

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO.118 OF 2016

THOMAS MUHORO NGATIA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Thomas Muhoro Ngatia was charged with two (2) counts under the **Wildlife Conservation and Management Act, 2013**. In the 1st count, he was charged for being in possession of wildlife trophy contrary to **Section 95** of the **Act**. The particulars of the offence were that on 22nd March 2016 at Githurai Kimbo in Nairobi County, the Applicant was found in possession of 40 pieces of elephant tusks weighing 112 kilograms with a street value of Kshs.11,200,000/- without a permit. In the 2nd count, he was charged with dealing in wildlife trophy contrary to **Section 84(1)** as read with **Section 92** of the **Act**. The particulars of the offence were that on the same day and in the same place, the Applicant was found dealing with the particular wildlife trophies without a dealers' licence. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. A hearing date has been scheduled. Pending the hearing of the case, the Applicant applied to be released on bail pending trial. The prosecution was opposed to the Applicant being released on bail pending trial. The trial court upheld the objection raised by the prosecution.

The Applicant was aggrieved by that decision and has applied to this court to be released on bail pending trial. Mr. Nyamweya, learned counsel for the Applicant submitted that there was no reason why the Applicant was denied bail pending trial. He explained that the Applicant was person of fixed abode, is a Kenyan citizen and is not likely to abscond if released on bail pending trial. He reiterated that the prosecution had not established any convincing compelling reason to warrant the Applicant being denied bail pending trial. For added measure, he submitted that the Applicant was not possessed of a passport which would make him abscond from the jurisdiction of the court. The witnesses were police officers and therefore it was highly unlikely that the Applicant would interfere with witnesses. He urged the court to admit the Applicant to bail pending trial.

Ms. Atina for the State opposed the Applicant's application to be released on bail pending trial. She submitted that there were compelling reasons why the Applicant should not be released on bail pending trial. She relied on the affidavit sworn by Chief Inspector Charles Inoti the investigating officer in the case. In the affidavit, he deponed that the Applicant was a flight risk and was likely to abscond if he is released on bail pending trial. He explained that the Applicant was a person of no fixed abode because the house that he was arrested in was a place of temporary abode where the wildlife trophies were kept. He further deponed that the fact that the Applicant is likely to face a hefty fine and a long term in prison is likely to incentivize him to abscond if he is released on bail pending trial. He urged the court to take into account the public interest in the nature of the crime that the Applicant faces and the fact that the crimes involves an international criminal network which may assist the Applicant to abscond from the jurisdiction of the court. It is on that basis that the prosecution urged the court not to release the Applicant on bail pending trial.

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). In addition, the **Bail and Bond Policy** recently published by the National Council on Administration of Justice requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail.

In the present application, the compelling reasons that the prosecution advanced in opposition to the Applicant being released on bail pending trial is essentially that the Applicant is a flight risk. The prosecution is of the view that the Applicant, being a person of no fixed abode and facing a hefty fine or a long term in prison is likely to abscond if he is released on bail pending trial. The prosecution also asked the court to take into consideration the nature of the charges facing the Applicant which is of public interest and has an international criminal element to it. On the other hand, the Applicant has argued that he is a person of fixed abode and is unlikely to abscond if released on bail pending trial. He stated that he was not possessed of a passport and was unlikely to abscond from the jurisdiction of the court.

Having carefully considered the rival submission made in this application, this court forms the following view of the matter:

The concerns raised by the prosecution that the Applicant will likely abscond if released on bail pending trial because he is a person of no fixed abode is not supported by evidence. It was clear that the Applicant was arrested in a house in Githurai Kimbo where he lives with members of his family. While the prosecution’s apprehension is justified that the Applicant may likely abscond because of the punishment he would face in the event that he is convicted, this court is of the view that the concern will be addressed by this court granting appropriate conditions of bail. In the circumstance of this application, this court is not convinced that the prosecution has placed before this court compelling reasons to deny the Applicant bail pending trial.

In the premises therefore, the Applicant is released on bail pending trial on the following conditions:

- I. He shall post a bond of Kshs.2 million with two sureties of the same amount.
- II. The Applicant shall be required to attend the trial court without fail on the dates scheduled for mention and hearing of his case.

It is so ordered

DATED AT NAIROBI THIS 18TH DAY OF MAY 2016

L. KIMARU

JUDGE