



REPUBLIC OF KENYA

High Court at Nakuru

Criminal Case 123 of 2010

REPUBLIC PROSECUTOR

VERSUS

MUSANA OLE MBUKOI ALIAS SANANGA 1ST ACCUSED
NICHOLAS KIPSIGEI NGETICH 2ND ACCUSED
JOHNSTONE KIPKURUI SIGEI 3RD ACCUSED
STEVEN KIAMBA MWANZIA 4TH ACCUSED
DAVID NJUNO MBIYU 5TH ACCUSED
EDDA WANJIRU MBIYU 6TH ACCUSED
JOHN KIRAGU MACHARIA 7TH ACCUSED

RULING

EDDAH WANJIRU MBIYU (the 6th accused) has sought orders for temporary release of her passport which she had been ordered to deposit in court, which was part of the terms set when she was granted bond. The grounds for seeking the order is that the 6th accused's son is graduating from KINGSTON UNIVERSITY, LONDON, in the United Kingdom and she would wish to attend and witness the event. Her counsel Mr. Muite submits that all parents encourage their children to excel in school and the climax is the graduation ceremony. He asked this court to conceptualise how a student will feel, seeing all his colleagues surrounded by their relatives and parents, while his mother, who is the remaining parent is missing. He draws to the court's attention that the accused requires the passport to travel to the United Kingdom on 25th January, 2013 and she undertakes to re-deposit it in court on or before 31st January, 2013. It is his contention that she is not likely to jump bail as she has constantly attended this court, as well as another court, where she is facing a charge of attempted murder.

Counsel also complains that the accused has been subjected to discrimination, as she is the only one out of the seven accused persons, ordered to deposit her passport. The significance of a mother's presence at such an event is emphasised, and that nothing has been presented to this court to suggest that she will not come back to the country were she to make the trip.

The application is opposed and counsel for the State submits that this is the 4th time the accused is seeking release of her passport citing a desire to attend to her off-springs' concerns and each time, the

request has been declined – with good reason. It is his contention that once the 6th accused leaves the country, she will be outside this court's jurisdiction, and ensuring her attendance will be difficult. The passport is the only document which will ensure she attends court.

He denies that the court discriminated against the 6th accused by ordering her to deposit her passport, saying she just happened to be the only one with a passport at the time. It is his contention that such an event can be attended by other family members and not necessarily the applicant.

The defence counsel in response argues that the present event is entirely different from the other situations which had caused the applicant to seek to travel out of the country. He submits that it is the crowning glory for many years of toiling, and the surviving parent ought to be given a chance to attend, saying she has a constitutional right to exit and re-enter Kenya. It is further argued that in any event, were the accused to jump bail, she could easily be extradited to Kenya as the country has an extradition treaty.

Upon the State Counsel pointing out that there was no document to confirm that the accused was invited to attend the graduation in the United Kingdom, the defence lawyer presented to the court a letter dated 26th November 2012 signed by one HOLLAND (the Graduation and Events Administrator) confirming that the accused has been invited to attend the graduation ceremony.

It is a fact that accused has in the past made efforts to have the passport released to her to enable her travel out of Kenya on account of her offspring's concerns. When the court made orders granting bail to the accuseds several conditions were placed on ALL the accused in the ruling dated 28th January 2011. A reading of that ruling required all accused to deposit their passports (for those who possessed) in court and that they could not leave the jurisdiction of this court without leave of the court. The order for deposit of passport in court was not specific to the 6th accused alone – it seems then that 6th accused was the only one who had a passport. The questions of the order being discriminatory, then does not arise. My perception is that the court deemed the requirement of deposit of passport a reasonable condition in the bond terms and I think it was also to take care of the fears expressed by the prosecution when opposing bail that the accuseds were likely to abscond. This is clear from the ruling at pg 5. The order was to guard against an accused absconding by granting conditions to be fulfilled to ensure attendance.

The defence counsel has urged this court to also consider the applicant's past conduct, which he says is a demonstration of her bona fides – that she has religiously attended court. This must also be considered in the light of:

- (a) Her past attempts to get back the passport which she has pursued with equal religious zeal.
- (b) From a reading of the record, she has demonstrated a desire to have the court off load her from the proceedings by filing a petition seeking declaratory orders against her arrest, detention and being charged.

These two factors are an indicator of the anxiety on 6th accused's mind, to get the trial off her tracks and therefore her propensity not to return.

The trial has progressed considerably and whereas I concur with the defence counsel that the most glorious moment would be for a mother to witness her child's high achievement, this emotional attachment must not be allowed to cloud the real likelihood that once the applicant is out of jurisdiction, there would no easy way to ensuring her return to continue with the trial – extradition is not a one way affair. Under the circumstances, I do not find it prudent to order for the release of the passport. Consequently the application is dismissed.

Delivered and dated this 21st day of December, 2012 at Nakuru.

H.A. OMONDI

JUDGE