



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appli. Misc. 517 of 2007

STATE.....APPLICANT

VERSUS

VINCENT PAMIRE.....RESPONDENT

RULING

Before me is an ex-parte Notice of Motion brought under section 3(1) (B) of the Judicature Act (Cap.8), (19 and 20 Victoria, C.113) Foreign Evidence Act 1858, and Part VII of the Judicature Act (Cap 8), as well as section 154 of the Criminal Procedure code (Cap 75). The application is filed by the Attorney General and seeks for two substantive orders, that ?

1. A magistrate of competent jurisdiction be appointed examiner.
2. The Honourable Court be pleased to grant orders that the said witness, Mr. N.S. Lochab, do attend the examiner (on a date, place and time to be appointed) or such other day and time as the said examiner may appoint do there submit to be examined upon oath, or affirmation, touching the testimony so requiring as aforesaid, and do then and there produce.

The application has grounds on the face of the Notice of Motion. It is also supported by an affidavit sworn by DORCAS ODUOR, Deputy Chief State Counsel in the Attorney-General's Chambers. The grounds of the application are firstly, that the Attorney-General had received a letter of request from the Attorney-General of Zimbabwe requesting for assistance for evidence on commission in a matter pending before the magistrate s Court for the Province of Mashonaland held at Harare Zimbabwe; secondly, that the accused in the matter, VINCENT PAMIRE was facing charges contravening a common law offence of theft by conversion; thirdly, that at the time of commission of the offence, the accused was a Director of Victoria Steel Mills a company duly incorporated in Uganda; fourthly, that during investigations, Zimbabwean Police discovered that the accused was paid monies by Mr. N.S. Lochab of Eldoret Steel Mills Kenya; fifthly, that the applicant was seeking for the witness Mr. N.S. Lochab who was capable of giving evidence relevant to the proceedings relating to the criminal matter, to give evidence on commission; sixthly, that the request exhibited an order of court of competent jurisdiction requesting the recording of the evidence (of) the witness on commission; and seventhly, that it was the opinion of the said Attorney-General of Zimbabwe that it was the best interest of justice that the witnesses evidence be recorded on commission.

At the hearing of the application, Mr. Bryant, State Counsel, appeared for the Applicant. Counsel submitted that the accused in the proceeding in the Magistrates Court in Harare Zimbabwe was charged with theft. One witness MR. LOCHAB, who was in Kenya, was requested to go to Zimbabwe and give evidence, but he refused, hence the filing of this application. Counsel submitted that this application had

been brought under the Judicature Act (Cap. 8) and was seeking for orders that this court appoints a magistrate to act as a commissioner to take evidence from MR. LOCHAB in Kenya. Counsel contended that the jurisdiction of this court to grant the orders sought was conferred under Part VII of the Judicature Act (Cap. 8). Counsel asked the court to grant orders as provided for under Schedule I to Part VII of the Act. Counsel also submitted that the Zimbabwe Government had indicated that they would bring the accused and his counsel who would be present during the proceedings and possibly cross-examine Mr. Lochab. Counsel also submitted that the record of proceedings would be transmitted to Zimbabwe.

I have considered the application, the submissions of the learned State Counsel and also perused the documents filed.

This application follows the receipt by the Kenya Attorney-General of a letter of request dated 6.2.2006, but stamped 20.6.2007 from the Attorney-General of Zimbabwe. That letter followed the delivery of a ruling by S. NHAU Regional Magistrate Zimbabwe delivered and certified on 8.2.2006 granting an application by the criminal prosecution against the respondent herein in the case in Zimbabwe in the following terms?

“This application is succeeds (sic) and the following order is made:- commission is hereby issued in terms of section 240 of the Criminal Procedure and Evidence Act, Chapter 9:07 authorizing any fit and proper person or judicial officer in Kenya to take the evidence of Mr. N.C. Lochab, a Kenyan national. The Commissioner shall confine the examination of Mr. Lochab to specific facts contained in the parties’ interrogatories. The expenses necessary for Respondent at examination of the witness shall be paid by the Applicant at rates prevailing at the time evidence is taken from Mr. Lochab”.

