



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC CRIMINAL APPLN NO. E426 OF 2021**

**MUSTAFA MWALIM MUSA ..... APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

**UBDI YAHYE HAGI .....INTERESTED PARTY**

**RULING**

1. By way of a Notice of Motion dated 22<sup>nd</sup> November 2021, the applicant, *Mustafa Mwalim Musa*, approached this court's seeking revision of the trial court's decision in a ruling dated 19<sup>th</sup> November 2021 in which his application to be admitted to bond pending trial in Makadara Chief Magistrate's Court Criminal Case No. 2989 of 2021 was dismissed. The applicant implored this court to set aside the trial court's ruling and admit him to reasonable bond or bail terms. He further prayed for an order that hearing of the aforesaid criminal case be presided over by another magistrate, other than *Hon. Opondo (PM)*.
2. In the grounds premising the motion and in the depositions made in his supporting and further affidavits dated 22<sup>nd</sup> and 29<sup>th</sup> November 2021 respectively, the applicant averred that he was arrested after he presented himself at Pangani Police Station on 21<sup>st</sup> October 2021 and was arraigned before the trial court on the same day. He was charged in two counts with the offences of obstructing a court officer contrary to *Section 126* of the *Penal Code* and escape from lawful custody contrary to *Section 58 (b)* as read with *Section 129* of the *National Police Service Act, 2011*.
3. The applicant asserts that the learned trial magistrate's decision to deny him bail was unjustifiable as the prosecution had not established compelling reasons why he should be denied his constitutional right to bail pending trial; that the learned trial magistrate based her decision on grounds that he had previously absconded court without considering the explanation he had offered for his failure to attend court on the date the criminal charges were registered against him. He averred that he was only informed when he presented himself at Pangani Police Station that criminal charges had been filed against him and that since he was absent, a warrant of arrest had been issued. He was thereafter arrested and arraigned in court.
4. The applicant further faulted the trial magistrate for not giving any consideration to proceedings in Milimani Commercial Court, Civil Case No. 10487 of 2021 which were the genesis of the charges he was facing and for citing the charge of escape from lawful custody as the reason for denying him bail which in his view infringed on his right to presumption of innocence. He asserted that he had no intentions of absconding his trial and that he was willing to abide by any terms the court may impose.
5. The application is contested by both the state and the interested party. The interested party according to the material placed before the court is one of the Directors of *Garun Investments Limited* which is entangled in a civil dispute with the applicant over ownership of property in land known as L.R. No. 36/VII/216. The dispute is the subject matter of Milimani Commercial Court Civil Case No. 10487 of 2021. The interested party was enjoined in the proceedings by consent of the parties on 21<sup>st</sup> December 2021 when the application was scheduled for hearing.
6. Starting with the opposition by the respondent, *Cpl. Hussein Hassan* who described himself as the investigating officer swore a replying affidavit on 20<sup>th</sup> December 2021. He deposed that the respondent was opposed to admission of the applicant to bond pending trial because on 29<sup>th</sup> September 2021, he was arrested after he led a group of people to obstruct court officers from executing orders issued by the court in Milimani Civil Case No. 10487 of 2021 and he thereafter escaped from police custody; that criminal charges were preferred against the applicant and registered in court on 15<sup>th</sup> October 2021 when a warrant of arrest was issued; that the applicant was arrested on 19<sup>th</sup> October 2021 and arraigned in court on 21<sup>st</sup> October 2021 for plea taking.
7. On her part, the interested party opposed the application through a replying affidavit she swore on 21<sup>st</sup> December 2021. She devoted most of the averments in the affidavit to giving a history of her civil dispute with the applicant and the facts of the case pending resolution at the Milimani Commercial Court. She in addition averred that she was apprehensive that if the applicant was released on bail he would

illegally divest her of occupation of the disputed properties; that the applicant has on several occasions verbally and through text messages threatened to harm or kill her and this has caused her genuine fear and anxiety. She claimed that as a victim of the offences facing the applicant and as a prosecution witness in the case before the trial court, she was entitled to protection and the threats against her amounted to compelling reasons to justify denial of bail to the applicant.

8. The application was argued orally before me by learned counsel *Mr. Khaemba* who represented the applicant, learned prosecuting counsel *Ms Akunja* who appeared for the respondent and learned counsel *Mr. Wachira* for the interested party. In their submissions, learned counsel reiterated and expounded on the positions taken by their respective clients in supporting and opposing the application.

9. In his submissions, *Mr. Khaemba* emphasized that the applicant was not a flight risk and that he had not absconded court as the only reason he failed to attend the court on date he was expected to take plea is that he was not aware that charges had been preferred against him. He invited the court to note that no evidence had been availed to prove that the applicant had actually threatened the interested party as alleged. He urged the court to note that as the applicant was in custody, he had no access to a phone through which he would post threatening messages to the interested party as alleged; that the interested party was not a victim but was a state witness in the case before the trial court. He persuaded me to find merit in the application and admit the applicant to bond.

