:** DAVID WOKABI NENE v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

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**DATED:** FEBRUARY 13, 2023

**APPEARANCES:**

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