



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL APPEAL NO. 178 OF 2014

REPUBLICAPPELLANT

VERSUS

1. BAKTASH AKASHA ABDALLA alias BAKTASH AKASHA
 2. VIJAYGIRI ANANDGIRI GOSWAMI alias VICKY GOSWAMI alias VIJAY GOSWAMI
 3. IBRAHIM AKASHA ABDALLA alias IBRAHIM AKASHA
 4. GULAM HUSSEIN alias HUSSEIN SHABAKASH alias HADJI HUSSEIN alias OLD MAN
-RESPONDENTS

RULING

In Miscellaneous Applications Nos. 334 and 337 both of 2014 which were consolidated the Applicant who was the Director of Public Prosecution sought orders for provisional Warrants of arrest against all the Respondents and for them to be held in police custody for a period of twenty one (21) days in the first instance to allow for formal extradition procedures to be complied with.

This application was heard by Honourable Gicheru – Chief Magistrate who granted the orders sought in his ruling dated 13th November, 2014.

On 19th November, 2014 the Respondents made an application for bond citing among other grounds the health of the Respondents. This application was opposed by the Director of Public Prosecution.

The learned trial magistrate rendered his ruling on 1st December, 2014 wherein he granted the Respondents bond but with several salient conditions.

Being aggrieved by those orders the Director of Public Prosecution filed a revision under section 362, 363, 364 and 365 of the Criminal Procedure Code in the High Court seeking orders for stay of the Chief Magistrate's orders and variation of the Lower Court orders and to place the Respondents in custody pending the hearing and determination of the extradition proceedings.

My sister Lady Justice Odero after hearing the revision proceedings delivered a ruling on 8th December, 2014 in which she held (at page 3 last paragraph),

“That the grant of bail by the trial Court is perfectly legal and proper. The trial magistrate acted well within his mandate and powers in considering and exercising his discretion to grant bail to the Respondents. The grant of bail is discretionary power granted to a Court”.

The Judge further observed that the Director of Public Prosecution ought to have approached the High

Court by way of an appeal as there was nothing injudicious of the exercise of the discretion to grant bail by the trial Court. Stay orders for the release of the Respondents were granted pending the hearing of the appeal.

Being aggrieved by the orders of stay, the Respondents filed an application for sticking out the appeal which application was heard by myself on 16th December, 2014 and in my ruling dated 19th December, 2014 orders were made that the matter do proceeded to appeal as earlier ordered.

The grounds of this appeal are that the learned trial magistrate erred in law by granting bail to the Respondents following a renewed application for bail by the Respondents having previously denied bail on an earlier application without any legal or factual basis.

Secondly, that there were no substantive new facts presented before the Court to warrant change of circumstances.

Thirdly that the learned trial magistrate failed to find as he had earlier on done that nature and gravity of the offence was a compelling reason to deny the Respondents bail.

That the learned trial magistrate failed to appreciate that the extradition proceedings preferred against the Respondents in themselves were an incentive for flight from the Kenyan jurisdiction by the Respondents and the bond terms were lenient in the circumstances.

Mr. Muteti Assistant Director of Public Prosecution submits that the renewed application for bail did not introduce anything new. The only new ground being that of the health of the Respondents which was not sufficient in the circumstances. Reliance is placed on the United States District Court of New York case of,

“In the matter of extradition of Hamilton Byrne 8331 S. Supp 287 where it was observed that,

“Were health problems a basis for release both in domestic as well as extradition cases, actual and feigned illness could rapidly empty custodial facilities”.

On the issue of gravity of the case Counsel cited the case of Danson Mgunya –Vs- Republic wherein Justice Ibrahim cited with approval the Supreme Court of Nigeria case of Alhaji Mujahid Dukubo –Vs- Federal Republic of Nigeria in which the Court set out grounds for granting bond to include;

- I. **The nature of the charges.**
- II. **The strength of the evidence which supports the charge.**
- III. **The gravity of the punishment in the event of Conviction**”.

It is further submitted that extradition proceedings by their very nature pose the threat of being removed from one's Country and therefore the motivation to flee is very high.

Reliance is placed in the case of Wright –Vs- Henkel Limited states Supreme Court where it was held that,

“Bail cannot ordinarily be granted in extradition cases, but it is not held that the circuit Courts may not in any case and whatever the special circumstances, extend that relief”.

