



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 51 OF 2014

SHIRE ALI ADAN ALIAS AWALE.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. Shire Ali Adan alias Awale (the accused) was arraigned in this court on 16th July 2014. He faces two counts of murder the particulars of which are that on 15th June 2014 at 7th Street Eastleigh Estate, Starehe District Nairobi county jointly with others not before court murdered one Mohamed Safi and one Abdikadir Ali. He denied both counts.
2. On 23rd July 2014, the accused applied to be released on bail. The State initially opposed the application vide a replying affidavit dated 30th July 2014 and sworn by **No. 57766 PC Dismus Suria**. The State's position was that the accused was a Somali national who was residing unlawfully in Eastleigh and was a flight risk. Subsequently the applicant's counsel filed a supplementary affidavit displaying documents seeking to prove that the applicant had a lawful migrant status. The State represented by learned prosecution counsel Ms. Mwaniki then asked the court for time to verify the alien status and the personal identification documents of the accused. On 2nd October, 2014, learned prosecution counsel Mr. Okeyo informed the court that the State had verified the applicant's documents and was satisfied with his alien status. He stated that the State was no longer opposed to the applicant being granted bail.
3. On 6th October, 2014, this court granted the accused bail on condition *inter alia* that he deposits his passport with the court. The applicant then presented his passport No. P00342833 bearing the names Adan Anod Shire. Upon scrutiny, the Deputy Registrar of this court rejected the passport as it did not bear the same names as those in the charge sheet namely Shire Ali Adan.
4. On 30th December, 2014 the accused filed an application seeking orders that the court verifies that the applicant's names Adan Anod Shire or Shire Adan Ali alias Awale do belong to the accused and that the court issues a release order pursuant to the bail earlier granted.

In response the State filed a Replying affidavit dated 2nd January 2014 (corrected to read 2015). The affidavit is sworn by No. 234251 IP Leonard Bwire. At paragraph 4 he listed the various documents held by the applicant which bear variations of his names as follows:-

- i. *Passport allegedly issued on the 10th March, 2014 indicates he is known as **Adan Anod Shire**.*
- ii. *Kenyan Alien Certificate indicates he is known as **Shire Adan Ali***
- iii. *Kenyan Driving License indicates he is known as **Adan Ali***

- iv. *Kenyan (Kenya Revenue Certificate) (Tax payer's registration certificate) indicates he is known as **Adan Ali Shire.***
 - v. *Verification of the Tax payer's registration certificate indicates he is known as **Shire Adan Ali.***
 - vi. *Kenya Logbook of motor vehicle registration number ZE 3780 indicates he is known as **Adan Ali Shire.***
 - vii. *Motor Vehicle Search Certificate from Kenya Revenue Authority indicates he is known as **Shire Adan.***
 - viii. *Medical Report which he presented to court on the 23rd July, 2014 indicates he is known as **Shire Adan Ali.***
5. **IP Bwire** also deposed that the police were in the process of conducting further investigations to confirm whether the accused person/applicant was linked to terrorist activities or known terror operations in Kenya or worldwide for reason that "*interchanging of names in one's personal documents is a common trend known with terrorists and its operatives*". Further, IP Bwire deposed at paragraph 7 that the applicants Kenyan alien certificate had expired and he was therefore not entitled to reside in Eastleigh but in one of the designated refugee camps.
 6. At the hearing of the application on 18th March 2015 I heard submissions from **Ms. Nyang** learned counsel for the applicant and **Mr. Okeyo** for the respondent. **Ms. Nyang** submitted that the variance of names of the accused for which he had sworn and filed an affidavit explaining the same could be cured by amending the charge sheet. She pointed out that the issue of terrorism which had been raised had been cleared by the anti-terrorism police. She took issue with the prosecution's request for the cancellation of bond through the averments in the Replying Affidavit.
 7. **Mr. Okeyo** on the other hand drew the court's attention to the Replying Affidavit filed on 2nd January 2015 (wrongly indicated 2014). He submitted that the investigations which had been ordered regarding the variance of the applicant's names in the passport, driving licence and KRA certificates raised doubt on the applicant's true identity leading to the conclusion that the applicant was a flight risk. He suggested that the doubts raised called for further verification of the documents. Other than this the State made no further submission on the immigrant status of the accused.
 8. Two issues arise in this application. The first one is whether the court can on the basis of an averment in the Replying Affidavit cancel the bond already granted to the applicant. The second is if there was sufficient cause to disbelieve that the names in the various official documents of the accused belong to one and the same person who is the accused.
 9. I will begin with the first issue which is an averment in the Replying Affidavit of **IP Leonard Bwire** asking the court to cancel the bond already granted to the accused. He avers at paragraph 13 that "*in view of the above anomalies and more so due to the recent terror attacks in Kenya we pray that the accused person/applicant remains in custody and that his bail/bond be canceled.*" In challenging this averment, defence counsel submitted that the prosecution ought to have filed an application for cancellation of bail. I agree with this submission for the following reasons. The Constitution gives an accused person the right to bail unless there are compelling reasons. In the present case, the accused filed his application for bail on 23rd July 2014. On 30th July 2014 **No. 57766 PC Dismus Syria** (one of the investigating officers filed a Replying Affidavit opposing the application. He deposed *inter alia* that the accused was a Somali national who was residing in Eastleigh unlawfully whereas he had refugee status and was therefore supposed to be in one of the designated refugee camps; that the accused was a flight risk and that he was likely to interfere with or intimidate witnesses.
 10. Before the application could be heard however, the record shows that on 2nd October, 2015 learned prosecution counsel **Mr. Okeyo** told the court that the State was no longer opposing the application and had verified the accused's documents which were found valid. He asked that the same be deposited in court. It was on the basis of that submission that the court granted the applicant conditional bail vide its ruling dated 6th October, 2014. It is my view that if the State now wishes to have the bail cancelled, it ought make an application before the court for the review of court's orders. It cannot sneak in a prayer for cancellation in a replying affidavit to the accused's own application. To do so would deny the applicant an opportunity to challenge the

