



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC APPLICATION NO. 75 OF 2015

FEISAL MOHAMMED ALI alias FEISAL SHABAL... APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By a Notice of motion dated 28th August, 2015 and brought under the provisions of Article 21, 22, 25, 49(1)(h), 50 and 159 of the Constitution of Kenya and all other enabling provisions of law, the Applicant, Feisal Mohammed Ali Alias Feisal Shahbal, seeks to have this court review and/or revisit the court rulings made in Momabsa High Court Criminal Revision No. 81 of 2015, Mombasa High Court Misc. Criminal Application No. 39 of 2015 and Mombasa High Court Criminal Revision No. 116 of 2015 and hold that in light of the change of circumstances relating to the Applicant, that the Applicant be admitted to reasonable bail/bond terms pending the hearing and determination of Mombasa Chief Magistrate's Criminal Case No. 1098 of 2014, Republic Vrs. Abdul Halim Sadiq Omar, Ghalis Sadiq Kora, Praves Noor Mohamed, Abdul Majeed Ibrahim, Fuji Motoros East Africa Ltd, and Feisal Mohamed Ali alias Feisal Shahbal.

This application is premised on the grounds; that the applicant, although entitled to be released on bail/bond terms, save for compelling reasons, has been in prison remand since 23rd December, 2014, awaiting the hearing and determination of the aforesaid case, where he is charged with five co-accused persons who were released on bond.

That the appellant is alleged to be a flight risk without relevant and credible evidence confirming this.

Further, that as a result of this, the applicant, has lost his Constitutional right of association, expression, engaging in economic affairs, nurturing his family and of his personal dignity.

The Respondent filed a notice of preliminary objection to the hearing of the Applicant's Notice of motion dated 28th August, 2015 on the ground that the court lacks jurisdiction to entertain the application which is vexatious, frivolous, bad in law and an abuse of the process of the court meant to:-

- i. Scandalise the court and subject it to public odium and condemnation.
- ii. Annoy, harass, oppress, embarrass, enslave and abuse the respondent.
- iii. Waste judicial time and public resource by filing a raft of doomed rigmorole applications.

This application was argued before me by Mr. Gikandi, Mr, Nabwana and Mr. Magolo for the Applicant and Mr. Wamotsa, Mr. Mutandi, Mr. Kiprop and Mr. Wangila for the state/Respondent.

In arguing the application, Mr. Gikandi gave the history of the case and the rulings the applicant is seeking reviewed. He based his arguments on the grounds deponed to in the supporting affidavit of Feisal Mohamed Ali alias Feisal Shahbal, the Applicant.

In a nutshell, from the arguments by Mr. Gikandi it has clearly come out that the reason they are seeking review is that there has been a change in circumstances in the matter warranting the applicant to be released on bail/bond.

Firstly, it has been submitted that the applicant has continuously been denied bail/bond for reason that he is a flight risk without any evidence that he has ever been summoned to attend court and he failed to do so.

Mr. Gikandi submitted that Criminal Case No. 1098 of 2014, where the applicant is charged with five (5) others, was fixed for hearing on 17/8/2015 and was to be heard on a daily basis since the applicant is in custody. But on 20/8/2015, the prosecution applied for an adjournment for failure by the witnesses attending court and need for witness protection for other witnesses. This, Mr. Gikandi stated, was unreasonable delay and in breach of Article 50() (e) of the Constitution which requires that a trial commences and be concluded without unreasonable delay.

He further submitted that a witness by the name Silas Mzungu and works with the Department of Registration of persons testified as PW and confirmed that the applicant is a Kenyan citizen and gave meticulous details of his sub-location, parents' names and Box Number. Which evidence can be used to release the applicant on bail/bond and impose stringent terms upon him.

He then submitted that in the event the court does not agree with them, then it should find that trial takes off within 10 days and proceeds on a day to day basis without any interruption as per the provisions of Article 165(6) of the Constitution which states that,

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function but not over an inferior court.”

Mr. Nabwana on the other hand submitted that his court has jurisdiction to handle all review matters and that is why the DPP, as per their own pleadings submitted themselves to the jurisdiction of the High Court.

He reiterated Mr. Gikandi's submissions that there was change of circumstance warranting this court to make a finding on bail/bond for the Applicant.

Mr. Nabwana argued that the DPP did not in any way negate that there has been a change in circumstance but only challenge this court's jurisdiction. And that they filed a notice of preliminary objection which is a procedure not provided for in criminal procedure code. He urged the court to grant the orders sought if it finds that this procedure is not provided for.

