



**Itebete v Republic (Miscellaneous Criminal Application E081 of 2022)
[2022] KEHC 16439 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16439 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CRIMINAL APPLICATION E081 OF 2022**

A. ONG'INJO, J

NOVEMBER 24, 2022

BETWEEN

JOHN AYISI ITEBETE APPLICANT

AND

REPUBLIC RESPONDENT

(Shanzu Chief Magistrate's Court Cr. Case No. 1023 of 2019)

RULING

Background

1. The applicant is the accused in Shanzu Chief Magistrate's Court Cr Case No 1023 of 2019 where he was charged with the offence of obtaining money by false pretenses contrary to section 313 of the Penal Code. The particulars of the offence are that the applicant on diverse dates between 15th day of January 2019 and January 30, 2020 at Nyali area in Nyali Sub-county within Mombasa County with intent to defraud obtained from Mohamed Hassan Adan Kshs 1.53 Million (one million five hundred and thirty thousand shillings) by falsely pretending that he was in a position to secure him meat supply tenders at Nairobi, Kenyatta and Pwani universities a fact he knew to be false. The applicant pleaded not guilty to the charge and the matter proceeded to hearing.
2. The prosecution called a total of three witnesses in a bid to prove their case against the accused and closed its case. Hon Y A Shikanga (P M) through a ruling dated June 17, 2022 found that the prosecution had established a *prima facie* case to warrant the accused to be placed on his defence. Before the applicant could defend himself, he filed the application filed on May 16, 2022 supported by an affidavit sworn on May 16, 2022 seeking for a review of the trial court's order on the ground that the charge against him amounts to double jeopardy as the complainant has also seen him in Mombasa Chief Magistrate's Court Civil Suit 235 of 2022 which arose from the same course of action.



3. The applicant complained that the complainant has been threatening his life and swearing that he will eliminate him if he does not refund his money. He said that he reported the threats to the police, IPOA and court and no action has been taken. The applicant also complained that he had paid cash bail of Kshs 100,000 which was forfeited and his bond cancelled. That he has been unable to raise security for Kshs 500,000 which was later granted to him. That as a result of his incarceration, he has been unable to get money to settle the debt between him and the complainant.
4. The applicant argued that the genesis of the dispute between him and the complainant was an enterprise that failed to come to fruition and the complainant has refused to comprehend the circumstances under which the enterprise flopped.
5. The applicant prayed for a review of the matter and restatement of his bond.

Analysis and Determination

6. This court made an order for the applicant to be escorted to hospital for treatment and a doctor's report to be filed. The respondent did not file a response to the application and Mr Ngiri urged the court to peruse the lower court file and determine the application. The applicant did not also file any submissions and the issues for determination are: -
 - a. Whether there is double jeopardy
 - b. Whether the applicant is entitled to orders of security and whether the bond terms can be reviewed

Whether there is double jeopardy

7. The applicant stated that beside the criminal case herein being in court, the complainant filed another civil suit No 235 of 2022 in the resident Magistrate's Court Mombasa. As a result, the applicant contends that the issue of double jeopardy arises. Double jeopardy according to this court refers to:

‘The fact of being prosecuted or sentenced twice for substantially the same offence’. See *Black's Law Dictionary*, Tenth Edition

8. This court finds that double jeopardy does not exist herein as the applicant has not been prosecuted twice for the same offence. The doctrine applies to matters that are strictly criminal in nature and there is no evidence on record to that effect. Filing of a civil case does not amount to double jeopardy. Therefore, the applicant's reliance on this rule falls.

Whether the applicant is entitled to orders of security and whether the bond terms can be reviewed

9. On July 15, 2022, the applicant stated to court that he was unable to proceed with his defence hearing in the trial court slated for July 7, 2022 due to the injuries he had sustained. On July 27, 2022, the court herein ordered the officer in charge at GK prison Shimo la Tewa to show cause why the applicant had not been taken to hospital. This court further ordered the prison to facilitate the applicant to extract emails and have them filed. This court confirms that copies of the medical examination report and the email print out were filed in court which showed that the applicant had been assaulted by a person known to him with the injury being dislocation of the posterior shoulder with the approximate age of the injury being 3 months.
10. Upon perusal of the court file, it has been established that the applicant's cash bail amount of Kshs 100,000 was forfeited to the state on May 25, 2021 as a result of the applicant's failure to attend court on several occasions. Upon further perusal of the court file, it was established that on April 7, 2022, the trial



court gave directions that although it established that the applicant was not a straight forward person from the bail Information report and the discussions in court, it was not proper for the applicant to be denied bail completely. The trial court thereby released the accused on a bond of Kshs 500,000 with a surety of a similar amount and that owing to his past conduct, no cash bail would be given.

11. While this matter was pending for ruling, the applicant filed a certified copy of judgment in Criminal Case No 1023 of 2019 in which he was acquitted of the charge against him.
12. In conclusion, although the applicant was acquitted in the trial court, his complaints to this court had no merit as there was no sufficient proof that the complainant had threatened him apart from the email he allegedly wrote to IPOA on November 22, 2021 and a response written on 12th August. There was nothing to authenticate the two emails as IPOA did not file any affidavit that a complaint had been made to them. The application is therefore dismissed. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 24TH DAY OF NOVEMBER, 2022.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Ms. Kambaga for Respondent

Applicant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE

