Juma v Republic (Criminal Revision E165 of 2022)
[2022] KEHC 15755 (KLR) (28 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15755 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL REVISION E165 OF 2022

DO OGEMBO, J

NOVEMBER 28, 2022

BETWEEN

ABDULRAHMAN IMRAAN JUMA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The applicant/Appellant, Abdurahman Imran Juma, has moved this court by a Notice of Motion Application dated 29.9.2022 and filed on 30.9.2022. The application is brought under section 356 and 357 of the *Criminal Procedure Code* and articles 165, 159, 50 and 48 of *the Constitution* of Kenya. The substantive prayer that was argued before this court was prayer 3, that;

> "THAT this Honourable court be pleased to issue orders staying and or suspending the orders of the learned Chief Magistrate Wendy K. Micheni, issued on 25.9.2022 in Miscellaneous Criminal Application No. E4167 of 2021, pending the full hearing and determination of the instant appeal or pending the further orders of this court."

2. The application is supported by an affidavit of the advocate for the applicant, WandungiK. Karathe, sworn on 29.9.2021.

3. The application was opposed by the Respondent. Learned counsel Mr. Wandungi and professor PLO Lumumba appeared for the applicant, while learned prosecuting counsel Mr. Vincent Monda, assisted by Ms. Njoni Kihara and Ms. Nduati, appeared for the Respondent.

4. Mr. Wandungi argued that the appeal filed by the applicant is arguable and has high chances of success, and that it is only fair that the appellant is accorded the opportunity to be heard on appeal. That the appellant was arraigned on an extradition case in which the state persuaded the court that they would dispose of the same by way of written submissions. That the protests of the appellant/applicant were

in vain. That the defence had informed the court of their wish to cross-examine the witness, a plea that was not granted. That the court proceeded to direct that the applicant be extradited to stand trial in the United States of America.

5. Counsel submitted on the applicants right of appeal. He relied on *DPP Versus Okemo and 4 others*, Petition No. 14 of 2020. He also cited the case of *Tanga Mudeke Versus Republic* Criminal Appeal No. 94/1994, in which the Court of Appeal dealt with the issue of right of appeal and held that there is even a right to second appeal. And that in the Okemo case, the court held that extradition proceedings are criminal in nature and that there is a right of appeal.

6. It was further submitted that section 7 of the *Extradition Act*, provides that the magistrate would have the same powers as that in any other case, so that even a fugitive ought to be tried as any other case and with a right of appeal. On the issue of habeas corpus, it was submitted that since the applicant was produced in court, the applicant could not come for orders of habeas corpus.

7. Counsel further submitted that should the orders be executed, the applicant would be extradited and the appeal filed would be rendered nugatory.

8. Counsel for the applicant further relied on the case of *Ian Gakoi Maina and others Versus Republic and Another* (2020)eKLR, in which the Court of Appeal held that its jurisdiction is derived at Rule 5 of its rules and that the applicant must show that the intended appeal is arguable, and that a refusal to grant the orders would occasion hardship. It was submitted that the applicant is not a fugitive criminal.

9. It was further submitted that section 7 of cap 76 demands for trial as any other trial and that the submissions made before the lower court deprived the applicant the right to cross examine. Counsel relied on the Okemo case where the Supreme Court sent back the case to the lower court for a hearing. That proceedings by way of written submissions violated section 7 of the Act as well as article 50 on the right to fair trial and that the applicant is entitled to a right of appeal upto the highest court.

10. It was also submitted that the schedule to the Act (cap 76) shows extraditable offences, but that money laundering is not one of them. And that in this case, there is no extradition request contrary to section 5 of the Act. Counsel summed up that the applicant ought to be given the chance of pursue his appeal.

