



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

MISC. CRIMINAL APPLICATION NO. E023 OF 2021

(FROM NAROK CMCR NO. 406 OF 2019)

(CORAM: F.M. GIKONYO J.)

DAVID KINYAMAL SANKUYA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

Applicant: Give back my liberty

[1] By a Notice of Motion dated 28th July 2021, the applicant is seeking **revision** of the trial court's decision to cancel his bond previously granted by the same court. The applicant also seeks that his case should be heard by a different magistrate.

[2] The applicant was charged together with others for arson in Olkurto CMCR NO. 406 of 2019. He was granted bond. He was however, charged in Narok CMCR NO. 607 of 2019 with the offence of escaping lawful custody where he pleaded guilty and was sentenced serve 6 months' imprisonment on 9th October 2019.

[3] The applicant asserts that he has a right to bond under the Constitution and that the other accused persons he escaped with were granted bond.

[4] Mr. Karanja, counsel for the prosecution opposed the application for bond/ bail on the ground that the applicant is facing another charge in court.

[5] The prosecution filed an affidavit sworn on 4th October 2021 by **CPL Madegwa** and the single significant reason cited as compelling reasons to deny the applicant on bond, to be: -

a) **Flight risk- the applicant escaped from lawful custody where he pleaded guilty and was sentenced on 9th October 2019.**

[6] The application was canvassed by way of written submissions. The applicant filed his written submissions while the prosecution chose to rely on the replying affidavit filed.

ANALYSIS AND DETERMINATION

[7] The questions to ask and which constitute issues for determination are: -

b) Whether the fact that the applicant was charged with, and convicted for escape from lawful custody is a demonstration of flight risk, and therefore, a compelling reason for which bail or bond could be denied by court?

c) Whether the trial of the case should be transferred to another magistrate?

[8] The accused faces a charge of arson; but he is still deemed innocent. He is, therefore, entitled under Article 49 (1) (h) of the Constitution, to be released on bail pending trial unless there are compelling reasons not to be so released. See **Muraguri v Republic [1989] KLR 181**,

and R. V. Richard David Alden (2016) eKLR.

[9] The twinning objective of bail is to ensure the accused gets his liberty, but at the same time, attends his trial. *Muraguri v Republic [supra]*. In this case, the relevant considerations are: the nature of the charge; the likely sentence; previous criminal records, the views of the family of the victim, the possibility or the temptation to abscond.

[10] Quite relevant to this case, is the second limb of paragraph (b) of sub-section (1) of section 123A of the Criminal Procedure Code which provides that: -

...if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody”.

[11] It bears repeating that, whereas the accused enjoys right to presumption of innocence pending trial, it is not a derogation of this right not to release the applicant on bail on the basis of compelling reasons proved before a court of law. The limitation to the right to bail is provided by the Constitution itself in article 49(1)(h); such is a claw-back provision, and therefore, constitutional.

[12] Has the prosecution proved compelling reason?

[13] The applicant is standing trial for alleged offence of arson. He was also convicted of the offence of escape from lawful custody when trial was pending.

[14] The fact that the applicant was convicted for escaping from lawful custody is a relevant factor in this case, and, all things being equal, is indicative of a likelihood to abscond. He escaped lawful custody while awaiting trial. Thus, I find and hold that the prosecution has proved that the applicant is likely to abscond trial- which is a compelling reason for refusal of bail within the meaning of Article 49 (1) (h) of the Constitution.

[15] In addition, the charge he is faced with is arson- a serious offence. See the *Bail and Bond Policy Guidelines* and Section 123A of the Criminal Procedure Code which require the Court to consider *inter alia* “**the nature or seriousness of the offence**” when determining bail.

[16] In the upshot, I decline the application for bail. Nonetheless, I will give the proper direction; the trial be expedited in order to avert prejudice of the rights of the applicant.

Whether case be transferred to another court.

[17] The applicant submitted that he did not have confidence in the court that handled Criminal Case No. 607 of 2019 to handle CMCR 406 of 2019. He further argued that his co- accused were granted bond while he was denied.

[18] On transfer of criminal cases: in *John Njeru Kithaka & another Vs Republic [2009] eKLR* the Court of Appeal cited the case of *Republic V Hashimu [1968] EA 656* where it was held that: -

‘...before a transfer of any trial is granted a clear case must be made out that the accused has reasonable apprehension in his mind that he will not have a fair trial before the magistrate from whom he wants the transfer.

[19] I will add; in *Galgalo Abgudo Wario & 2 Others Vs Republic [2015] eKLR* the court stated that it was unfair to deny the trial court an opportunity to consider an application for recusal before moving to the High Court for transfer of the case.

[20] The foregoing notwithstanding, other than expressing a personal desire that the trial court which heard the other case for escape from lawful custody should not hear the arson charge, the applicant has not shown that a reasonable bystander would have a reasonable apprehension in his mind that the applicant will not get a fair trial before the magistrate from whom the trial of case is sought to be removed and transferred. Needless to state, that, the law subserves legitimate interests of a party as opposed to individual desires that a certain judge should or should not hear its case, and its greater concern is to build an independent and robust judicial practice in the adjudication of cases as envisaged in the Constitution.

[21] Before I close, it is important to mention that the applicant made wild allegations against the trial magistrate without any evidence in support.

[22] Nevertheless, to avoid circumlocutions in the trial, and since there are other competent magistrates in Narok, in exercise of court’s supervisory jurisdiction under Article 165 (3) of the Constitution and in accordance with the principles set out under Article 159 of the Constitution, I direct that Narok criminal case No. 406 of 2019 be heard by another magistrate in Narok other than the trial magistrate in Criminal case no. 406 of 2019.

[23] The file to be mentioned before the chief magistrate for re allocation.

[24] It is so ordered. I repeat; trial be expedited.

Dated, Signed and Delivered at Narok Through Microsoft Teams Online Application This 17th Day of February, 2022

F. GIKONYO M.

JUDGE

IN THE PRESENCE OF: -

- 1. The applicant in person**
- 2. Ms. Torosi for respondent**
- 3. Kasaso C/A**