



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CRIMINAL APPLICATION NO. 110 OF 2019**

**RICHARD WAMBUGU MAHIHU.....APPELLANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

1. **Richard Wambugu Mahihu** the Applicant herein, is facing four separate criminal cases at the **CM's Court Thika**. These are **Cr. Case nos. 4747 of 2018, 4359 of 2018, 4749 of 2018 and 4906 of 2018**. In the first case, he is charged with Robbery with violence contrary to section 296(2) of the Penal Code. In that on 10<sup>th</sup> June 2018 at **Landless Thika**, jointly with others not before the court, being armed with a dangerous weapon, namely a pistol, he robbed **RW** of goods worth Kshs. 112,000/= and immediately before, during or after the said robbery threatened to shoot **RW**.

2. In the second case, the Applicant is charged with two other persons with Robbery with Violence contrary to section 296(2) of the Penal Code in that on 16<sup>th</sup> July, 2018, at **Thika Slaughter House** jointly with others not before the court while armed with guns namely AK47 rifle, Ceska and Glock Pistols robbed **MN** of cash Kshs. 200,000/= and a mobile handset worth Kshs. 15,000/= and immediately before or after such robbery threatened to shoot **MN**. The second charge therein is Attempted robbery contrary to section 297(2) of the Penal Code, the victim being **HMG**.

3. In the third case, the Applicant is charged with Being in possession of a firearm contrary to section 4(a) of the Firearms Act, and in the fourth case, the Applicant faces a charge of Robbery with violence contrary to section 296 (2) of the Penal Code. In that on 23<sup>rd</sup> March, 2018 at **Makongeni phase five Thika**, jointly with others, while armed with a Glock Pistol they robbed **JNG** of items worth Kshs. 120,000/- and at the time of the robbery used personal violence against the victim.

4. The Applicant was granted separate bail terms in the cases, varying from a bond of Kshs. 500,000/= with like surety to a bond of Kshs. 2,000,000/= with like surety. These are the terms the Applicant has by his motion dated 25<sup>th</sup> September 2019 sought to have revised and consolidated so that he can furnish one surety in respect of all the cases. He claims in his supporting affidavit that he has been unable to meet the bail terms and therefore proposes to furnish one surety in the sum of Kshs. 2,000,000/= to cover all the four cases.

5. The Director of Public Prosecutions (DPP) the motion through grounds of opposition dated 31<sup>st</sup> October, 2019, to the effect inter alia that there is no provision of law enabling the proposed consolidation, that the cases are before different courts, have different complainants and therefore consolidation is not tenable.

6. The motion was canvassed through written submissions. The Applicant reiterated this court's discretion under Article 165(6) and (7) of the Constitution and Section 362 of the Criminal Procedure Code and relying on the decision of this court in **Michael Mithamo Gatere V DPP [2018] eKLR**, he urged the court to revise and consolidate the bail terms to render them reasonable in terms of Article 49(1) (h) of the Constitution. For his part, the DPP submitted that the offences facing the Applicant are serious, arose from different transactions, involve different periods and several complainants which facts render them unsuited for the orders sought and which orders have no legal basis. The DPP takes the position that the bail terms imposed by the Lower Court are reasonable and that because the cases are in different courts a single surety would be burdened in ensuring the attendance of the accused in all the cases.

7. The court has considered all the material canvassed in respect of the application. There is no gain-saying the fact that the Applicant herein is entitled to be released on bond or bail, on reasonable conditions in the pendency of the trials. He is also entitled to the presumption of innocence throughout the trial (Articles 49 and 50 of the Constitution). Whereas the trial court must consider the nature of the charges and other relevant matters in deciding whether to grant bail and what conditions to impose, it must also bear in mind that the accused person is presumed innocent until proven otherwise.

8. Hence the caution in **Watoro v Republic (1991) KLR 220**: -

**“ The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion....What I think is important for the court to bear in mind, and reason for the caution is to remember the presumption of innocence is that, it would be wrong to leap to the conclusion that the accused was guilty because has been charged and decide the bail application on that basis.”**

9. The ultimate purpose of bail is to ensure that the accused person will attend trial. Obviously, the more severe the likely punishment for the offence charged, the more likely that an accused person may be tempted to abscond to avoid the eventuality of punishment. Therefore, in as much as the court must pay attention to the charges facing an accused person, it must be careful to give effect to the right to bail while determining what conditions to impose. If that does not happen, the terms imposed may well turn out to be effectively a denial of the right to bail.

10. There must be a balance between the presumption of innocence and the nature of the offence, as observed by **Ibrahim J** (as he then was) in **Philip Anyanya v R (2010) eKLR**:

**“Whatever the court will decide, the fear and anxiety exerting on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing a capital offence is real and cannot be wished away. It is therefore true that the seriousness of an offence and the sentence for which is possible upon conviction is a matter which can bear on the accused and can affect his decision to attend trial or not.”**

11. In an application of this nature the court must consider the peculiar facts of the case at hand in order to strike the correct balance between the presumption of innocence and the seriousness of the offence. No doubt, in this case, the Applicant faces five serious charges, four of which could attract the ultimate death penalty. The offences involve different complainants and were allegedly committed on different dates at different scenes and the cases are before different courts. It would be an onerous responsibility if a single surety were tasked with ensuring that the Applicant attends all the trials. The facts of this case differ from the case of **Michael Mithamo Gatere** which though involving multiple cases, related to misdemeanors preferred in the lower court against the said applicant.

12. Having reviewed the matter before me, I am of the view that in the circumstances of this case, consolidated bail terms in respect of all the form cases may not be prudent. And while bearing in mind the nature of offences and the presumption of innocence in favour of the Applicant *vis -a- vis* the need to ensure that he attends trial so that the victims can also be heard in furtherance of their rights under Article 50(1) and the Victim Protect Act, this court is minded, instead of ordering bail consolidation to review the bail terms in respect of two criminal cases, that is, **criminal case nos.4747/2018 and 4749/2018 only** as follows.

13. In **criminal case no. 4747/2018**, the court will reduce the terms from Kshs. 1 million and like surety so that the Applicant may be released on bond of **Kshs. 800,000/=** (Eight hundred thousand) with one like surety and in **criminal case No. 4749/2018** the bond is reduced from Kshs. 500,000/= and like surety to **Kshs. 300,000/=** (Three hundred thousand) and like surety. For the avoidance of doubt, **bail terms in criminal case no 4906 of 2018 and no 4359 of 2018 will remain as before, that is, Kshs. 2,000,000/= (Two Million) and like surety in each case.**

14. The prayer for consolidation of bail terms has therefore failed and the Applicant will be required to furnish separate sureties in all four cases. In the event that the lower court has since revised **downwards** any of the bail terms in the four cases facing the Applicant, such reduced terms will apply, notwithstanding this ruling.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29<sup>TH</sup> DAY OF JULY 2021**

**C. MEOLI**

**JUDGE**

**In the presence of:**

**Mr Ngeresa for the Applicant**

**Ms Kathambi for the DPP**

**Kevin: Court Assistant**