11. It was the same submissions that were buttressed by Prof. Lumumba in the additional submissions for the applicant.

12. Mr. Monda, lead counsel for the Respondent, opposed this application. He submitted that the applicant is not an accused person, but a fugitive under cap 76, and so, cannot enjoy the provisions of section 357 of the *Criminal Procedure Code.* that he has not undergone a trial or been sentenced. That the Chief Magistrate was competent to deal with the proceedings, and that under the Act, they can only come to court by way of habeas corpus and not an appeal.

13. Counsel relied on the case of *Torroha Mohamed Torroha Versus Republic* (1989)eKLR, that the degree to which the magistrate court is to be satisfied cannot be expected to be as of a trial. That the magistrate is under no duty to inquire as to the charges. Further, that in the case of *Patrick Ayisi Versus Republic* (2018)eKLR, the Court of Appeal held that the magistrate should peruse the entire and understand it and that the degree is not to be as high as the evidence adduced at a trial. That the magistrate does not try any issue because there is no hearing. That in fact the magistrate followed Section 7 of the Act and never infringed on any right of the fugitive and it was in fact a favour that the court allowed for submissions.

14. Counsel went on that there is an extradition treaty between Kenya and the USA signed on 22.12.193, legal notice No. 31 of 1961. And that article 2(5)(6) of *the constitution* states that International Law

shall form part of the Laws of Kenya. And that Kenya has also ratified other treaties including the United Nations convention on Transnational and organized crimes, which at articles 6, criminalizes money laundering or laundering of proceeds of crimes.

15. Further reliance was placed on the case of *Gunter Grochowski Versus A-G* (2009)eKLR, a case of extradition and the issue of harbeas corpus and in which the court held that the convention can be used as a legal basis for extradition and that the orders of the chief magistrate were found to be proper. That in any case, the offences are listed at the schedule.

16. Counsel also submitted that this application is not proper since it ought to have been by way of habeas corpus in accordance with section 9 of the Act. That this application is incompetent as jurisdiction was not complied with and ought to be struck out.

17. Counsel further went to that even in the Tanga Mudeke case cited by the applicant, the court declined to order a stay as the court. Opined that the applicant stood to suffer no prejudice. That according to the Respondent, a formal request was made through the diplomatic channel and endorsement by a magistrate was done as per section 12(2) of the Act. That even the Court of Appeal decisions do not require the taking of evidence and so the magistrate was right in issuing the orders.

18. In distinguishing the Okemo case, counsel submitted that the issue therein was who between the DPP and A-G should sign the authority to proceed before the chief magistrate's court and that there was no order of extradition. And that though it was held therein that they are criminal proceedings, the court did not go into what constitutes a hearing, making the Court of Appeal cases of Taroha Versus Republic and Patrick Ayisi Versus Republic, standing out on the issue of section 7 of the Act.

19. Further, that Tanga Mudeke case only dealt with the issue of jurisdiction, which is not in dispute in this case. And that the Timothy Isaac Bryant and Another Versus Registered Trustees of Kenya and other (Criminal Application No. NAI 3 of 2014 dealt with the issue of revision of appeal and not habeas corpus as in this case. Same as the case of Ian Gakoi Maina and others Versus Republic (2020)eKLR.

20. The court was urged to find this application incompetent and to struck the same out.

21. I have considered the above submissions by both sides. I have also carefully considered the ruling of the Honourable Chief Magistrate the applicant as aggrieved of the affidavits filed by the parties herein and the authorities filed and submitted on by the 2 sides.

22. The order of the Honourable chief magistrate, which the applicant is aggrieve of and which is issued on 23.9.2022 reads;

> " I do allow the application by the state and order that the Respondent/fugitive Abdulraman Imran Juma aka Abdul aka Rahman, to be repatriated from the Republic of Kenya to the United States of America to face trial on the charges indicted on."

