



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION NO.302 OF 2015**

**REPUBLIC..... APPLICANT**

**VERSUS**

**WESTWOOD MUTUA KIOKO *alias* MUSA KIOKO..... RESPONDENT**

**RULING**

The Respondent, Westwood Mutua Kioko *alias* Musa Kioko was charged in **Nairobi CMC Criminal Case No.1793 of 2013** with seven (7) counts of incitement to commission of a terrorist act contrary to **Section 27** of the **Prevention of Terrorism Act 2012**. The particulars of the offence relate to certain messages that are alleged to have been posted by the Respondent in his facebook account between 23<sup>rd</sup> September 2013 and 26<sup>th</sup> October 2013. When the Respondent was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was acquitted. The Applicant was however aggrieved with the decision of the trial court. It has filed an appeal against the acquittal of the Respondent to this court. The appeal is pending hearing and determination.

Pending the hearing of the appeal, the Applicant has moved this court pursuant to the provisions of **Article 165(3)(a)** of the **Constitution** and **Section 348A** of the **Criminal Procedure Act** seeking orders of this court to stay the execution of the judgment of the trial court pending the hearing and determination of the appeal. In particular, the Applicant sought orders for Respondent not to be released from custody pending the hearing and determination of the appeal. The grounds in support of the application are stated on the face of the application. The Applicant contends that it has an appeal which has a high likelihood of success in that it is of the view that the trial magistrate had failed to take into consideration all the evidence that was adduced by the prosecution witnesses which, according to the prosecution, established the charges brought against the Respondent to the required standard of proof. The Applicant contends that if the Respondent is released from custody, there was likelihood that he would abscond and fail to attend court during the hearing of the appeal. The Applicant stated that during the hearing of the case before the trial court, the Respondent was denied bail while awaiting trial. The Applicant was of the view that taking into account the serious nature of the charges facing the Respondent, and the fact that the activities for which the Respondent was charged with posed serious threat to the security of the general public, it is fair in the circumstances for the Respondent to be detained pending the hearing and determination of the intended appeal. The application is supported by the annexed affidavit of Mary Ng'ang'a, a prosecution counsel in the Office of the Director of Public Prosecutions.

The application is opposed. The Respondent swore a replying affidavit in opposition to the application.

The Respondent deponed that he was entitled to his freedom having been acquitted by a court of competent jurisdiction. He stated that there was no basis in law for his further detention. While acknowledging that the Applicant had the right of appeal, he was of the view that he should be released as ordered by the trial court pending the hearing and determination of the appeal. There was no reason why he should continue to be detained. He reiterated that the law under which the Applicant was seeking his detention in custody related to pre-trial proceedings and not the case where the accused has been acquitted. He reiterated that the serious nature of the offence cannot be a ground to deny him his freedom when a court of law has found him innocent and acquitted him. He dismissed the fear expressed by the Applicant that he would not attend court during the hearing of the appeal. He explained that he is a Kenyan citizen and had a fixed abode. He reiterated that there was no justification under the **Constitution** or any other law for his continued detention after his acquittal. He was of the view that the Applicant was breaching his constitutional right to freedom by making the present application. For added measure, the Respondent stated that the court had no power to legislate or to introduce new law when interpreting existing laws. It is on the basis of the above reasons that the Respondent urged the court dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Ms. Ng'ang'a and Ms. Kanyiri for the Applicant and Mr. Chacha for the Respondent. Counsels for the Applicant stated that the order of acquittal issued by the trial court should be stayed pending the hearing and determination of the appeal that has been filed by the Applicant. The Applicant was of the view that the intended appeal had a high chance of success. The Applicant contends that the Respondent's acquittal was in error. There was likelihood that the acquittal would be upset on appeal and the acquittal be substituted by a conviction. The Applicant reiterated that the Respondent faced serious charges under **The Prevention of Terrorism Act** whose sentences were severe. There was likelihood that the Respondent will abscond and fail to attend the hearing of the appeal. The Applicant urged the court to take into consideration that during trial, the Respondent was not released on bail pending trial on account of the fact that the trial court had established that there were compelling reasons to deny the Respondent bond due to the serious nature of the offences facing him. The Applicant stated that the offences facing the Respondent touches on national security and public interest. It is in public interest that the Respondent be detained pending the hearing and determination of the appeal. The Applicant reiterated that the basis of its application was lawful and justifiable in the circumstances. In that regard, the Applicant cited **Article 24(1)(d)** of the **Constitution** in support of its case. In particular, the Applicant stated that the rights regarding the safety of society must be balanced with the individual rights of the Respondent. In the present case, public interest outweighed the personal interest of the Respondent. The Applicant reiterated that it had adduced sufficient evidence before the trial court which should have resulted in the conviction of the Respondent. It was of the view that the trial court had relied on a procedural technicality to acquit the Respondent without analyzing the strength, or otherwise, of the prosecution's case.

