



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL REVISION NO. 754 OF 2018

REPUBLIC.....APPLICANT/PROSECUTOR

VERSUS

JOSEPH WANJOHI alias MUTHIE.....1ST RESPONDENT/ACCUSED

JANE WAMBUI WANJIRU.....2ND RESPONDENT/ACCUSED

RULING

This Notice of Motion was brought under certificate of urgency. It is anchored under Article 165 (6) and (7) of the Constitution, Section 362 of the Criminal Procedure Code and all other enabling provisions of the law. It seeks to set aside or revise the orders of the lower court (Hon. L. O. Onyina, SPM) in JKIA Criminal Case No. 90 of 2018 delivered on 23rd July 2018 and stay pending hearing and determination of this application and any other orders this court may deem fit to grant. It is not specified what is sought to be stayed by it was explained in court verbally by Ms Sigei for the Applicant after the court asked for a clarification that it is the proceedings in the lower court in Criminal Case No. 90 of 2018 that are sought to be stayed.

The application is supported by the grounds found on the face of the Notice of Motion and on the supporting affidavit sworn by Ms Sigei. Further grounds in support of the application are contained in the supplementary affidavit sworn by Ms Sigei which was placed on record on 9th August 2018 with the leave of the court. The gist of the grounds in support of the application is that the respondents who are the accused persons in Criminal Case No. 90 of 2018 at Jomo Kenyatta International Airport, were arrested on 12th July 2018 and after a search was conducted in their residence four (4) pieces of elephant tusks, assorted alcoholic drinks, cash Kshs 469,000, motor vehicle KCD 299H and mobile phones were recovered; that the accused persons were charged with being in possession of wildlife trophy contrary to Section 95 of the Wildlife Conservation and Management Act, 2013 on 13th July 2018. They denied committing this offence. They were released on Kshs 500,000 bond with one surety each. It is stated that investigations is being undertaken by a multi-agency team and is yet to be completed because the elephant tusks are yet to be forensically examined; the source of the assorted drinks and whether they are fit for human consumption is yet to be ascertained and the mobile phones are yet to be forensically examined. It was further stated that the respondents are currently being investigated for several offences including trafficking in narcotics, money laundering, proceeds of crime and engaging in organized crime.

Ms Sigei in the affidavit in support of this application further advanced the grounds that there are other suspects associated with the respondents who are yet to be arrested and that the offence facing the respondents is a serious one with stiff penalty if found guilty and all these factors are likely to motivate the respondents to abscond and/or interfere with investigations and witnesses. She further contended that the respondents had been charged with trafficking in narcotics in Kibera Chief Magistrate's Court Criminal Case No. 4704 of 2009 whose outcome has not been ascertained because the court file cannot be traced. Ms Sigei told the court that the activities of the respondents pose national insecurity and asked the court to take judicial notice that poaching of wildlife, a national treasure, leads to losses in the economy. I

guess she meant to demonstrate that wildlife is the mainstay of the economy in terms of tourism.

Ms Sigei deposed in her affidavit that the trial court was aware of all the facts of this case after the affidavit of K.W.S No. 7511 Ibrahim K. Athman was presented to the court but the court went ahead and admitted the respondents to bail in the terms now being contested.

In her oral submissions, Ms Sigei told the court that the right to bail is not absolute and can be denied upon presentation of compelling reasons. She submitted that the bond terms given to the respondents are lenient. She urged the court to grant the prayers sought in the application under consideration.

The application is opposed. Mr. Kang'ahi and Mr. Wandugi on behalf of the respondents. I have considered their respective submissions in opposing this application. They are challenging the application as being bad in law for citing Section 362 of the Criminal Procedure Code and seeking orders to set aside and stay the orders of the lower court. Both counsels have submitted that an applicant cannot come to court under Section 362 of the Criminal Procedure Code and seek these orders when that section is specific on the orders to be sought under it. Both counsels have submitted that this court has not been told what is incorrect, illegal or inappropriate in the decision of the lower court. Both counsels have submitted that the application for bail before the lower court was pegged on similar grounds as the ones being canvassed in this application; that the lower court considered all the issues in respect of the application for bond/bail, found no compelling reasons and admitted the respondents to bail. It was submitted that the Kibera Chief Magistrate's Court Criminal Case No. 4704 of 2009 did not relate to similar charge as the one currently facing the respondents; that the respondents were granted bail in the Kibera matter and that they were acquitted after that matter was determined. I was not presented with evidence controverting this information that the respondents were acquitted in the Kibera case. It was submitted that orders granting bail/bond are discretionary and in reviewing such orders this court must be satisfied that that discretion of the lower court in granting those orders was not exercised judiciously.

This court was referred to ACE MISC. APPLICATION NO. 12 OF 2018 as consolidated with six others, ***Rogers Nzioka and 10 others v. Republic*** where bail was granted. In that case the prosecution was opposing the application for release of the accused persons to bail/bond citing various grounds in opposition including seriousness of the offence and the stiff penalty, interference with witnesses, character and antecedents of the accused persons, threat to national security etc. The court found that the prosecution had failed to establish compelling reasons to warrant denial of bail/bond.

