

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 32 OF 2014

CAIXIA XIONG.....APPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. This is an application for revision brought by way of Notice of Motion dated 14th May 2014. It is brought under **Section 362** of the **Criminal Procedure Code, Cap 75 Laws of Kenya** and **Article 39** of the **Constitution**. The applicant **Caixia Xiong**, prays for orders that, the court do call for Cr. Case **No. 123 of 2014** and examine the correctness, legality and propriety of the order made on 7th May 2014 by the trial magistrate, the court do grant the applicant leave to travel to the Puntland State of Somalia between 24th May 2014 and 31st May 2014, and that her passport be released to her forthwith on 2nd June 2014 to facilitate her travel.
2. Mr. Kariuki, learned counsel for the applicant, submitted that the applicant pleaded not guilty to the charges in the trial court and the presumption of innocence applied. He contended that the ground given by the lower court for rejecting the applicant's prayer, which was that she faced a serious charge was not reasonable. Further that the court did not indicate the kind of guarantee it required of the applicant and that she was ready to deposit her passport back in court upon her return.
3. Mr. Kariuki argued that it was erroneous for the court to state that the applicant will not be allowed to pursue her personal interests when she has a case in court. That she should be allowed to do so unless and until she was convicted. Mr. Kariuki also urged that the engagement in Somalia required the applicant's personal attention and could not be delegated because to do so would render her jobless.
4. Lastly, Mr. Kariuki submitted that the applicant needed her passport for purposes of replacement, otherwise she might find herself to be in the country illegally. He argued that there was no justifiable reason to deny the application and urged the court to allow it.
5. The application was opposed by the Respondent represented by learned state counsel, Mrs. Ngetich, on several grounds. She urged the court to consider that a huge amount of money amounting to approximately Kshs.4 million was involved; that the charge is grave; that allowing the application would interfere with the trial and that the chances of absconding were quite high since there were no documents to support the reasons for the applicant's travel or evidence to show that the passport doubles up as her work permit or that it was due for replacement.
6. At the core of this application is the question whether the applicant will return to this jurisdiction and avail herself for the trial, if her passport is released to her and she is allowed to leave the country. This court must therefore examine the totality of the circumstances in determining whether or not to allow the application.
7. The applicant is faced with a charge in which it is alleged that she obtained Kshs.4 million by making false representations. Although the charge cannot be said to be grave as referred to by Mrs. Ngetich, the sum of money involved is quite large. The court is alive to the fact that the

presumption of innocence operates in her favour since she has not been tried and convicted of the offence, however, the nature of the charge in this case is a factor worth noting.

8. From the applicant's supporting affidavit she appears to have no family ties in Kenya. I note also that the letter of the chairman annexed to the applicant's supporting affidavit, purporting to introduce her as the country representative for the company ZhongShuai Petroleum Chemicals Industry Co. Ltd (ZSPC), and also the letter purporting to invite her to Puntland Somalia do not indicate any physical addresses in the countries of origin or destination. They look like documents anyone could write for themselves. Both her places of residency and employment are doubtful.
9. I have examined the lower court record for incorrectness, illegality and/or impropriety and found none. I have also carefully assessed the submissions from both sides, the authorities referred to and the totality of the circumstances governing this case, and find that the applicant's situation is quite uncertain and that in those circumstances the risk of her skipping bail is unacceptably high. I therefore find no reason to depart from the decision of the learned trial magistrate in **Cm Cr. Case No. 123 of 2014** arrived at on 7th May 2014.

The application is therefore found to be lacking in merit and is dismissed accordingly.

SIGNED DATED and **DELIVERED** in open court this **9th day** of July **2014**.

L. A. ACHODE

JUDGE