I find that the magistrates court in Zimbabwe had the jurisdiction to make the order that it made.

This court has jurisdiction under PART VII of the High Court (Practice and Procedure) Rules made under the Judicature Act (Cap.8 of the Laws of Kenya) to grant adjudicate with regard to the application herein, and to make orders, if the same are justified. The jurisdiction of this court to deal with such an application and make orders, as appropriate, are clearly spelt out under Rule 1 and 2 of PART VII of the High Court (Practice and Procedure) Rules, which provide as follows ?

“1. Where, under the Foreign Tribunals Evidence Act, a civil or commercial matter or criminal matter, is pending before a court or tribunal of a foreign country and it is made to appear to the court or a judge, that that court or tribunal is desirous of obtaining the testimony in relation to the matter of any witness or witnesses within the Jurisdiction, the court or judge may, on an exparte application of any person shown to be fully authorized to under the application on behalf of a foreign court or tribunal, and on production of the commission regatoire, or letter of request, or a certificate signed in the manner and certifying to the effect mentioned in section 2 of the Foreign Tribunals Evidence Act 1856, or such other evidence as the court or a judge may require, make such order or orders as may be necessary to give effect to the intention of the Acts above mentioned in conformity with section 1 of the Foreign Tribunals Evidence Act.

2. An order made under rule 1 shall be in the form in Schedule I with such variations as circumstances require.”

I have seen copy of the Letter of request from the Attorney-General of Zimbabwe. I have no doubt that the said Attorney-General of Zimbabwe is the office that is in charge of prosecutions in that country, has authority to request for the orders sought. In Kenya this kind of application can be made by the Attorney-General of this country. The ruling of the magistrate’s court in Zimbabwe, which I have referred to earlier, clearly shows that a witness from the jurisdiction of this court, that is Kenya, is required to give testimony in relation to the criminal case in Zimbabwe in which VINCENT PAMIRE is the accused. I have no doubt, from the facts placed before me in the documents filed herein, that the witness MR. N.S. LOCHAB, being in Kenya and having worked with Eldoret Steel Mills Kenya, is a relevant witness in the pending criminal case in Zimbabwe against VINCENT PAMIRE, and that the said Mr. N.S. LOCHABA

has refused or neglected to go to Zimbabwe to testify in the criminal case. I am satisfied that the Zimbabwe authorities have made all possible attempts to have the said witness MR. N.S. LOCHAB to go to Zimbabwe and testify in the criminal case, but have not been successful. In those circumstances, I find justification is allowing the application.

Consequently, I allow the application and order as follows:-

1. I appoint the Chief Magistrate Nairobi to be examiner with regard to the criminal case of The State –vs- Vincent Pamire that is pending in the magistrates court in Harare Zimbabwe, to examine and record the evidence of a witness MR. N.S. LOCHAB.
2. I grant orders that the said witness MR. N.S. LOCHAB do attend before the examiner on such a day or days and time and place as the examiner may appoint and do there submit to be examined upon oath, or affirmation, touching the testimony so required as aforesaid and do then and there produce any exhibit(s) that may be necessary.
3. This matter will be mentioned before the Chief Magistrate Nairobi on 29th October, 2007 for fixing hearing date(s), and summoning the witness and making any necessary orders for the prosecution of the case before the examiner.
4. I direct the Deputy Registrar of this Court to prepare the necessary court order under SCHEDULE I of PART VII of the High Court (Practice and Procedure) Rules of the Judicature Act (Cap.8 of the Laws of Kenya) with regard to my above orders.

Dated and delivered at Nairobi this 22nd October, 2007.

GEORGE DULU

JUDGE

In the presence of –

Mr. Bryant for applicant - absent

Eric – court clerk