23. The applicant has filed an appeal against the above order. The applicant, has in the meantime filed this application. At paragraph 3 of this application, the applicant seeks orders staying and or suspending the orders of the Honourable chief magistrate as hereinabove shown. The grounds on which this application is based and which counsel for the applicant has explicitly submitted on are contained in paragraph 13 of the affidavit in support of this application, specifically that;

    a. The court allowed the application for extradition through a process which violated the express Provisions of the Extradition Act Cap 76.

b. The subordinate court allowed the DPP to prosecute the matter by way of submissions in utter disregard of the operative law Under Cap 76 and the Criminal Procedure Code.

c. That the subordinate court fragrantly deprived the applicant of his rights for a fair trial.

d. That the proceedings by way of submissions if in contravention of the stipulations in the Criminal Procedure Code and the Extradition Act was oppressive and had a direct consequence of rendering the trial a complete sham a travesty of Justice and ultimately resulted in horrendous miscarriage of Justice which result mitigates against the interest of Justice as well as public policy.

e. That the extradition bundle lacked the "request" which is basic prerequisite without which extradition proceedings cannot lawfully lie.

24. The applicant has submitted that these issues show that the appeal filed is arguable and that the applicant deserved an order staying the orders of the Honourable Chief Magistrate pending the hearing and determination of the appeal filed. It is the same grounds that the respondent has opposed in its own submissions. For purposes of this application, I shall therefore take the same as the issues for determination herein.

25. First, it is worth noting that the applicant was presented before the chief magistrate's court under the provisions of the *Extradition (Contiguous and Foreign Countries) Act*, Chapter 76 Laws of Kenya. There is therefore no doubt that these are extradition proceedings which ought to be conducted in accordance with the provisions of the said Act.

26. In answering on the above issues, I must commend learned counsel for both parties for the extensive and apt research that they put into this matter. The authorities cited and presented to court were of immense help to the court in deciding the merits of this application and so whether the orders sought by the applicant can rightly issue. The applicant side relied on the following decisions of the superior courts.

i. Timothy Isaac Bryant and 2 others Inspector General of Police and 7 others (COA Criminal Application No. NAI 3 of 2014. That in this case, the Court of Appeal held:

> "A motion to stay execution of an order of a court under Rule 5(2)(b) aforesaid generally involves the weighing of two well known consideration, namely whether the intended appeal is arguable and whether the rejection of the application for stay would render the appeal or intended appeal nugatory."
>
> In the same case, the court relied on the authority of Stanley Kangethe Kinyanjui Versus Tony Ketter and 5 others, (COA) Civil Application No. 31 of 2012, that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the court, and also that whether or not an appeal will be rendered nugatory is a question of fact which must depend on the peculiar facts and circumstances of each case.

ii. Ian Gakoi Maina & 3 others Versus Republic and Another (2020)eKLR, also a decision of the Court of Appeal, in which the court re-affirming the finding in Reliance Bank Limited Versus Norlake Investments Limited (2002) EA 222, allowed for stay on the basis that failure to grant

the same would cause hardships and suffering that would be out of proportion as the party waited for the appeal to be heard and determined.

iii. *DPP Versus Chrysantus Barnabas Okemo and 4 others* (2021) KESG 13(KLB), a decision of the Supreme Court of Kenya. This was a case involving extradition proceedings just like our present case. In a majority decision, the Supreme Court made the following relevant findings amongst others.

a. That a reading of Article 157 of *the constitution*, the relevant extradition treaties and other applicable laws left no doubt that extradition proceedings were criminal in nature.

The court affirmed that it was the Director of Public Prosecutions, and not the Attorney General correctly mandated to initiate such extradition proceedings.

b. That the powers to prosecute any conduct of a criminal nature were exclusive preserve of the Director of public prosecutions.

c. That extradition proceedings were quasi criminal in nature, having elements of both criminal and administrative law. That one hand, they commenced as Foreign policy issues including the execution of International treaties and bilateral agreements between governments and on the other hand, they concluded as criminal processes.

iv. *Tanga Mudeke Versus Republic* (COA) Criminal Appeal No. 94 of 1994, a case of the Court of Appeal, also revolving around extradition proceedings. In this case, the Court of Appeal held that the Senior Principal Magistrate had no jurisdiction to issue the orders aggrieved of. And relying on the Court of Appeal decision in *Torroha Mohamed Torroha Versus Republic*, Criminal Application No. NAI 5 of 1988, there is a right and jurisdiction to hear even a 2nd appeal.