10. On her part, *Ms Akunja* besides relying on the replying affidavit sworn by the investigating officer, submitted that the right to bond pending trial was not absolute. She supported the trial court's decision on grounds that the applicant was produced before the court pursuant to a warrant of arrest and that his past conduct of absconding court constituted compelling reason for denial of bond.

11. *Ms Akunja* further acknowledged that the charges facing the applicant were misdemeanours and that if the court was inclined to grant the applicant bond, it should do so on conditions taking into account the depositions made by the interested party.

12. *Mr. Wachira* on his part emphasized that the interested party being the victim of the offences preferred against the applicant was entitled to the rights accorded to victims under *Section 10* of the *Victims Protection Act* which should be safeguarded by this court; that since the interested party is lined up as the first prosecution witness, if the applicant was granted bond, there was a high likelihood that he will interfere with her given that he knew where she resided, where she worked and conducted business; that the interested party feared for her safety and this was a compelling reason to deny the applicant bond.

13. I have carefully considered the application, the affidavits on record in support and in opposition to the application and the submissions made on behalf of the parties. I find that the key issue that arises for my determination is whether the trial court properly exercised its discretion in refusing to admit the applicant to bond pending his trial. A secondary issue is whether the applicant has established a case warranting an order that the case be heard by a magistrate other than *Hon. Opondo*.

14. Starting with the first issue, under *Article 49 (1) (h)* of the *Constitution*, an accused person has a right to be released on bond or bail pending a charge or trial unless there were compelling reasons to justify denial of that right. This means that the right to bond is not absolute since it is limited by the existence of compelling reasons. The constitution does not however define what constitutes compelling reasons. The term "compelling" has been defined in *Black's Law Dictionary 10<sup>th</sup> Edition* as "to cause or bring about by force, threats or overwhelming pressure; to convince a court that there is only one possible resolution of a legal dispute".

The term is also defined in *Thesaurus English dictionary* as "forceful, convincing, persuasive, undeniable and gripping".

15. I agree with the test adopted by *Gikonyo J* in *R V Joktan Mayende & 3 Others, [2012] eKLR* on what should constitute compelling reasons to warrant denial of bond. The Hon. Judge expressed himself as follows:

***"The phrase compelling reasons would denote reasons that are forceful and convincing as to make the Court feel strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution."***

16. From these definitions, it is clear that where the prosecution is opposed to the release of an accused person on bond, it must satisfy the court through cogent and credible evidence that the release of an accused person on bond would not be in the interest of justice and was likely to compromise the trial. However, whether the reasons offered by the prosecution meets the threshold of compelling reasons will depend on the facts and circumstances of each case.

17. The Kenya Judiciary's *Bail and Bond Policy Guidelines, March 2015* at p. 25 sets out judicial policy on bail as follows:

***"The following procedures should apply to the bail hearing:***

***The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:***

***a) That the accused person is likely to fail to attend court proceedings; or***

***b) That the accused person is likely to commit, or abet the commission of, a serious offence; or***

***c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or***

- d) That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e) That the accused person is likely to interfere with witnesses or evidence; or
- f) That the accused person is likely to endanger national security; or
- g) That it is in the public interest to detain the accused person in custody.”

18. Section 123 A of the *Criminal Procedure Code* also enumerates factors which a court should consider when exercising its discretion in deciding whether or not to grant bail. It states as follows:

**“(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular:**

- a) the nature or seriousness of the offence;
- b) the character, antecedents, associations and community ties of the accused person;
- c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;
- d) the strength of the evidence of his having committed the offence;

**(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person:**

- a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
- b) should be kept in custody for his own protection.”

19. From the foregoing, it is clear that the primary consideration in determining an application for bond is whether the accused person will turn up for his trial or whether his release will compromise the administration of justice or the public interest.

20. Turning to the question whether the learned trial magistrate correctly exercised her discretion in finding that the prosecution had established compelling reasons to warrant denial of bond to the applicant, my reading of the impugned ruling shows clearly that the learned trial magistrate fully appreciated the law governing the application of an accused person's right to bond pending trial which she reproduced. In arriving at her decision to deny the applicant bail, the trial magistrate relied on the case of *Kelly Kases Bunjika V Republic, [2017] eKLR* in which *Muriithi J* held that where an accused person is shown on a balance of probabilities to have escaped from lawful custody while awaiting trial, there was a likelihood that he was going to abscond his trial and it would be taking a risk to release such a person on bond since he had already demonstrated a disposition to abscond trial.