This court was also referred to ***High Court Criminal Application no 461 of 2009***. The respondents in that application had approached the High Court seeking admission to bail pending the hearing and determination of Kibera ***Chief Magistrate's Court Criminal Case No. 4704 of 2009*** mentioned above in this ruling. The High Court, (L. Njagi, J) allowed the application and admitted the respondents, accused in that case, to bail/bond.

I have considered this matter. I need not belabour the point that all offences are currentlyailable under Kenya's legal regime. Both the Constitution of Kenya 2010 in Article 49 (1) (h) and the Criminal Procedure Code under Sections 123, 123A, and 124 are clear that anyone charged with any offence can be granted bail unless there are compelling reasons and after the court has taken into account of all the relevant circumstances. I have noted that the respondents first appeared before the trial court on 13th July 2018. They were facing the charge of being in possession of wildlife trophy, being pieces of elephant tusks with the street value of Kshs 1,400,000. After the plea was taken the trial court admitted them to bail of Kshs 500,000 with one surety of the same amount each. This charge was amended to show that the tusks were valued less at Kshs 700,000. At this time the time the amended charge was presented in court the prosecution objected to the release on bail/bond of the respondents. The trial court, after taking submissions on the issue, made a ruling and rendered a decision on 23rd July 2018. This is the impugned decision. I have had time to read the ruling of the trial court. The ruling in my view is well reasoned. The trial court took into account the issues before it and found no compelling reason had been advanced to persuade the court to deny the respondents bail.

The applicant invokes the provisions of Article 165 (6) and (7) of the Constitution. These provisions give the High Court supervisory powers over the subordinate courts. This provision is not disputed by the respondents. The applicant also invokes Section 362 of the Criminal Procedure Code. This section provides that:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

The plain reading of this provision is clear that what the High Court is required to do in any application where this provision is invoked is to consider and satisfy itself as to the correctness, legality and propriety of any finding, sentence or order of the subordinate court. A strict application of this provision in my view is that it limits the High Court to determining the whether the orders or decision of the trial court in question complies with the requirements of Section 362 of the Criminal Procedure Code. In strictly applying this provision to the application before me, it is clear to me what my mandate is in respect of the matter under consideration. I have read and read the trial court proceedings, generally from the time the respondents appeared before it on 13th July 2018 on what is being referred to as holding charges and specifically after the charge was amended to indicate less value for the elephant tusks. I must admit that I find nothing illegal, incorrect or improper in the impugned decision. The trial court considered the issues brought before it and made a finding that there were no compelling reasons to deny bail to the respondents. In my view the trial court exercised its discretion judiciously.

I have gone further to considered the matter before to ensure justice is done. I note that the accused persons had at one time in 2009 been charged in Kibera Chief Magistrate's Court with trafficking in narcotics. Ms Sigei told the court that after writing to Kibera Court for information on the outcome of that case, they were not able to get the information sought because the file could not be traced. Mr. Wandugi informed the court that both he and Mr. Kang'ahi appeared for the respondents in that matter and to their knowledge the two were acquitted. This court is not able to confirm this information. Be that as it may, it is my considered view that the accused persons are facing a different charge from the one they faced in Kibera. Further even if the charge was similar, this court must determine this matter on its own peculiar circumstances. I have noted that in the Kibera case, the two respondents were admitted to bail. I have no information that they breached any term and condition of bail in that matter.

I have considered that the submission that the police are still investigating the two respondents and may prefer other charges. I have also considered submissions that investigation in this matter is complex and involves multi-agencies. In my view it would be prejudicial to the respondents if courts were to deny accused persons bond because the police may prefer other charges that are yet to be investigated. What is under consideration is bail in the current charge which isailable under the law. Any further action that the police may take against the respondents in future shall be handled in accordance with the law at that time in future.

I have noted that this matter was handled by Hon. Lady Justice Ngenye. Before the judge was a request by the prosecution to stay the proceedings in JKIA Criminal Case No. 90 of 2018 citing seriousness of the offence. The High Court considered the matter and noted that the same reasons given to the High Court had been brought to the attention of the lower court which considered the same before granting bail. However the High Court enhanced the bail terms by ordering that should the respondents raise bond before this matter was heard and determined, they should report to the Investigating Officer on 1/8/2018. They were also ordered to deposit their passports, if any, with the trial court and should not leave the jurisdiction of the court without express permission of the trial magistrate.

I am alive that the respondents are facing a serious offence with stiff penalty. I take judicial notice and appreciate that the wildlife of this country is her mainstay due to revenue generated through tourism and also as a natural beauty and inheritance that this country should treasure and protect. However, the accused persons enjoy certain rights given to them by the law one of which is the right to be presumed innocent until the contrary is proved (see Article 50 (2) (a) of the Constitution). This right is one of those that cannot be limited under Article 25 (c) of the Constitution.

With the above reasoning, it is my considered view that the applicant has not satisfied this court that the orders sought should be revised, set aside or stayed. I will not interfere with the orders of the trial court or those of the High Court as shown in this ruling. The respondents, if still in custody, shall execute their bonds as ordered by the trial magistrate and additionally by the High Court. The effect of this order is that I decline to grant the orders sought in the Notice of Motion dated 23rd July 2018. Orders shall issue accordingly.

Dated and signed by Hon. Lady Justice S. N. Mutuku this 10th day of August 2018.

S. N. MUTUKU

JUDGE

Delivered on 13th August 2018 by:

Hon. Mr. Justice John Onyiego

Judge