27. The Respondent, on the other hand based its submissions and relied on the following decisions.

28.

i. P*atrick Ayisi Ingoi Versus Republic* (2018)eKLR, a decision of the Court of Appeal, also a case involving extradition proceedings and which is largely similar in facts to our present case. Salient in the decision relevant to our case include the following findings:

a. That the case was similar to the Toroha case and that part III of Cap 76 was applicable

b. That the fundamental issue for consideration in this matter of extradition was whether a prima facie link had been made between the Respondent and the criminal act alleged in order to warrant extradition.

c. Giving direction on the jurisdiction of the magistrate and relying on the Tohora case, the court held

"Before exercising his discretion, to order the the return of the prisoner, the magistrate should peruse the entire evidence and understand it, without taking the position of the trial court. So, the

> degree to which the magistrate has to be satisfied is not expected to be as high as if any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial. The magistrate is under no duty to inquire into the merits of the charges to be preferred. The magistrate does not try or attempt to try any issue because there is no hearing (Kinga Versus Republic (1975)EA 155. If there is some evidence which disclose a connecting factor between the prisoner and the alleged offences the magistrate should order the prisoner to be returned."

In the case, the Court of Appeal dismissed the appeal on the basis that prima facie evidence had been laid showing the link between the appellant and the alleged offence. The basis had been laid to prove that the appellant would not get a fair trial in the court in the Republic of Tanzania.

ii. *Gunter Grochowski Versus A-G and Another* (2009)eKLR, an application for habeas corpus before the High Court. An application for extradition had been made under Cap 76. The court also considered the position of International conventions and treaties to which Kenya is party on the issue of extradition it held:

> " What I understand it to mean is that if Kenya makes extradition conditional to the existence of a treaty as espoused in the dualist doctrine, and if Kenya receives a request for extradition from another party like Belgium, with which it has no extradition treaty, it may consider this convention as the legal basis for extradition in respect of any offence under this Article.

29. The court went on to hold that since the convention can be used as a legal basis for extradition where there is no extradition treaty, the chief magistrate was right in ordering extradition. The application was accordingly dismissed.

30. The respondent also relied on the case of *DPP Versus Chrysanthus Barnabas Okemo and 4 others* and the Torroha Mohamed Torroha Versus Republic (1989)eKLR, same as Applicant, and which have already been considered above.

31. From the submissions made by the parties this court discern at least one issue raised by the Respondent and which has not been denied by the applicant side. That Kenya and the United States of America have signed and Extradition Treaty, the same signed on 22.12.1931. Counsel further submitted on article 2(5) and 6 of *the constitution*, that:

> " The general rules of International law shall form part of the Law of Kenya,"

And

> " Any treaty or convention ratified by Kenya shall form part of the Law of Kenya under this constitution."

32. The Respondent showed that Kenya has ratified the *United Nations Transnational Organized Crime Convention (UNTOC) i*n 2004, a treaty that enlists money laundering as an extraditable offence. With this ratification and the above constitutional provisions in Articles 2(5) and (6), this court as convinced that the matter placed before the Honourable Chief Magistrate, and now before the court a

matter properly before the court as extradition proceedings of the *Extradition (Contiguous and Foreign countries) Act*, Chapter 76 Laws of Kenya.

33. I have perused the same statute in detail. The schedule at the back of the same clearly lists, "Any offence that constitutes an offence of money laundering under the proceeds of Crime and Ant-Money laundering Act, No. 9 of 2009, are listed amongst the offences that may be subject of extradition orders. This essentially goes against the submissions of the applicant that offences related to money – laundering are not among the offences listed at the schedule to the Act.