21. The facts of the above case were however completely different from the facts in the case before the trial court which position appears to have escaped the attention of the learned trial magistrate. In the *Kelly Kases Bunjika V Republic, [supra]*, there was *prima facie* evidence from the trial court proceedings that the accused person had been held in remand custody during his trial for the offence of robbery and that he had escaped from remand custody and remained at large for a period of one and a half years.

22. In the case before the trial court, the charge of escape from lawful custody was based on a claim that the applicant had escaped from police custody before he was presented before the court, an allegation which the applicant denied. At the time the trial court made its decision, the charge was just an allegation which was subject to proof by way of concrete evidence when the applicant's trial commenced.

23. In my view, the mere fact that an accused person was facing a charge of escape from lawful custody was not by itself sufficient reason to conclude that if admitted to bond, he was likely to abscond. It must be remembered that an accused person has a constitutional right to be presumed innocent until the contrary is proved and unless the prosecution established by tangible and credible evidence other reasons that demonstrated that the accused was a flight risk and that he was therefore not entitled to enjoy his right to bond, the existence of a charge of escape from lawful custody alone cannot constitute a compelling reason to justify denial of bond to an accused person.

24. The respondent has urged me to find that the trial court's decision was justified since the applicant was produced in court through a warrant of arrest. In my view, the fact that an accused person is produced in court through a warrant of arrest can only be evidence that the accused had a disposition to abscond and was therefore a flight risk if the prosecution established that the accused was aware that he was required to be in court on the date the warrant was issued but he deliberately failed to attend the court.

25. In this case, the applicant in an affidavit filed before the trial court sworn on 2<sup>nd</sup> November 2021 explained as he did to this court in the affidavits sworn in support of the application that the reason he was not in court when the warrant of arrest was issued is because he was not aware of the charges filed against him. *Cpl. Hussein Hassan* confirmed in his replying affidavit that the charges against the applicant were filed before he was arrested. He did not claim nor produce any evidence to prove that the applicant had been notified of the existence of the charges and the date he was required to be in court to answer to the same and that he deliberately failed to attend the court. He did not also specifically deny that the applicant had presented himself at Pangani Police Station before he was arrested. He just confirmed the date of his arrest without disclosing the circumstances under which he was arrested.

26. The learned trial magistrate found that the applicant had absconded because he had not presented himself before the court to explain his absence without first investigating whether the applicant had been notified of the date he was required to be in court. This was a misdirection on the trial court's part. In the absence of evidence that the applicant was aware of the date he was required to be in court and he deliberately failed to attend the court, it cannot be validly said that he had absconded the court and that he was therefore a flight risk.

27. In view of all the foregoing, I am satisfied that the learned trial magistrate wrongly exercised her discretion in denying the applicant the right to exercise his constitutional right to bond pending trial.

28. Regarding the interested party's claim that her safety would be compromised if the applicant was admitted to bond, I find that no evidence has been furnished to establish that the text messages annexed to her replying affidavit originated from the applicant or that the applicant was connected in any way to issuance of the alleged threats. This notwithstanding, though the charges facing the applicant disqualifies the interested party from being a victim of the alleged offences given the definition of a victim in the *Victim's Protection Act*, considering that she is a prosecution witness in the case before the trial court and the two are disputants in the civil case pending determination at the Milimani Commercial Courts, apprehensions regarding her safety must be taken seriously and cannot be brushed aside. They cannot however form the basis of denial of the applicant's right to bond since they can be taken care of by the imposition of appropriate conditions to the grant of bond.

29. Turning to the prayer for an order that the case be heard by a different magistrate, it is my finding that the applicant has not given sufficient reason to justify the issuance of such an order. The decision whether to grant or refuse bail is an exercise of judicial discretion and cannot be a ground of ordering that a case be heard by a different magistrate.

30. For the above reasons, the applicant's application partially succeeds to the extent that the order made by the trial court in the ruling delivered on 19<sup>th</sup> November 2020 denying the applicant bond/bail pending trial is hereby set aside. It is substituted by orders of this court granting the applicant bond on the following terms:

- i. The applicant may be released on bond of KShs.500,000 with one surety of a similar amount who shall be approved by the trial court.
- ii. The applicant shall not contact, intimidate, threaten or **interfere whether directly or indirectly with** the interested party or any other prosecution witness in this case by any means whatsoever.
- iii. In the event of violation of condition (ii) above, the applicant is liable to have his bond cancelled and to proceed with his case while in custody.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JANUARY 2022.**

**C. W. GITHUA**

**JUDGE**

**IN THE PRESENCE OF:**

**MR. KHAEMBA AND PROF. NANDWA FOR THE APPLICANT**

**MS AKUNJA FOR THE RESPONDENT**

**MR. NTHEI HOLDING BRIEF FOR MR. WACHIRA FOR THE INTERESTED PARTY**

**MS KARWITHA: COURT ASSISTANT**