REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC CRIMINAL APPLICATION NO 86 OF 2018

PETER MUTUKU KIIO...1ST APPLICANT

PHILEMON CHERUIYOT CHEPKWONY.............................2ND APPLACANT

TIMOTHY KAMONDE KAGURU..3RD APPLICANT

VERSUS

REPUBLIC..RESPONDENT

RULING

Introduction

1. The applicants have applied for review of this court's ruling of 8th October 2018 with a view of admitting them on bail pending the hearing and determination of their trial. The 1st and 2nd applicants also sought to adduce additional evidence in support of this application. The application was brought pursuant to the provisions of articles 27 (1), (4) and (5), 49 (1) (h) of the 2010 Constitution of Kenya, section 123 of the Criminal Procedure Code, the Appellate Jurisdiction Act (Cap 9) Laws of Kenya and section 362 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

2. Additionally, the applicants are also seeking the following orders. An order to admit additional new evidence in support of the application namely an order for the court to visit Narok Police Station cells to acquaint itself of how they are secured. Another order for the cells register and the occurrence book for 16th and 17th August 2018 to be availed for the scrutiny of the court.

The grounds in support of the application

3. The application is supported by nine grounds that are set out on the face of the notice of motion and a 27 supporting affidavit of Peter Mutuku Kiio. The major grounds are as follows. First, when the application for bail was made in the trial court, some crucial information relating to how the applicants were locked in Narok police station cells was made available to the court. Second, the cells register and the occurrence book for 16th and 17th August 2018 should be availed to the court for scrutiny. The applicants are charged with robbery with violence contrary to section 296 (2) of the Penal Code (Cap 63) Laws of Kenya. The rest of the grounds relate to matters of law, which I do not find necessary to set out here.

The affidavit evidence

4. The major averments in the affidavit are as follows. First, the cell in which the applicant and his co-applicants were locked up in Narok police station on the 16th August 2018 is secured with a steel door, which is locked from outside. Additionally, the roof is fortified with a cement slab and exiting from that cell in any other way other than through the door is impossible. Second, the applicant has deposed that he did not attempt to flee from the said cell. Third, the applicant has deposed that it would serve the ends of justice if this court visits Narok police station to confirm that it would not have been practical to even attempt to escape as alleged. Fourth, the applicant has deposed that if the above information was available to this court at the time he made his previous application for bail, both the High Court and the magisterial court would have arrived at a different conclusion. He also has deponed that the offence charged is bailable.

Submissions of the applicants

5. Mr Kilele, counsel for the applicant has submitted that based on the provisions of article 149 (1) (h) of the 2010 Constitution of Kenya, the applicants have on a balance of probability satisfied the court that there no compelling reasons to deny them bail. Counsel has also cited a

number of authorities.

6. The case for the 3rd respondent is similar to that of the two co-applicants. Mr. Omoa, like counsel for the other co-applicants cited article 149 (1) (h) of the 2010 Constitution, amongst other authorities.

The case for the respondent

7. Ms. Nyaroita, counsel for the respondent has filed written submissions in opposition to the application. She cited ***Tom Martins Kibisu v Republic (2014) eKLR*** in which the Supreme Court held that new evidence means "*evidence which was not available at the time of trial and which despite exercise of due diligence could not have been available at the trial.*" Furthermore, counsel cited section 358 (1) of the Criminal Procedure Code, which authorizes the High Court to admit new additional evidence in an appeal from a subordinate court; if the court takes the view that such evidence is necessary. Counsel also cited ***Elgood v Regina (1968) EA 274***, a case in which the Court of Appeal for Eastern Africa laid down the principles to be taken into account in considering whether to admit new additional evidence. The principles are as follows. First, the evidence sought to be adduced must be new evidence, which was not available at trial. Second, it must be relevant evidence to the issues raised. Third, it must be relevant evidence to the issues raised. Third, it must be credible evidence. Fourth, the court has to consider whether the said evidence might have created a reasonable doubt in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial.

8. Counsel has submitted that the evidence sought to be adduced was available when the earlier application was made according to the replying affidavit evidence of IP Michael Lemayian, who was the investigating officer. Furthermore, the applicants had the opportunity to cross examine IP Michael Lemayian. Finally, counsel submitted that the issue of attempted escape from lawful custody was considered by the court, when it dismissed the application on 8th October 2018.

Issues for determination

9. I have considered the affidavit evidence, the rival submissions and the authorities cited by all counsel. As a result, I find the following to be the issues for determination.

1. Whether or not the applicants have presented new evidence.

2. Whether or not the provisions relied upon authorize review of the ruling that denied to the applicants.

Issue 1

10. The new evidence the applicants sought to produce include the following. The cells register and the occurrence book (OB) entries of 16th and 17th August 2018, which counsel for the applicants have urged the court to scrutinize**.** The cells register and the occurrence book entries of 16th and 17th August 2018 were available before and during the hearing and determination of first application, in respect of which a ruling was handed down on 8th October 2018. Secondly, the new evidence sought to be obtained urging the court to visit the police cells with a view for the court to acquaint itself on how the Narok police cells are secured, should have been done as part of the hearing of the application. **See generally *Kuyate v. Republic (1967) EA 815.***

11. Furthermore, the failure of the applicants to cross examine IP Michael Lemayian on his replying affidavit in the first application constitutes acceptance of the truth of the matters deponed thereto. They are now estopped from challenging its truthfulness.

12. The evidence sought to be adduced in not new evidence and does not meet the threshold laid down in ***Elgood v Regina, supra.***

Issue 2

13. The constitutional provisions cited by the applicants do not provide for review of the ruling or order refusing bail. Even the provisions of section 123 of the Criminal Procedure Code have no provisions for review. The Appellate Jurisdiction Act (Cap 9) Laws of Kenya is in terms of its preamble is *"An Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto."* It is clear that this statute does not apply to proceedings in the High Court. Furthermore, section 362 of the Criminal Procedure Code confers on the High Court power to "*call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality, or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court*." It is equally clear that these provisions confer on the High Court power to revise orders of magisterial courts. These provisions do not therefore apply to the instant proceedings. Counsel for the applicants also cited section 358 of the Criminal Procedure Code in support of calling of additional evidence in the instant application. These provisions only apply to appeals by convicted persons whose appeals are in the High Court for hearing and determination. They do not apply to review applications of this nature.

14. It is clear from the foregoing that the application is a disguised appeal against the ruling and order denying bail to the applicants. It is trite law that a right of appeal is generally conferred by law. The applicants have not cited any enabling provision of the law that enables them to apply for review of the instant ruling and order.

15. The upshot of the foregoing is that the application fails and is hereby dismissed**.**

Ruling signed, dated and delivered in open court at Narok this 9th day of October, 2019 in the presence of all 1st and 2nd applicants and Mr.

Kilele holding brief for Mr. Omao for the 3rd applicant and Mr. Mwangi for the respondent.

J. M. Bwonwong'a

Judge

9/10/2019