prayers sought.

11. The 2nd issue is whether there was sufficient cause for the court to believe that the accused Shire Ali Adan alias Awale (as stated in the charge sheet) was not the holder of Somalia passport No. P00342833 bearing the names Adan Anod Shire which the accused seeks to deposit in court. On this issue, the applicant filed a lengthy affidavit explaining how he came to be known by the various names and how the said names have variously found their way into his personal and official documents.

12. The State promptly opposed the application and vide the Replying Affidavit of No. 23425 IP Leonard Bwire sworn and filed on 2nd January 2014 stated that the anomalies in the names of the accused cannot be cured by an affidavit; that State was in the process of investigating whether the accused was linked to terrorist activities; and that the accused was likely to abscond trial.

13. At the hearing of the application on 18th march 2015, Mr. Okeyo for the State submitted that investigations were ordered regarding variance of the names of the accused. That the documents namely his passport, driving licence and KRA Certificates bore different names which cast doubt on their authenticity and the identity of the accused leading to the opinion that the accused was a flight risk. Mr. Okeyo further added that there was need for verification of the documents.

14. I find the submissions of the State not helpful at all. I say so because the record shows that since the time the issue of the names came up, the State has had ample time to verify the accused's documents and to conduct an investigation into its suspicion that the accused may have links with terrorists. The State itself returned a verdict in favour of the accused. The court was shown a letter written to the Director Public Prosecutions by the Anti-terrorist police unit clearing the accused's passport as having been genuinely acquired and clearing the accused of any communication with terrorist suspects. With such clearance from the relevant State agency, I find, on the basis of the documents laid before court, that the court has no further role in the verification of the accused's documents. It has not been shown to the court that the person charged in court in the names of Shire Ali Adan alias Awale is not the holder of Somali passport No. P00342833. The burden was on the prosecution to prove the same to the court.

15. In the premises I allow the application and direct that the accused deposits the said passport in court subject only to the normal verification by the Deputy Registrar of the Court. The State is at liberty to amend the names in the information as per its own findings contained in the sworn affidavit of IP Leonard Bwire as well as continue any further verification of the accused's documents, identity, and social networks if necessary.

Finally, I reiterate that the accused shall comply with all the bond terms earlier granted vide the Ruling dated 6th October, 2014

Orders accordingly.

Ruling delivered, dated and signed at Nairobi this 12th day of May, 2015

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Accused

.....: For the accused

.....: For the state