



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

PETITION NO. 1 OF 2014

TITUS KOOME KUBAI.....1ST PETITIONER

JULIUS KITHINJI MEEME.....2ND PETITIONER

**PAULO KOBIA (SUING THROUGH MOTHER AND NEXT FRIEND)3RD
PETITIONER**

VS

**DIRECTOR OF PUBLIC
PROSECUTIONSRESPONDENT**

RULING

Before me is the Notice of Motion dated 30.9.2014 in which the three applicants/petitioners seek the following orders:

- 1. That this court be pleased to have the petitioners released on the bond terms granted by the sub-ordinate court of Ksh.200,000/- each with one surety of a similar amount but allow that Mr. Stanley Ngiri be allowed to stand surety for all the other petitioners pending the hearing and determination of the petition herein.**
- 2. That the honourable court be pleased to have the petitioners released on the bond terms granted by the sub-ordinate court of Ksh.200,000/- each with one surety of a similar amount but allow that Mr. Stanley Ngiri be allowed to stand surety for all the other petitioners pending the hearing and determination of the petition herein.**

The application is based on grounds on the face of the application and the affidavits of Julius Kithinji Meeme, 2nd applicant Zipporah Ngiri the mother of the 3rd applicant and one Stanley Ngiri a proposed surety for all the applicants. The 2nd applicant deponed that they were first charged with the offence of assault in **Criminal Case No. 1440/2012**. The charge was later substituted with an offence of robbery with violence contrary section 296(2) on 4.6.2013. As a result, the Chief Magistrate (CM) enhanced their bond terms from 200,000/- each with a surety of like sum; that the accused are cousins and were not able to get different sureties save for their cousin, Stanley Ngiri who was ready and willing to stand surety for all of them; that is why they seek a review of the bond terms; that the prosecution failed to avail their witnesses on various occasions and on 5.2.2014 the CM denied the prosecution an adjournment and ordered the prosecution to proceed with their case; that the prosecutor then applied to withdraw the case under section 87(a) CPC which application the defence opposed for having been brought in bad faith; that the applicants were not released upon withdrawal of the case under section 87(a) CPC but the next day,

they were charged in **Criminal Case No. 1407/2014** thus infringing on their rights to a fair hearing. That is what propelled them to file this application seeking to stay the proceedings in **Criminal Case No. 1407/2014** pending the hearing of the petition for the reason that section 87(a) CPC contravenes Article 50(2) of the Constitution. Mr. Mbogo, Counsel for the applicants, urged that when the trial court decided to grant an adjournment, it did so under Article 48 of the Constitution which provides for expeditious trial, yet allowing an application to withdraw and re-arresting the applicants amounted to contravention of the same Article. Mr. Mungai learned Counsel for the State did not oppose the release of the minor (accused 3) to the next of kin but urged that the terms in respect of the 1st and 2nd applicants was fair and should remain.

As to the prayer for stay, Mr. Mungai submitted that at the time the court granted the application under section 87(a) of the CPC, the prosecution had not lost interest in the case and the trial court was well grounded in granting the order under section 87(a) CPC and that **Criminal Case No. 1407 of 2014** has been given a nearby date.

After the oral arguments the court allowed prayers 2 of the Notice of Motion whereby it was ordered that the 3rd applicant who was a minor be released to his parents who will ensure that he attends court as will be required of him; the court also allowed the 1st and 2nd applicants to have only one person stand surety for them as prayed. What is left for determination is the prayer for stay.

I have perused the proceedings in **Maua Criminal Case No. 1440/2012** in which the applicants had been charged on 14.5.2012. The charges were withdrawn on 5.2.2014 after a period of just below 2 years. The police re-arrested the applicants soon thereafter and have charged them afresh in Criminal Case No. 1407/2014. The issue that the applicants all want to be determined is whether the court was in breach of their rights under articles 2, 10, 47, 48 and 50 of the Constitution when an application under S. 87(a) CPC was allowed. The said section provides as follows:

87. In a trial before a subordinate court a public prosecutor may, with the consent of the court or on the instructions of the Attorney General, at any time before judgment is pronounced, withdraw from the prosecution of any person, and upon withdrawal -

(a) if it is made before the accused person is called upon to make his defence, he shall be discharged, but discharge of an accused person shall not operate as a bar to subsequent proceedings against him on account of the same facts;

The word used in the above section is “may”, meaning that the court has to exercise its discretion judicially under the said section without infringing the rights of any party to the proceedings.

The applicants have invoked Articles 2, 10, 47, 48 and 50 of the Constitution. While Article 10 provides for national values which bind all state organs and officers, no specific right is guaranteed thereunder. Article 47 guarantees the right to administrative action, expeditious and efficient disposal of cases; Article 48 guarantees right to access to justice for all. Article 49 guarantees rights of an arrested persons while, Article 50 guarantees the right to a fair hearing before an independent and impartial tribunal or body. The onus will be upon the applicants to demonstrate how their rights have been breached under the said provisions and that, if not granted a stay of the proceedings in **Criminal Case No. 1407/2014**, and then this petition will be rendered nugatory. The applicants must be given an opportunity to urge this petition before this court so that this court has an opportunity to consider the said allegation that is; whether or not the court exercised its discretion properly.

For the above reasons, I grant prayer 2 of the Notice of Motion and order that the proceedings in **Criminal Case No. 1407/2014** are hereby stayed, pending the hearing and determination of this petition.

The court also directs that this proceedings be expedited and direct the Respondent to file its reply to the petition within 14 days after which the petition will be set down for hearing.

DATED SIGNED AND DELIVERED THIS 20th DAY OF FEBRUARY, 2015.

R. P .V. WENDOH

JUDGE

Mr. Mulochi for State

Mr. Igweta holding brief for Mr. Mbogo for petitioners

C.C. Jane/Kirimi