Further it is submitted that Article 24 of the Constitution permits the limitation of rights if its justifiable in a democratic and open society and that the extradition proceedings have a bearing on the rights of the larger Society.

Counsel has cited the case of United States –Vs- Messina 566 District Court ED New York where it was held,

“In extradition proceedings the presumption is against bail because of the nations foreign relations interest in successfully producing extradited persons. Accordingly, bail will be granted only under special circumstances”.

Its the contention by the Director of Public Prosecution that if the Respondents are released on bond there is no guarantee that they would avail themselves in Court as the terms and conditions are lenient.

Counsel, for the first Respondent Mr. Wandugi submits that the appeal is incompetent as the proceedings are not properly on record. It does not have a certified copy of the order or Judgment appealed from.

Further it is submitted that section 348(a) of the Criminal Procedure Code provides that appeals by the Director of Public Prosecution should be a question of law.

Counsel submits that this matter went before Justice Odero on revision and she made a finding on it. In that revision she was acting as an appellate Court and if the Director of Public Prosecution was aggrieved by her decision an appeal ought to have been filed in the Court of Appeal. Reliance is placed in ***Criminal Appeal No. 61 of 2004 Muya – Vs- Republic*** where it was held that,

“An order made by the High Court in the exercise of its revisionary jurisdiction is deemed to be a decision of the High Court in its appellate jurisdiction and accordingly the decision in this case was appellate to the Court of appeal on a matter of law”.

It is also submitted that a fresh application for bail can be made at any time during the proceedings of the trial and that the Respondents had established changed circumstances by producing documentary evidence on their health.

Mr. Oguk for the 2nd Respondent did submit that bail is a Constitutional right under article 49 (I) (h) of the Constitution and its not a preserve of Kenyan citizens only but also to foreigners.

Mr. Ndegwa for the 3rd Respondent submits that there is a mis comprehension of facts in the filing of the grounds for appeal by relying on the fact that there was no proof of changed circumstances when the learned trial magistrate made a ruling granting the Respondents bond.

That the first ruling was generated by an application by the Director of Public Prosecution seeking to have the Respondents detained for twenty one (21) days. That Mr. Ombete did not to make an application for bond at the time and what is touted as a second application for bond was indeed the first one and there was no need to show changed circumstances.

Further that even if it was a second application for bond new circumstances had been shown. It is submitted that a compelling reason is a question of fact which has to be established and proved by evidence.

Cliff Ombeta for the 4th Respondent submits that the first application was by the State to have the Respondents detained for twenty one (21) days and his application for bond was not a second application but the first one. Further that the learned trial magistrate did consider all issues placed before him which were the seriousness of the offence, the issue of the red notice, the issue of the Respondents being a flight risk. It is submitted that the red notice is not a principle known in our laws as its not found in our extradition Act and further that section 14(3) of the extradition Act provides for bond.

The four Respondents face extradition proceedings on two counts.

Count I: Conspiracy to import Heroin in violation of title 21, United States Code, Section 959, 960, 963 and Article 18 USC Section 3238 the offence punishable by a maximum of life imprisonment.

Count 2: Conspiracy to Import Metha Phelamin, in violation of title 21 United States Code, Section 959, 960, 963 and tittle 18 USC Section 3238, the offence is punishable by a maximum of life

imprisonment.

These extradition proceedings are at the request of the Government of United States of America.

The Law respecting extradition proceedings in America. On the issue of bond is captured in the cited case of **United States – Vs- Messina**

Wherein there is a lengthy discourse on the principles of granting bail in extradition proceedings. The main principle being that in extradition proceedings bail will be granted only under special circumstances. In the same breadth it was noted that in the 1977 Digest of United States practice in international Law 156 it was observed,

“In general its the practice of United States Courts to allow persons provisionally arrested to remain at large on bond if there is no evidence that the person is about to flee”.

That is the American position, its not binding on this Court but its of persuasive value as well as comparative.

In the Kenyan context the issue of right to bond is provided under article 49(i) (h) of the Constitution in the following words,

“Every Accused person has right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released”.

