

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.135 OF 2016

REPUBLIC.....APPLICANT

VERSUS

WYCLIFFE NYAKWANA NYAMWEYA.....RESPONDENT

RULING

The Director of Public Prosecutions (DPP) was aggrieved by the decision of the trial court in **Kibera Chief Magistrate's Court Criminal Case No.2745 of 2016** delivered on 28th June 2016 whereby the court granted the Respondent cash bail of Kshs.150,000/-. The DPP considered this bail not to accord with the serious nature of the charge that the Respondent was facing, and further, the antecedents leading to the Respondent's arrest. The Respondent was charged with two offences under the **Wildlife Conservation and Management Act 2013**. The 1st Count is that he was **found in possession of wildlife trophies** contrary to **Section 95** of the **Act**. He was further charged with **dealing with wildlife trophies** contrary to **Section 84(1)** as read with **Section 92** of the **Act**. According to the DPP, these charges attract long custodial sentences in the event that the Respondent would be found guilty. The DPP submitted that there was high likelihood that the Respondent may be tempted to abscond if he is not granted stiff bond terms commensurate with the charges that he is facing. In fact, the DPP is of the view that the Applicant should not be released on bail pending trial because of the reasons stated above. The DPP therefore urged the court to set aside the order of the trial court granting the Respondent bail pending trial and substitute it with an appropriate order of this court.

In response, the Respondent swore a replying affidavit in opposition to the application. He denied the averment made by the DPP to the effect that he is or is likely to be a flight risk while out on bail pending trial. He deponed that the law presumes him innocent until proven guilty by the court. The allegations made by the DPP were meant to prejudice his trial and cause him to suffer miscarriage of justice. He stated that he had no reason to abscond from court because he was interested in having the trial concluded so that he could exonerate his name and return back to work. He urged the court not to be persuaded by the argument put forward by the DPP in a bid to deny him bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Ms. Gichohi for the DPP and by Ms. Kisoo for the Respondent. Counsel essentially reiterated the contents of the respective affidavits sworn in support and in opposition to the application. That the Respondent has the constitutional right to be released on bail pending trial is without doubt. Under **Article 49(1)(h)** of the **Constitution**, any person facing criminal charges before a court of law, is entitled, as a matter of right to be released on bail pending trial unless it is established that there are compelling reasons. The DPP argued that the charges facing the Respondent were of a serious nature and would, if the Respondent is convicted, attract a long sentence in prison. He further argues that the antecedents leading to the Respondent's arrest and subsequent arraignment in court were such that he was likely to abscond if he is released on bail pending trial. The antecedents referred to by the DPP relates to the circumstances of the Respondent's arrest. The investigating officer deponed that, upon receiving information from the Respondent's accomplice, they sought to have the Respondent arrested. However, the Respondent, on learning that he was being sought by the police took flight and went underground. It was after an extensive manhunt that the Respondent was arrested and later charged before court. In this regard, the DPP was of the view that the Respondent is likely to abscond if he stays released on bail pending trial.

The Respondent disputed this fact. He was of the view that there was no basis upon which this court would upset the decision of the trial court to release him on bail pending trial. There was no reason to doubt that he would attend court when required during trial. He urged the court to disallow the DPP's application.

In all cases where the court is called upon to exercise its discretion in regard to whether or not it should grant bail pending trial, the most important consideration is whether the accused will attend court during trial. This point was re-emphasized by the court in **Republic –Vs- Danson Mgunya & Another [2010] eKLR** when M.K. Ibrahim J (as he then was) held thus:

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”

From the foregoing decision, it is clear that the paramount consideration that the court must take into account in determining whether or not to release an accused person on bail pending trial is whether the accused will attend court if so released on bail pending trial. Whereas, the court may take into consideration other factors, such as the serious nature of the charges facing the accused, and antecedents of the accused's arrest and subsequent arraignment in court, such considerations will not overwhelm the primary and main consideration of ensuring that the accused person will attend court during trial.

In the present application, it was clear that the trial court properly exercised its discretion when it granted the Respondent bail pending trial. The DPP has a case when he states that the circumstances of the Respondent's arrest should inform the court in determining whether or not to release the Respondent on bail pending trial. However, once the Respondent was charged before court, the circumstances changed. When he was being sought for by the police, he was under no compulsion to present himself to the police. Since being charged before the trial court, the Respondent is under duty and compulsion to attend court at the risk of being remanded in custody pending his trial. The Respondent has done nothing to give justification to the court to deny him bail while he is awaiting trial. The serious nature of the charges facing him, cannot, *per se*, be an overriding reason for this court to take into consideration when the Respondent himself showed willingness to attend court during the hearing of this application before the High Court after the court directed him to do so.

This court finds no merit with the DPP's application as a result of which the application is hereby dismissed. The orders of the trial court regarding the bail that was granted to the Respondent shall remain in force pending trial unless the circumstances relating to the Respondent's attendance to court changes. It is so ordered.

DATED AT NAIROBI THIS 28TH DAY OF JULY 2016

L. KIMARU

JUDGE