In opposing the application, Mr. Muteti submitted that the application before court has no description conceivable in law, as it was neither an appeal nor a revision.

Mr. Muteti went on to submit that the jurisdiction that Hon. Justice Muya had in mind in his ruling delivered on 26/8/2015 at page 287 of the record for review has been spent. That the applicant had moved to the High Court to review its order and the court declined. And so the proper forum was the Court of Appeal. He further submitted that what the applicant's counsel were doing was to try their luck and whatever they had presented before court was a potential embarrassment to this court by asking it to exercise jurisdiction and is spent. He submitted that judicial time is precious and should not be taken for

granted but should be spent economically to achieve the ends of justice.

Mr. Muteti informed court that the applicant's counsel had filed an appeal, which was the right procedure but they had then abandoned the same.

In response to the adjournments, Mr. Muteti submitted that the adjournment sought on 19/8/15 was precipitated by counsel for the applicant when they applied for documents and supply of any evidential material before they could proceed with the hearing.

As for how the applicant was arrested, Mr. Muteti submitted that this was not part of what was before this court.

He submitted that the purpose of review is limited to the discovery of new and important matters, which has not been done in this case.

That the time spent on all the multiple applications by the applicant would have been utilized to pursue a speedy conclusion of this case.

Mr. Kiprop submitted that the High Court exercised unlimited jurisdiction under section 354 of the Criminal Procedure Code and powers of Division under the Criminal Procedure Code.

He invited the court to note that there were already three (3) revisions by Justice Muya, being Revision No. 81/15, 39/15 and No. 166/15 where he exercised his powers and was sitting as an appellate court. And this being the case, the decision is final as provided for under section 361(7) of the Criminal Procedure Code.

In challenging this court's jurisdiction with regard to the said application, Mr. Kiprop submitted that the applicant's application is an afterthought to restart, reopen, relitigate, reagitate and e-canvass matters which have been determined by Hon. Justice Muya in exercise of his jurisdiction, hence this court lacks jurisdiction to entertain it as it will amount to the court sitting on its own appeal.

He also submitted that in these rulings Hon. Justice Muya was *funtus officio*.

Mr. Wamotsa, submitted that it was necessary for provisions of preliminary objection to be put in the Criminal Procedure Code but has jurisdiction to entertain this application in view of the provisions of Chapter 10 of the same Constitution, and the Judicature Act. This is because jurisdiction is a threshold issue which should be determined at a preliminary stage.

He submitted that by the applicant saying that there is no iota of relevant and credible evidence strong is indicating that the accused person is a flight risk. These are directed to the court since it is Justice Muya on 30/3/15 in Criminal Revision No. 81 of 2015 who held that there were compelling reasons to deny the 6th accused person bond for being a flight risk.

Mr. Wamotsa hence submitted that what had been advanced were not grounds for review but grounds to be ventilated on the Court of Appeal or any other higher court.

He further submitted that it is vexatious to bring the same application, based on the same grounds and attach court decision, waiting orders.

In response, Mr. Gikandi reiterated that Hon. Justice Muya in his ruling was of the view that a review of the application could be entertained if new circumstances arose. He admitted having filed an appeal but had withdrawn the same after he realized that Justice Muya had re-confirmed that they could apply for review in the High Court.

Mr. Magolo distinguished the authorities cited by the Respondents particularly the ones dealing with vexatious litigation and submitted that what was common in this case was a litigant pursuing no

legitimate right and therefore making an application for the sake of it. That in their case, the applicant was pursuing a right to bail which is legitimate and guaranteed by the Constitution, there eligible to review it as many times as circumstances arose. He stated that circumstances had changed when the case failed to proceed as scheduled. He urged the court to invoke its duty as per the provisions of Article 20 and 22 of the Constitution and protect and promote the rights of the applicant who is in custody, awaiting trial on unknown date.

I have carefully considered the lengthy arguments by all counsel and read through the cited authorities and provisions of the law relied on by all.

It is not denied that the applicant has been in custody since 23/12/2014 after being denied bail/bond for being considered a flight risk.

The court is alive to the fact that it has a duty to protect and promote the rights of an accused person as per the provisions of Article 20, 22, 27, 47, 49(1) (f) and 50(2)(a), (e), (j) of the Constitution.

The Applicant, in his application dated 28th August, 2015, has asked this court to review the orders denying his release on bond/bail in Mombasa High Court Criminal Revision No. 81 of 2015, Mombasa High Court Misc. Criminal Application No. 39 of 2015 and Mombasa High Court Criminal Revision No. 116 of 2015.