34. The 2 conflicting sides to this application based their submissions on the procedure of conduct of extradition proceedings on basically 2 authorities. The applicant's submissions were based on the Okemo case that extradition proceedings are criminal in nature and the Honourable chief magistrate ought to have conducted this matter in the normal manner of criminal proceedings. Indeed the Okemo case was a decision of the Supreme Court. I have closely considered the decision. The issue before the Supreme Court and on which the court made a determination was who between the offices of the Honourable the Attorney General and that of the Director of Public Prosecutions had the mandate under the 2010 constitution to institute extradition proceedings. The Supreme Court in disappointment expressed itself.

> " is indeed a matter of concern to this court that a case as fundamental, revolving around a critical constitutional question, as this one, has been stuck in our justice system for over 10 years for it to be resolved."

35. The Supreme Court duly resolved the constitutional issue and referred back the matter to the magistrate's court to accordingly deal. In the decision of the Supreme Court, the court other than holding that extradition proceedings are quasi criminal in nature, having elements of both criminal and administrative law, the court really did not delve into directing on exactly how such proceedings may be conducted. This decision therefore does not address the issue at hand in this matter i.e whether the Honourable chief magistrate conducted the extradition proceedings as required by law.

36. The Respondent on the other hand, relied on the case *Patrick Ayisi Ingoi Versus Republic* (2019)eKLR, a decision of the Court of Appeal, which in many respects, adopted the findings in the similar case of Torroha Mohamed Torroha Versus Republic (1989)eKLR, also a decision of the Court of Appeal. I have carefully considered this decision and I agree with counsel for the Respondent that whereas the Okemo case also was in respect of proceedings of extradition under cap 76, the Supreme Court therein gave directions mainly on the issues of jurisdiction between the Attorney General and the Director of Public Prosecution on which of the 2 constitutional offices is mandated under *the constitution* to institute such extradition proceedings. And that whereas, the Supreme Court held amongst other findings, that extradition proceedings are quasi criminal in nature, no directions were given by the court on how the proceedings themselves would be conducted.

37. The Ayisi case, on the other hand, though a decision of the court of Appeal, gives an insight on how extradition proceedings before the Chief Magistrate's Court ought to be conducted. That the fundamental issue for consideration in a matter of extradition is whether a prima facie case has been made between the Respondent and the alleged criminal act. That the trial magistrate should peruse the entire evidence and understand it, without taking the position of a trial court. That the degree to which the magistrate has to be satisfied is not expected to be as high as it any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial, and is under no duty to inquire into the merits of the charges to be preferred. That the magistrate does not try or attempt to try any issue because there is no hearing. And that is there is some evidence which discloses a connecting factor between the prisoner and the alleged offences, the magistrate should order the prisoner to be returned.

38. This is a decision of the court of Appeal. The same binds this court. And in the absence of any decision of the supreme court overrunning or overturning the above decision of the court of Appeal, it is safe, as I hereby fund, that the decision in the Ayisi case remains the proper and sound legal position regarding extradition proceedings under cap 76 Laws of Kenya.

39. There is no doubt that Kenya has signed an extradition treaty with the united states of America. There is also no doubt that the united states of America has a well functioning legal system with rights of appeals (see the Torahha case shown above). And from the annextures attacked to the Affidavit in support of the application, a formal request has been made to the Republic of Kenya by the united states of America. The offences expected to be preferred against the subjects have also been attached and disclosed. At count 2, the offence is one of conspiracy to commit money laundering, an offence well captured in the schedule of offences under Cap 76 Laws of Kenya.

40. Further, the Republic of Kenya has signed and ratified the *United Nations Transnational Organized Crime Convention (UNTOC),* since 2004, a convention which declares money laundering as an extratable offence. And by dint of Article 2(5) and 6 of *the constitution* of Kenya,

> " the general rules of international law shall form part of the law of Kenya and'
>
> "Any treaty or convention ratified by Kenya shall form part of the law of Kenya, under this constitution."

41. There is therefore no doubt on whether or not the offences intended to be preferred against the subject/ applicant are extraditable offences.