Regarding the legality of the orders sought, the Applicant reiterated that there were lawful and justified in the circumstances of this case. The Applicant submitted that the court should apply a three-part test to determine whether the application should be allowed: whether the restriction is prescribed by law, whether the restriction is intended to serve a legitimate purpose and finally, whether the restriction is necessary in a democratic society. The Applicant relied on **Article 24(1)** of the **Constitution**, **Article 29(2)** of the **Universal Declaration of Human Rights** and **Article 19(3)** of the **International Convention on Civil and Political Rights**. The Applicant argued that the restriction of the Respondent's right to liberty was justified because of the wider interest of the nation and security. The Applicant cited a case of the European Court of Human Rights in the case of **Handyside –vs- The United Kingdom (Application No.5493/72)** in support of its case. The Applicant further submitted that under **Article 159(1)** of the **Constitution**, the court as the custodian of people's wishes, must protect the victims of crime of terror by dealing appropriately with those who wish to commit such acts of terror. The Applicant urged the court to allow the application.

Mr. Chacha for the Respondent opposed the application. He submitted that the Respondent was not a suspect in any crime. He was not an accused person before any court. He had gone through the due process anticipated under the law and had been acquitted. There was no law or justification to warrant the Respondent's continued stay in custody or to have his liberty restricted. The fact that the Applicant had

exercised its right of appeal was not sufficient reason or basis for the Respondent's continued detention. The Respondent argued that there was no legal basis upon which this court can grant the orders sought by the Applicant. The fact that there is a pending appeal was no justification for the court to interfere with the Respondent's right to freedom. The Respondent reiterated that this court had no legislative powers and therefore cannot interpret the law to justify the continued detention of the Respondent in custody after being acquitted by the trial court. The Respondent was of the view that the fears expressed by the Applicant that he would abscond from the jurisdiction of the court was unjustified since he was a person of fixed abode. The Respondent undertook to be present in court during the hearing of the appeal as he has always been anxious to clear his name and character. The Respondent submitted that under **Articles 49, 50 and 51 of the Constitution**, a suspect or an accused person is given certain rights relating to his liberty. The curtailment of his right to liberty can only be justified under public interest – national security was not one of the considerations to limit an individual's right to liberty. The Respondent submitted that the prosecution failed to establish a link between the alleged incitement and victims of terrorism. The Respondent reiterated that the Applicant had failed to establish the existence of any limitation as anticipated under **Article 24 of the Constitution**. The Respondent stated that the orders sought by the Applicant were prejudicial to his right to liberty. The Respondent was of the firm view that his continued stay in custody was illegal since this court had no power under the law to continue to detain him after his acquittal. The Applicant urged the court to dismiss the application and grant him his freedom pending the hearing of the intended appeal.

This court has carefully considered the rival submission made by the parties to this application. As stated earlier in this Ruling, the Applicant's application is predicated on **Article 165(3)(a) of the Constitution** and **348A of the Criminal Procedure Code**. **Article 165(3)(a) of the Constitution** confers this court with unlimited original jurisdiction to deal with criminal and civil matters. **Section 348A of the Criminal Procedure Code** provides that the prosecution may appeal against an order of acquittal made in a criminal case. For the Applicant to succeed in its application, it must establish a legal basis or foundation for moving this court for the particular orders. The Applicant craves for this court to issue orders staying the acquittal of the Respondent pending the hearing and determination of the appeal lodged by the Applicant challenging the acquittal of the Respondent.

It was clear to this court that no such provision exists or is known in law. Once the Respondent was acquitted by the trial court, he was entitled to his liberty pending the hearing and determination of the appeal lodged by the Applicant. The Applicant forcefully argued that it has an appeal which has a high chance of success and, that therefore, it would be in the interest of justice for the Respondent to remain detained in custody pending the hearing of such appeal. The other argument that the Applicant advanced is that since the Respondent is facing a serious offence related to terrorism, which has an element of public interest, the court should invoke its jurisdiction and direct that the Respondent remains in custody pending the hearing and determination of such appeal. The Respondent, as suspected was not amused by the turn of events. He emphatically argued that there was no law which grants this court jurisdiction to issue such orders.

