

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appli 731 of 2007

MILLITONIC KIMANZI MWENDWAACCUSED

V E R S U S

REPUBLICPROSECUTOR

R U L I N G

Millitonic Mwendwa Kimanzi (*the applicant herein*) has made this application by way of Chamber Summons dated 17/10/07 under Section 135 (1) of Cap 75 Laws of Kenya seeking the consolidation of the following cases, ACC 30/07, ACC 43/07 and ACC 48/07, all now pending before Makadara Chief Magistrate's court.

He also prays that upon consolidation, the court do grant him affordable bond terms. The application is supported by the applicant's affidavit in which he states that all the above mentioned cases emanate from the same station and are investigated by the same investigating officers and are all fresh cases. He further states that the offences charged are founded on the same facts and are series of the same or similar nature. Incidentally, the applicant had made a similar application on 10th September, 2007 before the Chief Magistrate's court at Makadara. He however states that the learned Chief Magistrate misdirected herself when she declined the application on grounds that the offences alleged were serious and aggregate counts were many yet they did not exceed 12 counts. He complains that the denial of bond terms is an infringement of his constitutional rights contrary to Section 77 (2) of the Constitution of Kenya. Applicant says he is a family man and is suffering.

In his submissions to the court, the applicant stated that he has been in custody for 8 (eight) months yet the charges he faces are bailable and that the complainants are siblings – only that he was charged at different times. He also pointed out that he has health problems relating to his kidney and is due for surgery, urgently. He says his parents were killed in the post-election violence in Nakuru and now he is the sole bread winner for his six siblings in Nakuru.

The application is opposed by the learned State Counsel Mrs Obuo sought to rely on the contents of two separate affidavits by two police officers saying the complainants are different and the matters did not arise in the course of the same series nor are the investigating officers the same or even from the same police station. She says that consolidation will actually be prejudicial to the applicant. The affidavit by Francis Kipchojo Kidogo, a Chief Inspector of Police seconded to the Kenya Anti-Corruption Commission as an investigator indicates that the three cases the applicant is facing relate to three distinct and separate events and the facts in each instance are different. He avers that in ACC 30/07 the offence was committed on 25/3/07 at Muthaiga Police Station area in Nairobi. Whilst the offence in ACC 43 of 2007 was committed on 31st July, 2007 at Touch Down Restaurant in Langata Area within Nairobi City and ACC 48 of 2007 involves an offence committed on 16th August, 2007 at the Central Business District, Nairobi. Although all the cases relate to the offence of impersonation, CIP Kidogo states that in all three occasions the applicant was arrested either by the police or City Council Inspectorate Askaris and so given the distinct and separate facts in each of these three cases, the matters cannot be consolidated nor can the offences be charged together in the same charge sheet or information. CIP Kidogo further states that in ACC 30 of 2007, application set for hearing on 10/4/08, and the applicant was admitted to bail at the plea stage but at some stage, he jumped bail. ACC 43/07 is set for hearing on 19th March,

2008 and ACC 48/07 is set for hearing on 20th March, 2008. It is submitted that in ACC 43/07 the applicant absconded and failed to attend court on 6/8/07 and Warrant of Arrest was issued but before he could be apprehended in execution of the Warrant of Arrest, applicant committed the offences which are the subject of ACC 48/07. The cash bail the applicant had deposited in ACC 43/07 was forfeited to the state.

These averments are further buttressed by the affidavit of Corporal Wycliffe Sirengo also attached to the Kenya Anti-Corruption Commission as an investigator and is in fact the investigating officer in ACC 43/07. Corporal Sirengi incidentally is also the investigating officer in ACC 48/07. It would seem that the applicant was not granted bond in this last case because according to Corporal Sirengo, he was on the run and there is every likelihood that he will abscond if admitted to bail. However applicant in response now tries a different approach and says the complainant in all the cases is the same i.e the Republic of Kenya through the Kenya Anti-Corruption Commission and that the matters are the same as he is being charged with impersonating an investigator in all the cases. He denies having jumped bail and says when he appeared in court, he gave an explanation which was accepted by the court and the Warrant of Arrest was lifted but he was given very harsh bond terms. He says the offences were all committed within a period of six months and so consolidation would be justified. Section 135 (a) of the Criminal Procedure Code provides-

(1) Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form or are part of a series of offences of the same or a similar character.”

From the original lower court’s files I have perused and the affidavits sworn by the two police officers it is plain that the only feature shared by the three files is that they all relate to the charge of impersonating an investigator – the charges are not founded on the same facts nor do they form part of a series of offences – they are separate and distinct transaction, and the only similarity is the character of the offence- they were not a series. Indeed the dictionary, definition of a series as found in Oxford Advanced Learner’s Dictionary of Current English, A.S. Hornby, 6th Edition, Edited by Sally Wehmeior page 1074, means-

“Several events or things of a similar kind, that happen one after the other.”

In the present situation, the events of a similar nature happened between March and August, on different dates and with several breaks in between and certainly not founded on the same facts.

From the foregoing, I do not find any merit in the application for consolidation and subsequently the said application is dismissed.

What about the bail application? Now that the consolidation has not been granted, and since the applicant had already been granted bail, I think the issue is rested – in any event it seems that even when appellant is out on bond, fresh charges emerge – hence the separate bail terms in each file, and which terms I consider fair.

I therefore decline to review the bond terms as there is really no reason given, under the circumstances. The upshot then is that the entire application is dismissed.

Delivered, signed and dated at Nairobi this 16th day of April, 2008.

H.A. OMONDI

JUDGE.