In an application for review of a decision by the same court, I believe a party is same court. I believe a party is expected to show that there are new circumstances which were not within his knowledge at the time of the other decisions and would warrant this court to revisit its early decision.

In this case, the applicant ought to show this court that there has been a change in circumstances, which are different from the one that were presented to court at the time Mombasa High Court Criminal Revision No. 81 of 2015, Mombasa High Court Misc Criminal Application No. 39 of 2015 and Mombasa High Court Criminal Revision No. 116 of 2015 were canvassed.

The applicant was declared a flight risk after the move was canvassed and reason for this given in Mombasa Criminal Revision No. 81 of 2015. It was restated in Mombasa Misc Application No. 39 of 2015.

However, in his current application the applicant alleges that there has been a change in circumstances which would warrant this court to review its orders in Mombasa Criminal Revision No. 81 of 2015, Mombasa High Court Criminal Application No. 39 of 2015 and Mombasa High Court Criminal Revision No. 116 of 2015.

It is alleged that this case was fixed for hearing on 9th and 10th of July, 2015 but it did not take off because the 4th accused person was sick. It was then agreed that the matter be adjourned to 17th August 2015 and gone on on a day to day basis since the applicant was in custody. The case proceeded for hearing on 17/8/2015 and went on until 20/8/2015 when the prosecution applied for an adjournment and introduced the issue of witness protection for some witnesses.

It was also alleged that Justice Muya in his ruling vide Mombasa High Court Misc Application No. 39 of 2015 ordered that the case proceeds on 9th and 10th July 2015.

I have perused the record and found that Justice Muya noted;

“Case has a hearing for two days starting from today at the lower court. Same to proceed as scheduled...”

It will be noted that Justice Muya did not add a penal note as to what would befall the case if it did not proceed as scheduled.

Anyway, adjournments are part of a court's process subject to the limitation of the trial court. I do not find this to be a change of circumstances since there had been no indication that the case would have been determined within that period.

According to the applicant's counsel, another change in circumstances arose after a witness referred to as Silas Mzungu (PW 1) testified and gave details of the applicant's home (physical location), parents and address. He submitted that this then means that the applicant is a Kenyan with parents and known address and therefore will comply with any conditions infused by the court if released on bond and is likely to abscond.

I wish to point out that at the time the applicant was found having left Kenya for Tanzania in an attempt to evade arrest for the offence he is currently facing, this home, parents and known address were in existence and they did not stop him. It is therefore not a guarantee that the applicant will not abscond if released on bond.

I find that the applicant has not advanced any change in circumstances to warrant a review of the denial of his release on bail by the High Court on 30/1/2015, 9/7/2015 and 26/8/2015.

Infact, much of what was argued before me by counsel for the applicant, has been canvassed by my brother Justice Muya on 30/1/2015, 9/7/2015 and 26/8/2015. It would therefore be prudent for this court not to revisit the same issues and review the decision by Justice Muya as this would amount to sitting on an appeal from a co-current court. If these were to happen in a situation where the circumstances are similar, the administration of justice would be put into disrepute.

Justice Muya in holding that a contrary finding to the applicant being a flight risk could be arrived at by the High Court under review or by the Court of appeal, the meant first intent. For a review, what is to be considered is quite clear. An in this instant case, I find that the applicant has not satisfied this court that there has been a change in circumstance to warrant a review as prayed. I believe the applicant should have maintained the appeal they had filed as that was the proper procedure.

I therefore decline to grant the applicant prayer for review.

I appreciate that the applicant has been in custody for about a year. There is therefore need for the case to be expedited. I urge all parties to ensure this is done.

Ruling signed, dated and delivered in court on this 29th September, 2015.

D. CHEPKWONY

JUDGE

29/9/15

In the presence of:-

Mr. Gikandi for the applicant

Mr. Nabwana for the applicant

Mr. Wamotsa for the Respondent

Court Assistant Kiarie

29/9/15

Before Hon. Justice D.O. Chepkwony

Court Assistant Kiarie

Mr. Wamotsa for Respondent

Mr. Gikandi, Mr. Nabwana for Applicant

Mr. Gikandi – I wish to be supplied with particulars of the proceedings and ruling and that I could arrange to have them typed in my office so that we can pursue an appeal in the Court of Appeal.

As matters stand now, we have already secured hearing dates of 21st, 22nd and 23rd October 2015.

We therefore need to file an appeal before the order to amend the appeal being rendered nurgatory.

D. CHEPKWONY

JUDGE

29/9/15

Court – Application granted. The applicant counsel and DPP to be supplied with certified photocopies of the court's ruling as prayed.

D. CHEPKWONY

JUDGE

29/9/15