42. I have considered the aggrieved decision of the learned chief magistrate. In the same, the learned chief, considering the same submissions and authorities as were made before this court, made specific findings. Kenya amongst many other findings therein were:

    i. That the mandate of the magistrate during the extradition hearing was to ascertain merely that a prima facie link existed between the Respondents and the criminal incident, full ascertainment of the linkage belonged belonged to the arena of trial, which would result in the conviction or acquittal (See Republic Versus Wilfred Onyango Nganyi).

    ii. That considering the extent of evidence presented, the court is satisfied that the same meets the threshold contemplated (see Torohha Mohamed Torahha) that the degree to which a magistrate is satisfied does not need to be high and that the magistrate has no duty to enquire into the merits of the case as there is no hearing at the extradition proceedings (Patrick Ayisi Versus Republic).

    iii. That the conduct for which the Respondent is accused are crimes punishable by law both in the United States of America and in the Republic of Kenya, and are extradition offences.

    iv. That under Cap 76, at the schedule, among the listed extradition crimes is any offence that constitutes an offence of money laundering under the *proceeds of crime and Anti-money Laundering Act*, No. 9 of 2009 are listed,

    v. That the United Nations Convention Against TransNational Organized Crimes are part of laws of Kenya by dint of Articles 2(5) of *the Constitution* of Kenya.

vi. That no evidence has been presented before court to show that the accused shall not be accorded a fair trial. And that it is expected that the United States of America, being a democratic state will accord the fugitive a fair trial in this case and that he shall not be discriminated based on his race, religion or colour.

43. The court therein went on to order extradition (repatriation) of the applicant from the Republic of Kenya to the United States of America, to face trial on the charges indicated on.

44. I have considered the above findings of the Honourable Chief Magistrate and I am convinced that they are in line with the written law (cap 76) and *the constitution* of Republic of Kenya. The findings are also in tandem with the decisions and directions of the superior courts on the subject of extradition.

45. From the foregoing, this court is not convinced that the applicant has any arguable appeal with any chanced of success. Neither is this court persuaded that an order of stay is meritorious as urged by the applicant. This court further not convinced that the appeal of the applicant would be rendered nugatory should an order of stay of the orders issued by the lower court on 23.9.2022 not issue.

46. I accordingly find the application of the applicant dated 29.9.2022 lacking in any merit. I dismiss the same wholly. Each party shall bear own costs of this application. Orders accordingly.

D. O. OGEMBO

JUDGE

28TH NOVEMBER 2022

COURT:

47. Ruling read out in open court in presence of the applicant, Mr. Wandungi (Also holding brief for Prof. PLO Lumumba) for the applicant, and Mr. Monda and Mr. Kihara for the state/respondent.

D. O. OGEMBO

JUDGE

28TH NOVEMBER 2022

Mr. Wandungi:

48. Based on the Torohha case on right of 2nd appeal, we apply for copies of ruling and conservatory orders of the ruling for 20 days so that we may move the Court of Appeal.

Mr. Monda:

49. We also need to be supplied. We oppose conservatory orders. No notice of Appeal has been filed. Under rule 5(2)(b) they can move the Court of Appeal. Cap 76 does not envisage stay to the Court of Appeal. This court is now funitus officio under Cap 76.

Mr. Wandungi:

50. We both relied on the Torohha case which declares even 2nd appeal. I would be in the interest of Justice to grant the same.

Court:

51. I have considered the oral applicants made by counsel for the applicant. I order as follows:

i. Certified copies of the proceedings and ruling to be prepared and supplied to the parties immediately.

ii. In view of the weighty nature of this matter (extradition). I issue a conservatory order over the orders issued above (dismissing the application of the applicant) for a period of 20 days from today's date to enable the applicant file the intended appeal/application at the court of appeal.

52 It is so ordered.

MONDA:

We pray he be held at Gigiri police station.

COURT:

Applicant to be held at Gigiri police station as prayed.