



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**CRIMINAL CASE 76 OF 2011**

**EDDAH WANJIRU MBIYU ..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**RULING**

By an application dated 12<sup>th</sup> September 2012 seeking for this court to review the orders made by Justice Emukule on 5<sup>th</sup> September 2012 and that this court orders for the release of the applicant's passport for a period of 21 days to enable her travel to the United Kingdom (UK) between 13<sup>th</sup> September and 4<sup>th</sup> October 2012.

It is premised on grounds that there is new evidence which may now persuade the court's decision. It is argued court had earlier intimated that if need be, it would be inclined to release the passport temporarily to the applicant who needs to travel with her daughter to the United Kingdom to ensure she settles down properly – she being the sole guardian. The applicant deposes in the supporting affidavit that her daughter MARION MICHELLE was granted admission as a student at the Keele University and she now has the admission letter confirming her placement. The international students are required to arrive by 19<sup>th</sup> September 2012 for orientation at the university. Applicant wishes to travel with the girl so as to ensure she settles down properly and she promises to be back to the country by 4<sup>th</sup> October.

The State opposes the application on grounds that it is *Res Judicata*, a similar application with similar arguments having been made before Hon. Justice Emukule and the same was refused. However Mr. Ogola argues on behalf of the applicant that since the judge had ruled that the documents presented in court did not demonstrate an express admission of applicant's daughter to Keele University. In his view the letter of admission now presented to this court plus evidence of payment of fees should persuade this court to grant the orders sought.

He urges court to pay heed to freedom of movement as enshrined under **Article 39(2)** of the **Constitution** saying the right to leave Kenya can only be limited as provided for under **Article 24(1)** of the **Constitution**. It is his contention that the only law which can limit right of movement when one faces a criminal charge, is a law which outlaws released on bail, yet Article 149 of the Constitution provides for release on bail on reasonable terms. The counsel states:

**“In making his decision, the judge did not consider the provisions of the Constitution – this was an error apparent on the face of the record.”**

In response, Mr. Omari on behalf of the State, argues that the application is improper as it is asking this court to review the decision of a court of concurrent jurisdiction – such a request should only be made to

a court of superior jurisdiction. Mr. Ogola concurs but explains that the reason why the matter has been presented to this court is because the judge whose decision is contested is not sitting for the next two weeks and given the urgency of the matter, it had to find some audience.

I am in agreement with Mr. Omari that this application ought to have gone either to the judge who made the ruling or to a superior court; in fact the statement by applicant's counsel about the judge failing to take into consideration the provisions of the Constitution places this court in an embarrassing situation giving it the appellate position.

But even if for the sake of expediency the matter had to be placed before whichever court was sitting, then comes the issue of *res judicata* – which basically means that an issue has been argued and a decision made – the issue here was release of the passport – needless to say, a decision was made in that regard. I have read through the decision by the Honourable Judge and in my view what applicant has attempted to do is to patch up the loopholes pointed out in that decision, what is termed as new evidence is information which the applicant could easily have obtained at the time of making the application if due diligence had been exercised. Infact the judge's ruling does not suggest that were other documents to be availed he would reverse his finding – his observation was that the applicant's daughter was old enough to travel on her own and find a place to settle in the United Kingdom.

As regards the provisions of **Article 39 (2)** and **24** of the **Constitution** – it is precisely in honour of the legal Constitutional provisions that the court gave bond on certain terms which it deemed as reasonable. The upshot is that the application has no merit and is dismissed.

**Delivered and dated this 21<sup>st</sup> day of September, 2012 at Nakuru.**

**H.A. OMONDI**

**JUDGE**

Miss Opiyo holding brief Mr. Ogola

Miss Opiyo also holding brief Gembe for 3<sup>rd</sup> accused and Mr. Kisila

Mr. Omari for State

Mr. kanyi Ngure for deceased's family