



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. E306 OF 2021

ZAMEER KASSIM MOHAMED.....1ST APPLICANT

MAHIR NAKURU AUTOMOTIVES LIMITED.....2ND APPLICANT

VERSUS

REPUBLIC.....DPP

RULING

Court:

The applicant, ZAMEER KSSAMALI MOHAMED, has moved this court vide a letter dated 17.6.2021, seeking that this court do exercise its powers under sections 362, 363, 364, 365, 366 and 367 of the Criminal Procedure Code, to revise the orders made by the trial court on 17.6.2021. The said orders were to the effect that the applicant, and the co-accused (a Limited Liability Company, Mahir Nakuru Automotives Ltd), each be released on a cash bail of Kshs. 10,000,000/= with an alternative of a surety each of Kshs.20,000,000/=. This application has been heard under certificate of Urgency.

The applicant has been represented in these proceedings by Mr. Mungu, Mr. Okello, Mr. Ayim and Ms. Kavraj. It was variously submitted that the terms of bail imposed by the lower court were excessive in the circumstances and ought to be revised. That the applicant had been out on a police cash bail of Ksh.100,000/= and dutifully presented himself before the court. Also that even before the trial court, bail was not opposed by the prosecution side.

The applicant further submitted that this matter would properly go for arbitration thereby necessitating that the applicant be released from custody as his incarceration would only delay settlement of the case. That he is an established businessman and is not a flight risk. The court was urged to take notice of the current poor business environment. A proposal was made of a cash bail of between 100,000/= and 200,000/= or an alternative of a surety of Kshs.500,000/= to apply for both the applicant and the company.

Lastly, it was submitted that the charges before the lower court related to tax compliance whose objective are meant to facilitate the effective and efficient collection of tax, and thus the necessity of releasing the applicant to enable him engage the Kenyan Revenue Authority on the issue of settlement. An undertaking was given that the applicant would abide by any conditions that the court may make.

Mr. Kiragu for the Respondent, on the other hand, submitted that the terms set by the trial court be retained as it was out of discretionary powers of the court. That no evidence has been shown that the applicant cannot meet the terms, and that in fact the court was lenient in imposing the terms. Counsel also submitted that even in Covid times, certain businesses have made profits. He prayed for stringent terms.

I have considered the submissions made by both the applicant and the Respondent sides. This application seeks revision of terms of bail as set by the trial court. Under Article 49(1)(h) of the Constitution, an arrested (accused) person has the right;

“to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The constitution as seen above, guarantees the right to bail to all accused persons (except where there exists compelling reasons). Since the applicant was already placed on bail, this application is only on whether the terms set by the court were reasonable. Whereas the constitution does not specifically state what the word reasonable would entail, the interpretation I can deduce from this is that the issue of which terms would be reasonable would depend on the circumstances of each particular case.

It is worth noting that the primary purpose of grant of bail is to secure the attendance of the accused in court for his trial. So that is the court

is persuaded that the accused would attend court for his trial, then the right to bail would be available to the accused. And the terms of the bond or bail ought not be punitive, unreasonable or excessive as to amount to a denial of the same right.

This issue therefore for this court to determined is whether the terms set by the trial court were reasonable as declared by the constitution. I find the following circumstances material in deciding on this issue:

i) I have considered the nature of the charges that the accused faces before the lower court. As rightly submitted, the charges relate to tax compliance. They could very well be settle under the alternative dispute settlement regimes which can only be efficiently facilitated by the applicant's participation. Such participations and direct involvement of the applicant therefore require that he secures his release from custody.

This court otherwise takes the view that the Kenya Revenue Authority's interest in this matter is first and foremost the collection of tax that may be due. Other penal consequences, particularly, the incarceration of the applicant would only come second to this.

ii) It is noted that prior to being presented before court, the applicant, admittedly, had been on a cash bail of Ksh.100,000/= granted by the investigating officer. All this time, he cooperated with the investigators and presented himself before the court to answer to the charges.

iii) That the applicant has been charged jointly with the 2nd accused, a company in which he is probably a director or principal officer.

iv) It is worth noting that the prosecution did not oppose the release of the applicant on bail. Also all through these submissions, there has been no claim that he is a flight risk.

v) It has also been pleaded on the ill health of the applicant.

vi) The court also takes note of the first commitment of the applicant to abide by any condition that the court may impose, particularly to attend court for the hearing of his case.

Section 362 of the Criminal Procedure Code grant this court the jurisdiction to call for and examine the records or orders of any subordinate court and determine its correctness, legality or propriety. Section 364, on the other hand, stipulates the orders that this court may issue in exercise of its powers of revision under section 362. At section 364(1)(b), this court may reverse such orders.

I have considered the circumstances of this case as enumerated above. I am convinced that the terms of bail as set by the trial court on 17.6.2021 were excessive. I accordingly reverse and revise the same and order that the applicant may be released on bond on the following terms:-

- a. a bond of Ksh.3Million with 1 surety of a similar amount.
- b. In the alternative, a cash bail of Ksh.500,000/=
- c. The bond/bail posted by the applicant to also cover the 2nd accused, the Limited liability company.
- d. All the other terms of bond as ordered by the trial court to remain as ordered by the trial court.

Orders accordingly.

D. O. OGEMBO

JUDGE

25.6.2021.

Court:

Ruling read out in the presence of Mr. Mungu, Mr. Okello, Mr. Ayim, Ms. Kavraj for the applicant, the applicant (Nairobi Remand) and Mr. Kiragu for the Respondent.

D. O. OGEMBO

JUDGE

25.6.2021.

Court:

The original lower court file to be taken back to the trial court.

D. O. OGEMBO

JUDGE

25.6.2021.