



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPL. NO. 632 OF 2004**

NAJMA AKASHA.....APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**CONSOLIDATED WITH**

**MISC. CRIMINAL APPL. NO. 633 OF 2004**

SHAUKAT JUMA.....APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**R U L I N G**

Miscellaneous Applications Nos. 632/04 and 633/04 have been consolidated having been based on same grounds and for the further reasons that both Applicants are represented by **DR. KHAMINWA**.

The Applicants both seek in pertinent;

***1. THAT the Applicants be released on bail in the event of arrest or admitted to bail in anticipation of arrest.***

***2. THAT the costs of this Application be in the cause .***

The Applications are brought under Section 3, 123, 124, 125 and 126 of the Criminal Procedure Code and Inherent Powers and Jurisdiction of the High Court and all other enabling provisions of Law. The Application is opposed by the Respondent through counsel, **MR. OGETII**.

The very first issue raised by the Respondent is that the Affidavit supporting the Application is incompetent for failure to disclose the source of the information deponed. **DR. KHAMINWA** did not quite address the issue raised except to submit that the deponent had authority to swear the affidavit as stated in paragraph 1 of both the Affidavits.

The Applicant in 632/04 is **NAJMA AKASHA** while in 633/04 is **SHAUKAT JUMA**, hereinafter referred to as 1st and 2nd Applications respectively. They are, from the averments in the Supporting Affidavit to this Applications, a man and wife. Both Applicants are supported by the Affidavits sworn by

one **HAYAT AKASHA** who is the mother of the 1st Applicant and therefore the mother-in-law of the 2nd Applicant. It is **MR. OGETII**'s submissions that the information contained in the said Affidavits is incompetent on account of non-disclosure of the source of the information. Those submissions are in my view over generalized. It would have been more expedient if the learned state counsel identified the specific paragraphs of the Affidavit which in his view were incompetent for the reason given.

I have undertaken the exercise myself. In the first Application, HAYAT's Affidavit contains several averments whose source is not disclosed and which do not qualify to be deponed to by herself. These are the averments in the following paragraphs: -

**Nos. 6, 7, 8, 9, 10, 12, 13, 14, 16, and 17.**

In the 2nd Application the incompetent averments are contained in paragraphs: -

**Nos. 4, 6, 7, 10, 11, 12, 13 and 14**

Having found the said averments incompetent on account of non-disclosure the only fate they should suffer is to strike them off. I therefore declare the said paragraphs struck off the Affidavit.

Having done so, the remaining part of the two Affidavits of **MRS HAYAT AKASHA** cannot, in my view sustain the Applications. The Application is unsubstantiated and the grounds on which it is based remain mere statements without evidence. As such the Application fails for lack of sufficient evidence. Just for purposes of completion, I will elaborate a little on the issue of the basis of the Application having no substantiation.

On the face of the Chamber Summons, six grounds are cited as the basis of the Application. The very first ground is that the offence that the accused (read applicants) anticipates to be charged with is bailable. No evidence has been placed before this court to show

**1. That the Respondents are seeking the Applicants.**

**2. That the Applicants are being sought for bailable offences**

I have read the Affidavit sworn by **MR. OGETII**, learned Counsel for the State. He discloses that indeed the Police at Special Crime Prevention unit, Gigiri are seeking for the Applicants for a range of offences including non-bailable ones. The said averment is unchallenged and has to be accepted as factually correct. Since the Applicants have not brought any evidence to substantiate the ground cited that the offence(s) they are being sought for are bailable, that ground fails.

The second ground cited is that the Applicants will not abscond but will make themselves available. This ground can only be substantiated by the Applicants themselves. **MRS. HAYAT** has, in her Affidavits, shown that the Applicants are adults. Their whereabouts are not disclosed. She cannot stand in their shoes or minds to say on their behalf that they shall not abscond. That ground was also not substantiated and therefore not proved.

The same reasons advanced for the failure to substantiate ground 2 of the Application also applies to grounds three, four and five. It is only the Applicants who can depone to the grounds cited in the said three grounds in which it is alleged;

**Ground 3 – That the Applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade that person from disclosing such facts to the court or to any police officers.**

**Ground 4 – That the Applicants shall not leave Kenya without the prior permission of the court. Ground 5 – That the Applicant undertakes to abide by or with such other condition as may be imposed by this Honourable Court as if the bail were granted under its**

***proceedings or by it.***

Whereas an Applicant can rely on evidence from persons other than himself/herself, such evidence should meet the standard requirements. Where, as in the Affidavit contained herein, the deponent obtained the evidence or information from some other source, such source should be disclosed and the full names or source of the information given.

I find that the affected averments did not meet the required standard. At their very best, the averments contain hearsay evidence which the court cannot rely on.

Having so found, these Applications have no legs to stand on and are therefore dismissed with no order as to costs.

Dated at Nairobi this 3rd day of December 2004.

**LESIT**

**JUDGE**