



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL REVISION NO. 54 OF 2014

REPUBLIC.....APPLICANT

VERSUS

1. BAKTASH AKASHA ABDALLA
2. VIJAYGIRI ANADGIRI GOSWAMI
3. GHULAM HUSSEIN
4. IBRAHIM AKASHA ABDALLA.....RESPONDENTS

RULING

By way of an application for review filed under certificate of urgency the Hon. Director of Public Prosecutions sought the following orders:

- “1. **THAT** there be a stay of the learned Chief Magistrate’s orders granted on 1st December, 2014.
2. **THAT** the applicant be heard on this application ex-parte in the first instance and on a priority basis thereafter.
3. **THAT** the learned honourable Judge varies the lower court’s orders and places the fugitives in custody pending the hearing and determination of the extradition proceedings scheduled to commence on 2nd December, 2014 before the Chief Magistrate’s Court Mombasa.
4. **THAT** this court may grant any other order that it may deem fit and just to grant.”

On 1st December, 2014 Hon. Justice Edward Muriithi did grant a limited stay of the orders of the Hon. Chief Magistrate granting the accused persons bail. The matter then came up before me for oral arguments. **MR. MUTETI** Assistant Director of Public Prosecutions assisted by **MR. KAHORO**, **MS. KAGORI** and **MS. MBAYA** appeared for the Hon. Director of Public Prosecutions whilst **MR. WANDUGI** and **MR. OMBETA** appeared for the accused persons. In issue is the ruling of the Chief Magistrate **HON. MAXWELL GICHERU** delivered on 1st December, 2014 in which he granted to the accused persons bail of Kshs. 5 million plus two (2) Kenyan sureties of a similar amount during the pendency of extradition proceedings filed against them. The Hon. Director of Public Prosecutions by way of this application for review seeks to have that ruling of the Hon. Chief Magistrate varied and/or reversed.

The powers of the High Court to review a decision of the Lower Court are contained in section 362 of the Criminal Procedure Code which provides:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court. [my own emphasis]

Therefore in order to persuade the High Court that its intervention by way of review is warranted the Applicant (here being the Hon. DPP) must demonstrate that the orders made by the trial court were incorrect, lacked legal foundation or were inappropriate in the circumstances.

I have carefully perused the record of the trial court with respect to this matter. I have also given careful consideration to the submissions made by both parties before me. The grant of bail by the trial court is perfectly legal and proper. The trial magistrate acted well within his mandate and powers in considering and exercising his discretion to grant bail to the respondents. The grant of bail is a discretionary power granted to a court. The presiding judicial officer is required to consider the bail application, weigh it against constitutional and legal provisions and make a decision one way or another. I have absolutely no doubt that the Hon. Chief Magistrate did give due and thorough consideration to the application for bail made on behalf of the accused persons. His lengthy ruling is evidence of this fact. The High Court would only be required to intervene by way of review where there is evidence of an injudicious exercise of the discretion to grant bail by the trial court. As stated earlier my anxious perusal of the record of the lower court does not reveal any such injudicious exercise of discretion by the Hon. Chief Magistrate. The Hon. Chief Magistrate carefully considered and analyzed all relevant areas of law, and he did also consider and analyze the objections to the grant of bail made by the Hon. DPP before exercising his discretion in favour of granting bail. I find nothing incorrect, illegal or improper in the manner in which the Hon. Chief Magistrate handled this bail application nor in the manner in which he exercised his legal discretion in the matter.

The Hon. DPP clearly does not agree with and is aggrieved by the decision reached by the Hon. Chief Magistrate to grant bail. In the circumstances they ought to have approached the High Court by way of **appeal** seeking to reverse the decision to grant bail. The Hon. DPP would then proceed to place arguments before the High Court with a view to persuading it that given the circumstances pertaining in the case the exercise of the trial magistrate’s discretion in favour of granting bail was wrong. The point here being that the **exercise** of the discretion to grant bail has not been shown to have been improper. The Hon. Chief Magistrate has full legal backing donating to him such discretion. Rather what is in issue is the **decision** which the Hon. Chief Magistrate reached in the exercise of that discretion. The former would be a matter for review whilst the latter is clearly a matter for appeal. The arguments raised before me by the Hon. DPP

- Seriousness of the offence
- Flight risk of the accused
- No change in circumstances
- International obligations of Kenya with respect to Extradition
- Citizenship of the 2nd and 3rd respondents

are all factors which in my view would amount to arguments available upon appeal to reverse the decision of the trial court. I therefore find no basis upon which to review the decision of the Hon. Chief Magistrate and I decline to do so. The avenue of appeal however remains open and available to the Hon. DPP. In anticipation of the fact that the Hon. DPP may wish to avail themselves of this avenue I do hereby grant them seven (7) days within which to file and serve such appeal. Further in order to avert the risk of rendering such appeal nugatory I do hereby *suo mo* extend the stay of the ruling of the Hon. Chief Magistrate granting the respondents bail pending the filing of any such appeal. If within seven (7) days no appeal has been filed then the respondents will be at liberty to be released on the bond terms and conditions as set out by the Hon. Chief Magistrate in his ruling of 1st December, 2014. It is so ordered.

Dated and Delivered in Mombasa this 8th day of December, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Muteti for State

Mr. Wandugi for Respondents

Court Clerk Mutisya

M. ODERO

JUDGE

Court:

In the interim the respondents will continue to be held at the Port police station.

M. ODERO

JUDGE

8TH DECEMBER, 2014