It was clear from the argument advanced by the Applicant that the Applicant was literary turning on its head the principles applicable when the court is determining whether or not to release a person convicted of an offence on bail pending appeal. In **Motichand –vs- Republic [1972] EA 399** Muli J (as he then was) held thus:

***“The authorities on the point appear to have established the principle that bail pending appeal should only be granted on the grounds of exceptional, special or unusual reasons appearing in the case. Exceptional, special or unusual reasons are not a phrase of art so that each must inevitably be determined on its merit having regard to the circumstance of each particular case.”***

In **Rebecca Mwikali Nabutola–vs- Republic [2012] eKLR** Mbogholi J held thus:

***“The grounds upon which an applicant may be released on bail have been ventilated adequately by all counsel on record. See Mundia vs Republic 1986 KLR 623, Somo vs Republic (1972) EA 476 Ademba vs Republic (1983) KLR 442. It is incumbent for the applicants to show at this***

***stage that their appeals have overwhelming chances of being successful, that there are exceptional and unusual circumstances; that the appeals are likely to be delayed such that the applicants may serve their sentences or substantial parts thereof by the time the hearing is reached among other considerations.”***

Can the Applicant as the prosecution rely on these principles in its bid to secure the detention of the Respondent pending hearing and determination of the appeal? This court does not think so. The principles governing the release of a convicted person on bail pending appeal has legal backing. **Section 357(1) of the Criminal Procedure Code** provides for such an application. There is no law however which supports the Applicant’s contention that the Respondent ought to be detained pending the hearing and determination of the appeal lodged by the Applicant, no matter the strength of such appeal. The Applicant has relied on **Article 24(1) of the Constitution** to support its argument that the continued detention of the Respondent is necessary and justified in public interest. This court does not see how the particular **Article of the Constitution** is applicable in this case. The Respondent has been tried and acquitted by a court of competent jurisdiction.

The Applicant expressed the fear that since the Respondent was charged with a serious offence under **The Prevention of Terrorism Act**, the court should be cognizance of the fact that national security and public interest is a matter in issue in the case. This court agrees that terrorism and acts of terrorism is a matter which it cannot turn a blind eye. However, this court cannot turn its back on principle instrument that underpins all the laws of this country: **The Constitution. Articles 49, 50 and 51 of the Constitution** guarantee the Respondent certain rights upon his arrest, his trial and his detention. All these rights relate to pre-trial events and does not extend to events after the acquittal of such an accused person. It was not by accident that **Article 25(c) of the Constitution** specifically and categorically stated that the fundamental right to a fair trial cannot be limited or abridged. The Respondent has been subjected to a fair trial process and has been acquitted. Whereas the Applicant has a right of appeal, that right cannot be invoked to import a concept that does not exist in the law *i.e.* the detention of an acquitted person pending the hearing and determination of the appeal.

As stated earlier in this Ruling, all arguments advanced by the Applicant in relation to the detention in custody of the Respondent was valid pending the hearing and determination of the charges facing the Respondent before the trial court. Once the Respondent was acquitted, such arguments ceased to have any validity. This court does not accept the argument advanced by the Applicant that just because the Respondent may pose a danger to the society, then, the court should act outside the provision of the law to secure his continued stay in custody pending the hearing of the appeal. The Applicant has not placed any concrete evidence before this court to justify its fears. The security apparatus have machinery in place to secure the safety of this country. This machinery is operated within the law. G.W. Ngenye-Macharia J dealt with a matter similar to the present one in **Republic –vs- Issa Salim Mkab Nairobi HC. Misc. Application No.139 of 2015**. She stated thus at page 9 of her Ruling:

***“That said, though, the court is alive and aware of the importance of national security; but the security apparatus must act within the law and be careful not to react to apprehension in seeking orders of this nature. More so, even given the volatile security situation in our country, all suspects and even those who are acquitted and appeals are pending against them must be dealt with within the confine of the law, otherwise the courts will be judged harshly if they do not uphold the tenets of the supreme law of the land.”***

This court agrees with the above observation by the Learned Judge. This court is not prepared to look outside the law to accede to the application filed by the Applicant. The Respondent’s fundamental right to freedom and liberty has been vindicated by the court. He has been acquitted of the charges that faced him. Of course, that acquittal is subject to the appeal lodged by the Applicant. There is no legal reason or justification for the continued detention of the Respondent. There is no concept known in law of staying an acquittal of an accused person pending the hearing and determination of an intended appeal by the Republic. The application filed by the Applicant has no legal basis and cannot be allowed. The Respondent is entitled to his liberty.

The Applicant's application lacks merit and hereby dismissed. The Respondent is ordered released from custody forthwith. He shall however be required to attend court during the hearing of the appeal. It is so ordered.

**DATED AT NAIROBI THIS 23<sup>RD</sup> SEPTEMBER 2015**

**L. KIMARU**

**JUDGE**