



Nzuki v Attorney General & 2 others (Miscellaneous Criminal Application E418 of 2023) [2024] KEHC 568 (KLR) (Crim) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 568 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL
MISCELLANEOUS CRIMINAL APPLICATION E418 OF 2023
K KIMONDO, J
JANUARY 30, 2024

BETWEEN

JOHN WAMBUA NZUKI APPLICANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

INSPECTOR GENERAL OF POLICE 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS 3RD RESPONDENT

RULING

1. John Wambua Nzuki (hereafter the applicant) prays for bail pending the determination of an application in the nature of *habeas corpus*. The Notice of Motion is dated 22nd November 2023 and supported by his deposition of even date.
2. The application is contested by the Director of Public Prosecutions (hereafter the DPP) and who also appeared on behalf of the Inspector General of Police (the 3rd respondent). Their grounds of opposition are dated 7th November 2023.
3. The Attorney General, who was sued as the 1st respondent, did not defend these proceedings.
4. The background is as follows. The applicant is a Kenyan. He is wanted in the Republic of Zambia to answer on charges of theft by servant contrary to section 278 of the Penal Code of Zambia. It is alleged that between 1st October 2010 and 30th May 2011, while he was the head of information technology at Intermarket Banking Corporation Limited, he stole 13,000,000 Zambian Kwacha equivalent to US\$ 2,700,000 from the bank's suspense account number 225999.



5. A warrant of arrest was issued by the Subordinate Court of the First Class in the Republic of Zambia on 30th January 2015. On 20th July 2015, the DPP issued the Authority to Proceed. An extradition order was finally made on 30th October 2023 by the Chief Magistrates Court sitting at Nairobi in Miscellaneous Criminal Application Number 15 of 2023.
6. Being aggrieved, he lodged “an appeal” to the High Court. Prayer 2 of the motion is couched in the following terms: that pending determination of the appeal, the court be pleased to release the applicant on lenient bail terms. The reality however is that there is no formal appeal before the court.
7. Rather, there is an application by way of chamber summons dated 2nd November 2023 to compel the 2nd respondent to present the applicant to the High Court and to order the respondents to release the applicant on bail on conditions to be set by the High Court. That application was lodged by the law firm of Ajaa Olubayi. When new counsel, Mbalu & Associates, came onto the record, they filed the instant motion again seeking for bail. For that reason, I readily find that the subsequent motion is highly irregular.
8. Regarding the merits of the instant motion, learned counsel, Mr Mutava, argued that the applicant has been in police custody since 30th October 2023. Furthermore, the extradition proceedings are impugned for want of compliance with the *Extradition (Commonwealth Countries) Act*, Chapter 77 of the Laws of Kenya; and, that the sole witness called by the lower court, Seargent Felix Karisa Bazi, was not privy to the criminal charges facing the applicant in the Republic of Zambia. Accordingly, it was argued that there are high chances of success of the “appeal” or *habeas corpus* application; and, there are no compelling reasons to deny bail.
9. The retort by the DPP is two-fold. That there is no legal basis to recall the extradition order; and, that there are no valid grounds to order for the release of the fugitive. It was also submitted that in view of the extradition order, the applicant is a serious flight-risk.
10. I take the following view of the matter. The allegations of theft by the applicant back in Zambia remain just that. In that sense the applicant is still presumed innocent at this moment. Under Article 49 (1) (h) of the *Constitution*, he is entitled to bail unless there be compelling circumstances. See generally, *Republic v Joktan Mayende & 3 others*, High Court, Bungoma Criminal Case 55 of 2009 [2012] eKLR, *Michael Juma Oyamo & another v Republic*, Court of Appeal, Nairobi Criminal Appeal 113 of 2018 [2019] eKLR; *Muraguri v Republic* [1989] KLR 181; *R v Fredrick ole Leliman & 4 others*, Nairobi High Court Criminal Case 57 of 2016 [2016] eKLR.
11. However, the applicant is seeking bail pending challenge of the extradition order by the lower court. That prayer in the nature of a *habeas corpus* order is pending. It would obviously be overreaching and highly prejudicial to delve into the merits of that prayer. But I can safely state the following: To succeed in an application for bail at this stage, the applicant would need to demonstrate that the review sought has a high chance of success or that there are some exceptional circumstances.
12. I remain alive that the extraditing court is not a trial court. The matters it is supposed to be satisfied with before making the order were well stated by the Court of the Appeal in *Torroha Mohamed Torroha v Republic* [1989] eKLR. The following passage appears in the judgment-

The Court shall have regard to Section 14 (1) of the *Act*. The Magistrate then peruses the documentary and oral evidence and ensures that Sub- Section 1 (a) and (b) of Section 14 of the *Act* has been complied with. Before exercising his discretion to order the return of the prisoner, the magistrate should peruse the entire evidence and understand it, without taking the position of a trial court. So, the degree to which the Magistrate has to be ‘satisfied’



is not expected to be as high as if any such satisfaction was derived from an analysis and evaluation of evidence adduced at a trial. The Magistrate is under no duty to enquire into the merits of the charges to be preferred. The Magistrate does not try or attempt to try any issue because there is no hearing. *Kunga v Republic*, [1975] EA 155. If there is some evidence which discloses a connecting factor between the prisoner and the alleged offences, the magistrate should order the prisoner to be returned.

- 13 From the materials and records now before me, I am not satisfied that the *habeas corpus* application has a high chance of success; or, that there are exceptional circumstances to warrant grant of bail pending those proceedings. Furthermore, and, as matters stand now, an extradition order to remove the applicant to the Republic of Zambia is in force. An alleged accomplice, Macmillan Musamba Miyanda, was convicted in the Republic of Zambia and jailed.
14. I find that a combination of all these circumstances heighten the risk of absconding if the applicant is released on bail. That is a strong and compelling reason for denial of bail.
15. The upshot is that the applicant's notice of motion dated 22nd November 2023 is devoid of merit and is hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY 2024.

KANYI KIMONDO

JUDGE

Ruling read virtually on Microsoft Teams in the presence of-

The applicant.

Mr. Mutava for the applicant instructed by Mbalu Associates Advocates.

Ms. Nduati for the Republic instructed by the Office of the Director of Public Prosecutions.

Mr. E. Ombuna, Court Assistant.

