



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC.CRIMINAL APPLICATION NO.2 OF 2016**

**IN THE MATTER OF AN APPLICATION UNDER ARTICLE 165(3)(B) & (7) OF THE**  
**CONSTITUTION OF KENYA 2010 AND SECTION 364 OF THE CRIMINAL PROCEDURE**  
**CODE**

**IN THE MATTER OF SECTION 10 OF THE JUDICATURE ACT CAP. & THE HIGH COURT**  
**(PRACTICE AND PROCEDURE), VACATION RULES, PART I RULE 3**

SIMINDEI NAURORI .....1<sup>ST</sup> APPLICANT

KILANGASH TOPOSAT.....2<sup>ND</sup> APPLICANT

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicants, Simindei Naurori and Kilangash Toposat were charged with an offence under **Section 77(2)** as read with **Section 92** of the **Wildlife Conservation and Management Act, 2013**. They were charged with poisoning endangered species of wildlife. The particulars of the offence were that on 6<sup>th</sup> December 2015 at Musiera area within Masaai Mara National Reserve in Narok County, the Applicants, jointly with others not before court, poisoned eight (8) lions three (3) of which died. When they were arraigned before the trial magistrate's court at Narok, they pleaded not guilty to the charge. Although they had been released on bond of Kshs.2 million by the trial court, the prosecution had opposed their release on bail. The investigating officer, PC Charles Obade swore an affidavit in which he stated that the Applicants ought not to be released on bail pending trial because there was likelihood that they would interfere with witnesses, and secondly, in light of the serious nature of the charge facing the Applicants, he was of the opinion that it is in public interest that they be denied bond.

The prosecution was aggrieved by the decision of the trial court and has moved this court in a bid to have it exercise its revisionary jurisdiction under **Section 362** and **364** of the **Criminal Procedure Code** to revise the said decision of the trial court and make an appropriate decision denying the Applicants bail pending trial. In the affidavit in support of the application for revision, Gikui Gichuhi, a Principal Prosecution Counsel in the office of the Director of Public Prosecution, swore that the trial court did not properly apply its mind to the reasons that the prosecution put forward in opposing the release of the Applicants on bail pending trial. In particular, she stated that the Applicants were likely to interfere with the investigation. She further stated that there was high possibility that the Applicants will flee from the jurisdiction of the court. She urged the court to take into consideration the fact that the charge brought against the Applicants is of great public interest in view of the decreasing state of the endangered wildlife. She was of the view that the bond terms issued by the trial court was extremely lenient taking into consideration the nature of the charges facing the Applicants.

In response, the Applicants filed grounds in opposition to the application. Martine Ole Kamwaro, the Advocate of the Applicants swore a replying affidavit in further opposition to the application. The Applicants contend that they had a constitutional right to be released on bail pending trial unless there were compelling reasons for the court not to do so. In the present case, it was the Applicants' assertion that there were no compelling reasons why they should not be released on bail pending trial as ordered by the trial court. They were of the view that the reasons advanced by the prosecution in seeking to have the court deny them bail pending trial were not tenable. The Applicants stated that by the time the Applicants

took plea before the trial court, the presumption was that investigations were completed. It was therefore unlikely that the Applicants would interfere with the investigations or the witnesses. The prosecution did not give any evidence to support its contention that the Applicants are likely to be a flight risk and therefore capable of fleeing from the jurisdiction of the court. The Applicants stated that they were Kenyan citizens with fixed abode and had no intention to abscond from attending court. They were willing to abide by any terms that the court may impose to secure their attendance in court. It was for these reasons that the Applicants urged the court to disallow the prosecution's application and uphold the decision of the trial court to release them on bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Ms. Gichuhi for the State and by Mr. Ole Kamwaro and Mrs. Mungai on behalf of the Applicants. This court has carefully considered the said submission. Counsel essentially reiterated the contents of the application and the supporting affidavits. The issue for determination is whether the prosecution made a case for the court not to release the Applicants on bail pending trial. The **Constitution** under **Article 49(1)(h)** grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. The **Constitution** does not define what constitutes "**compelling reasons**". However, courts have rendered decisions that articulate what constitutes compelling reasons and include the following: *the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with witnesses, the need to protect the victim of crime and the accused person, the relationship between the accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives.* (See **ALHAJI MUJAHID DUKUBO-ASARIN Vs. FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006**). The court will consider these reasons based on the circumstances of each case and in the interest of justice.

In the present application, the prosecution urged this court to deny the Applicants bail in view of the nature of the charge facing them. It is the prosecution's contention that the Applicants have been charged with a serious offence of poisoning endangered wildlife which is a heritage of this country. This court hears the prosecution to be saying that public interest demanded that the Applicants remain in remand because there was likelihood that they would interfere with witnesses or flee from the jurisdiction of the court. On their part, the Applicants denied that they would interfere with witnesses or be a flight risk. They promised to abide by the terms that will be imposed by the court in order to secure their release on bail pending trial.

Having carefully considered the arguments made in this application, the court takes the following view of the matter: as it is, the law presumes the Applicants to be innocent until proven guilty in a court of law. Whereas the prosecution has a case when it contends that in view of the serious nature of the charge facing the Applicants (i.e. if convicted, the Applicants may be sentenced to serve life imprisonment), for this court to deny the Applicants bail pending trial, the prosecution is supposed to establish compelling reasons. Other than allegations, no concrete evidence has been placed before this court to support the assertion by the prosecution that the Applicants were more likely to interfere with investigations or witnesses or flee from the jurisdiction of the court. From the affidavit sworn by the investigating officer and the one sworn in support of the application before this court, this court discerned that the prosecution was literally shooting in the dark in the hope that of the many alleged compelling reasons that they have put forward, one would stick. Courts have held in many cases that sufficient compelling evidence must be placed before the court for the court to deny an accused person his constitutional right to be granted bail pending trial. In the present application, this court is of the view that the prosecution did not place any compelling reason before the court for the court to deny the Applicants bail pending trial. The fact that the charge facing the Applicants is serious or that their case has attracted public interest, cannot constitute sufficient reason for this court to deny the Applicants bail pending trial.

In the premises therefore, this court finds no merit with the grounds put forward by the prosecution when urging this court to deny the Applicants bail pending trial. Those grounds do not constitute compelling reasons. The application is dismissed. The Applicants shall be released on bail pending trial on the same

terms proposed by the trial court. The order of staying of the order of the trial court earlier issued by this court is hereby set aside. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY 2016**

**L. KIMARU**

**JUDGE**