



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPLICATION NO.427 OF 2001**

PAUL MUIRURI KIGWATHI..... APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

The application before me is an ex-parte Chamber dated 21st June, 2001 filed under Certificate of Urgency by PAUL MUIRURI KIGWATHI (hereinafter referred to as “the applicant”) seeking (a) leave to apply for orders of prohibition, stopping the Senior Principal Magistrate’s Court at Kibera or any other court of concurrent or lower jurisdiction from conducting or continuing with the trial in Criminal case No.3670 of 2001 filed against the applicant at Kibera Law Courts until further orders of this court. (b) An order that the said leave, if granted, to operate as a stay of the said criminal proceedings. (c) That the applicant be admitted to bail pending the outcome of the Notice of Motion to be filed and (d) That the said Notice of Motion be filed and served upon the Republic within 21 days. These orders are being sought by his advocate Mr. Fredrick Okeyo under Sections 77 and 84 of the Constitution of Kenya and The Law Reform Act chapter 26 Laws of Kenya.

Section 77 of the Constitution of Kenya makes provisions to secure protection of law, while Section 84 thereof makes provisions for the enforcement of an individual’s fundamental rights and freedoms. The Law Reform Act makes provisions for the issuance by the High Court Judicial Review orders of Mandamus, Prohibition and Certiorari.

This application is based on the grounds endorsed thereon and verified by a supporting affidavit of JANE NJERI MURIRI (to be referred to as “Mrs. Muiruri”) the applicant’s wife, and annexures thereto. Mr. Okeyo’s submissions are a clarification of those facts and the law.

The applicant is a sitting councilor in the Nairobi City Council and represents Mihango Ward in Embakasi area. He is also the Deputy Chairman of the City Planning Committee of the said Council.

NICHOLAS MUTUKU MBITI (to be referred as “Mr. Mbiti”) is employed by Pemwe Security Services as a guard. In the month of March, 2001 he was rendering guard duties at Twiga Chemicals Factory along Nanyuki Road in Industrial Area Nairobi. This factory is owned by TWIGA CHEMICALS INDUSTRIES LIMITED (to be referred to as “the Company”).

It is alleged by the Republic in annexures marked JNM – 1 and JNM – 2 which are the charge sheets, that during the night of 24th and 25th March, 2001 Mr. Mbiti broke and entered into the company’s factory with intent to steal and did steal 317 cartons of actellic, 153 cartons of karate, 124 cartons of superdoom Powder, 196 cartons of stabilizer and 131 cartons of orthene all valued at Shs.1,813,096 the company’s property.

In the alternative it is alleged by the Republic that Mr. Mbiti failed to use reasonable means to prevent

the breaking into the company's said factory and the subsequent stealing of its said property.

By reasons of the above, Mr. Mbiti was charged in the Chief Magistrate's Court Nairobi in Criminal case No.699 of 2001 with Factory breaching and stealing contrary to Section 306 (a) of the Penal Code. In the alternative he is charge with Neglect to prevent a felony Contrary Section 392 as read with Section 36 of the Penal Code. This case is still pending before Chief Magistrate, Nairobi.

It is further alleged by the Republic that the applicant, during the same night of 24th /25th March, 2001 at Company's said factory, and while being armed with dangerous and offensive weapons to wit ropes, robbed Mr. Mbiti of the same items which Mr. Mbiti had allegedly stolen from the same factory. As a result of the above, the applicant was charged in the Senior Principal Magistrate's court at Kibera in Criminal Case No.3670 of 2001with Robbery with Violence C/s 296(2) of the Penal Code. The applicant pleaded not guilty and was remanded in custody because this offence is unbailable. It has been fixed for hearing on 26th September, 2001.

The applicant is now seeking for leave to file a Notice of Motion seeking for an order of prohibition directed to the Senior Principal Magistrate Kibera prohibiting the said Magistrate from continuing with or conducting the Criminal trial in Criminal case No.3670 of 2001. It is Mr. Okeyo's submission that the applicant's intended trial for Robbery with violence, where the alleged victim Mr. Mbiti is also charged with the offence of breaking into and stealing from a factory the same items the applicant is alleged to have robbed, is a mockery of justice and a serious abuse of the process of this court. Mr. Okeyo has further submitted that justice in the instance matter can only be seen to have been done if the Republic's decision to try the applicant is quashed and the proceedings in criminal case No.3670 of 2001 are prohibited.

In my view the legal issue to be determined in the substantive motion is whether a thief can be charged with robbery of another thief of the same items which had been stolen by the first thief. It will be necessary to determine that point in view of the clear definitions of stealing in Section 268(1) of the Penal Code and of Robbery in Section 295 of the same Penal Code. On the face of it, it would appear that, with reference to this case, Mr. Mbiti did not become the general or special owner of the goods which he had stolen from the factory, so that the applicant could not in law steal the same from him with violence or at all. A thief cannot steal stolen items from another thief, for the simple reason that the first thief did not have a lawful claim of ownership of the stolen property.

I will give the applicant leave, which he is seeking to file a Notice of Motion as prayed. In other words I grant prayers 1 and 4 in this Ex-part application.

The applicant further prays that this leave do operate as a stay of the Criminal proceedings and that, by reason of staying those criminal proceedings he should be released on bail. In my view the Republic ought to be served with this application so that the issue of stay of proceedings and bail can be heard inter-partes. At this stage therefore I refuse to grant prayers 2 and 3 of this application. The applicant may now fix this application for hearing inter-parties for those prayers.

It is so ordered.

Dated and delivered this 25th June, 2001.

A.G.A. ETYANG'

JUDGE

Delivered this 25th June, 2001 in the presence of Mr. Okeyo for the applicant – ex-parte, Miss Mutonyi – Court clerk in attendance.

A.G.A. ETYANG'

JUDGE

25.6.2001

Mr. Okeyo:

I ask for hearing on 28th June, 2001 at 9.00 a.m.

A.G.A.ETYANG'

JUDGE

Order:

Hearing of this application for orders of stay of proceedings and bail pending trial is fixed at 9.00 a.m. on 28th June, 2001. The Republic be served forthwith.

A.G.A. ETYANG'

JUDGE

25.6.2001