It is trite law that the primary consideration is whether the Accused person will attend Court and be available at the trial and that all factors and circumstances must be considered with this Central principal in mind **Republic – Vs Mgunya EALR 2011 page 365.**

As submitted by Ndegwa Counsel for the Respondents the main thread in this appeal is that no changed circumstances were proved before the learned trial magistrate and therefore it was not proper for him to grant bond. This theme of changed circumstances is based on the believe that the Respondents had earlier on made an application for bond which was rejected and they were renewing the application for bond when it was granted by the Lower Court.

A perusal of the record of proceedings shows that its the Director of Public Prosecution who filed the first application which was seeking the detention of the Respondents for twenty one (21) days but not the Respondents.

The Respondents later made an application for bond and sought leave to produce medical documents showing that they were in ill health.

Afterwards the learned trial magistrate made a ruling admitting the Respondents to bail.

On this issue the learned trial magistrate (at page 48 5th paragraph) had this to observe,

“On the first issue of the right to bail, I find that it can be renewed at any time in the course of proceedings. In the alternative a suspect can appeal against an order of refusal of bail to a higher Court. It is also trite law that the prime consideration in granting bail is whether or not an arrested person will attend Court as and when required”.

The learned trial magistrate also directed his mind on the provisions of section 14(3) of the Extradition Act and Article 49 (I) (h) of the Constitution in arriving at his decision to grant bail.

I have anxiously considered and evaluated the rival arguments posited by the Appellant and the Respondents in this case.

The genesis of this appeal was generated by a revision which was filed and was heard by Justice Odero, the orders sought in that revision were inter alia;

1. **A stay of the learned Chief Magistrate's orders granted on 1st December, 2014.**
2. **Variation of the same orders.**

In her ruling (which I will substantially quote because of its substance and effect) dated 8th December, 2014 she made the following finding (at page 3 last paragraph),

“The grant of bail by the trial Court is perfectly legal and proper. The trial magistrate acted well within his mandate and powers in considering and exercising his direction to grant bail to the Respondents. The grant of bail is a discretionary power granted to a Court I find nothing incorrect, illegal or improper in the manner in which he exercised his legal discretion in the matter”.

However, in the same vein she did note that the avenue of appeal remained open to the Director of Public Prosecution. The Director of Public Prosecution opted to follow up that avenue although it was one which was strewn with obstacles.

Obstacles in the way of filing an appeal on a matter which the Judge had substantially made findings on the bond application revision amounting to almost a final decision.

Having made the finding that there was nothing incorrect, illegal or improper in the manner in which the learned trial magistrate handled the bail application, can a Court of concurrent jurisdiction purport to arrive at a different position? To do so, I find would amount to sitting on an appeal on a decision made by a fellow Judge.

Is there room left to wriggle in this application?

I find much as I would have been required to delve into all the issues raised by this appeal a definite finding was made on the issue of bond in the revision matter and there is no point of interrogating it further as it would be an exercise in futility.

Though the issue of bond was settled by the revision ruling. The one on conditions ought and should be revisited.

The Respondents face extradition proceedings which are quite serious in nature and the temptation to flee is not far fetched. They were granted a bond of Ksh. 5 million with two sureties of similar amount. I find the circumstances obtaining in these extradition proceedings Warrant stiff bond terms so as to alleviate the temptation to flee. The bond terms granted by the learned trial magistrate are hereby enhanced to Ksh. 30 million with two sureties of similar amount for each respondent. They will be reporting to the investigating officer three (3) days in a week i.e. Mondays, Wednesdays and Fridays at 10:00 a.m.

Further, they will comply with other conditions granted by the learned trial magistrate.

The appeal succeeds to that extent only.

Ruling delivered dated and signed this **9th** day of **February, 2015**.

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M. MU YA

JUDGE

9TH FEBRUARY, 2015

In the presence of:-

Mr. Muteti, Jami, Miss Ochola for the State

Mr. Oguk, Wandagi, Ombala and Ndegwa for the Respondents.

M. MUYA – JUDGE

Mr. Muteti:

We apply to be furnished with certified copies of the Ruling.

Court:

Defence and the Director of Public Prosecution to be furnished with certified copies of the Ruling.

Mr. Oguk:

We apply that the Accused persons be remanded at Port Police Station.

Court:

Accused persons to be remanded at Port Police.

M. MUYA – JUDGE

The original file to be returned to the lower Court for purposes of continuing proceedings on **16th February, 2015.**

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M. MUYA

JUDGE

9TH FEBRUARY, 2015