



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISC CRIMINAL APPLICATION NO. 104 OF 2016

LEONE ALBERTO FULVIOAPPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONRESPONDENT

R U L I N G

By originating Notice of Motion dated 30th September, 2016 and brought under Article 10, 22,25,47,49 and 159 of the Constitution of Kenya, the applicant is seeking that;

1. pending the hearing and determination of the application interparties, the Respondents be restrained from moving the applicants from Mombasa to any other place;
- 2 that Respondents be ordered to release the applicant from their custody;

The application is founded on the following grounds;

- (1) that the applicant is a Kenyan citizen residing in Mombasa within the Republic of Kenya;
 - (2) that the applicant is an old man and quite sickly
3. that on 27th September, 2016 the applicant was admitted at Oasis Medical Centre where the respondents arrested him and is now under arrest threat;
 4. that the police have not given any reason or explanation as to why they want to arrest the applicant;
 5. that the law provides clearly that before a person is arrested, a full disclosure must be made as to why he is being arrested which is not the case herein.
 6. that the Respondents have infringed the law as they also took away the Applicants gun which is quite abnormal. That the applicant and his family are apprehensive that the respondent are up to no good.

These grounds are what has been deponed to by the Applicant's daughter, SAMANTHA DOMINIQUE LOEONE and confirmed by annexures "SDL-1, and "SDL-2"

In response, the respondents filed an affidavit sworn by No 23 3491 C.I. John Lelei an investigator attached to INTERPOROL NATIONAL CENTRAL BUREAU of the Directorate of Criminal Investigations Department, in which he deponed that;

(1) in the course of his duties at the Interpol Bureau, Nairobi, he had got information that one ALBERTO FULVIO was wanted in ITALY and a Red Notice had been published in the Interpol website,

(2) the Red Notice is under Control No A-559/1-2016 file No. 2009/9113 and was published on 29th January,2016.

(3) the fugitive was alleged to be residing in Mombasa, Kenya. (A copy of the original Red Notice is attached and marked “SL1”)

(4) he immediately commenced investigations into his whereabouts.

(5) from the documents it is clear;

(i) the applicant was convicted of complicity in Drug Trafficking contrary to Articles 81 – 110 of the Italian Penal Code and Article 71 of Italian special law 685/75;

(ii) on 17th May, 1983 he kept either to give or to sell to third persons 283.31 grams of drug of which 67.99 grams were pure heroin;

(iii) a sentence of 8 years, 9 months, 18 days imprisonment was imposed upon him,

(iv) the Respondent is subject of an international arrest warrant and has to undergo extradition procedure in Kenya formerly to be surrendered in Italy upon receipt of the necessary extradition request (see bundle of documents marked “SL 2”)

(v) the extradition request had not been received by the investigating officer as at the time of arrest, of the Applicant, so he requires time to enable him get the extradition request to file the same in court;

(vi) is prayer to this Honourable court is to be granted fourteen (14) days for the respondent to continue being detained at Mtwapa police station to facilitate investigations as they await formal extradition request;

(vii) it is not true that the applicant is being inhumanely held and it is confirmed that he was informed why he was under arrest at the time of his arrest;

7 the office has written to Interpol Italy indicating the applicant is under arrest (refer to annexure marked “JL 3”.)

8 the process of his naturalisation as a Kenyan citizen and the subsequent issuance of a national ID card No 28622187 is under active investigations to establish whether any crimes were committed in issuance of the same.

9 In the event that the applicant is released before the expiry of 14 days, he is likely to leave the jurisdiction and or interfere with investigations.

10 Since Kenya is a signatory to the treaty establishing Interpol, we are under a duty to ensure that the fugitive is surrendered to the requesting state in line with our treaty obligation.

Mr Gikandi, counsel for the applicant in arguing the application submitted that the applicant was arrested on 23.9.2016 and though admitted in a hospital for treatment, he is under the guard of the police.

He prayed that the applicant be released on bond as provided for under article 49 (1) (h) of the constitution unless there are compelling reasons to deny him this right.

He submitted that there was a contradiction in the documents marked by the respondent as annexure "SL2" No 25 and page 4, with regard to the period that the applicant is alleged to have been jailed in Italy. That this and the period it has taken to execute the warrants was evidence of realize by the Respondents.

Mr Gikandi also submitted that the applicant is a Kenyan with Kenya papers which he identified as a Kenyan ID card and a certificate of naturalisation as a citizen of Kenyan and is therefore entitled to the presumption of being innocent until proven guilty.

Mr Muteti on the other hand submitted that he was relying on what was deponed to the replying affidavit by CIP Lelei on 5.10.2016 together with the annexures relied "SLI-1" and "SL-2" entirely. He submitted that it has not been disputed that there is "a Red Notice" published by Interpol against the applicant dated 29.3.2009 and a republication on 29.1.2016. He also submitted that Kenya as a country has extradition arrangement with Italy as provided for at section 3 of Cap 77. The Extradition Common Wealth countries) Act and its therefore bound to surrender fugitives found on its soil in an effort to assist in the fight against the crimes that threaten the security and peace of the world.

Having listened to both counsel in their arguments in support of their cases, I have also appreciated what is depend in their respective affidavits, attached annextures, cited authorities and the law.

I find that it is not denied that the applicant was arrested on 23.9.2016 and is currently under the guard of police officers at Oasis Hospital at Mtwapa where he is admitted for treatment.

In consideration of the arguments by each party, I find that it would only be prudent to grant orders for the release of the applicant on bond/bail where he has been arraigned before court, for even in cases where one seeks for bail anticipating arrest or charge, they normally surrender themselves to court.

There is need to avoid the risk of defeating justice for either party, for I find each one of them have justified fears. For the applicant, there is the fear of his rights and fundamental freedom being infringed. For the Respondents, there is the fear of their extradition orders, being defeated.

I therefore direct that once the doctor has certified the applicant's recovery, he be escorted and submitted to court's jurisdiction for any or necessary orders. Since he is already under arrest by the police.

Ruling dated and signed this 11th day of October 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Mutua holding brief for Mr Muteti and Mr Makuto for Respondent

Mr Gikandi for Applicant – Present

C/clerk- Kiarie

