



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL REVISION CASE NO. 73 OF 2021

PETER GACOKI MUHIYA.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. In the Cr. Case No. E1473/2021, the Applicant is charged with offence of **Being in Possession of Unaccustomed Goods** contrary to **Section 2109(c) of East African Community Customs Management Act, 2004**.
2. He appeared before Lower Court for plea on 16/07/2021 and after pleading not guilty, he applied to be released on bail/bond pending trial.
3. The prosecution opposed the application on the basis that he has another case in Kerugoya Court where he was released on a bond of Kshs. 300,000/-.
4. On that basis, the trial court held that the fact that he had another case is sufficient and compelling reason to deny him bond and direct that the case shall be heard while he is in custody.
5. The in alternative, the prosecution had conceded bail subject to “*terms commensurate with charges, the value of motor vehicle*”. And thus Prosecution urged for stiff bond terms.
6. Thus this court has been moved to revise the order denying Applicant bond.
7. The Applicant relies on the provisions of **Section 362 Criminal Procedure Rules** and 2 authorities namely **Job Kenyanya Musoni v Republic (2012) eKLR** which held;

“The prosecution’s other reason in opposing the accused’s admission to bail in this case is that the accused is a repeat offender as he is suspected to have committed the current offence while on bail in other cases. I do not find substance in this argument because the Constitution guarantees to every accused person the right to be presumed innocent until proved guilty. The existence of other criminal cases facing an accused person cannot of itself be a basis for denying an accused person bail in subsequent cases. This would in fact be a good basis for inferring that such an accused person can be trusted to honour his bail terms if he has not breached the terms of bond granted to him in several other cases which are pending trial in different court.”

8. **Republic v Danson Mgunya & Another (2010) eKLR** that;

“Liberty is precious and no one’s liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted.....”

THE PROSECUTION’S RESPONSE IN REPLY:

9. The prosecution responded, that while an accused person is entitled to bail/bond under **article 49 (1) (H) constitution of Kenya 2010**, this right is not absolute. The presence of a compelling reason however curtails this right.
10. The refusal to grant bail and detention of an accused in custody is always in the interests of justice and among factors to consider inter alia whether or not the accused will attempt to influence or intimidate witnesses, to conceal or destroy evidence, the gravity of the offence and even the likely sentence if found culpable, inter alia.
11. The prosecution also relies on judiciary ***bail/bond policy guidelines Sec. 4.9*** which set out the principles guiding courts in determining

applications for bail/bond which inter alia include;

- *Character & antecedents of the accused person*
- *Failure of an accused to observe bail or bond terms*
- *Likelihood of interpreting with witnesses*
- *Public order, peace and security*

12. The reason for particular and specific mention of the said paragraphs is found in the reasoning that the accused would in all likelihood offend them or already has.

13. It is submitted that, the accused has a similar case in Kerugoya being Cr. No. 970/18 facing a similar offence. The fact that he was released in bond in the Kerugoya case did not deter him from re-offending. The public good, order and security will not be served by releasing a menace to society.

14. The fact that he would commit a similar offence shows a complete lack of respect to court's orders and a legitimate expectation that he would consider his case a grave one, thus desist from acts that would put him in conflict with the law.

15. The prosecution submit that, accused further, when he was in custody pursuant to miscellaneous EO79/21, the affidavit therein clearly stated that the accused was operating with a cartel. Thus if released on bond, it is likely that he would warn his fellow operatives thus scuttling ongoing investigations.

16. Besides the foregoing, it should be noted that the accused committed the offence in 2017 before fleeing on the run until his capture on 9th July, 2021. This in itself is indicative of a highly probable tendency to be a flight risk.

17. It is contended that, the courts generally have granted bond/ bail reasonably or on stringent terms, however, there have existed instances and situations where the courts have departed from this norm and sought to deny an accused person bond. It cites the case of **Republic v Daniel Mwoka Muthusi (2019) eKLR** where the learned Honourable Odunga, J denied a bond to a repeat offender.

18. The judge therein extensively discussed the issue of bail/bond and based on the circumstances, denied the accused bond. Similarly relies On Hon. J.L. Onguto, J in **Petition no 2 of 2016 Johnstone Muthama & others v Inspector General of Police & 2 others (2016) eKLR** where court proceeded to deny bond on grounds of possible interference of witnesses.

19. Prosecution finally submits that, the application for review is an abuse of court process and defective. The proviso to sec 357 (1) of the Criminal Procedure Code bars the making of any application for bail to the High Court once a subordinate court has declined one. It only allows for an appeal not review.

ANALYSIS AND DETERMINATION

20. I have gone through the materials presented by both rivaling parties herein.

21. **Under Article 49(1)(h) of the Constitution** provides that: -

“An accused person has the right ...

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

22. The Constitution however has not identified what qualifies under the term “compelling reasons.” The ordinary meaning according to Thesaurus English Dictionary of the word **“compelling” is forceful, convincing, persuasive, undeniable and gripping.**

23. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.

24. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation.

25. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial.

26. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court.

27. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release.

28. In **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August**

2017), the Court held that:

“The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will

(i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or

(ii) not stand his or her trial or appear to receive sentence; or

(iii) attempt to influence or intimidate witnesses or to conceal or

***(iv) destroy evidence;*”**

29. The prosecution opposed the application on the basis that he has another case in Kerugoya Court where he was released on a bond of Kshs.300, 000/- which fact accused admitted and In alternative, the prosecution had conceded bail subject to imposition of stiff bond terms which would be commensurate with charges, the value of motor vehicle inter alia.

30. On that basis, the trial court held that the fact that he had another case is sufficient and compelling reason to deny him bond and direct that the case shall be heard while he is in custody.

31. The court did not consider the alternative prosecution argument on element of conditional concession on grant of bond on stiff terms.

32. Further the prosecution has raised two serious issues which have to be interrogated by trial court namely the allegations that;

· That accused, when he was in custody pursuant to miscellaneous EO79/21, there was an affidavit therein alleging that the accused was operating with a cartel. Thus if released on bond, it was likely that he would warn his fellow operatives thus scuttling ongoing investigations.

· Further, that the accused committed the offence in 2017 before fleeing on the run until his capture on 9th July, 2021. which in itself would be indicative of a highly probable tendency to be a flight risk.

33. These facts were not interrogated in the lower court and there is no material before this court on the same thus I find that the mere existence of another criminal case against accused is not compelling reason to deny him bond however the court makes a finding that; the trial court did not consider;

(i) Grant of stiff bond terms elements as proffered by pros as alternative to denial of bond.

(ii) The issue of the allegations that the accused was operating with cartels raised in Misc. App 79 of 021.

(iii) And the allegations that he had ran away from justice in relation to the Kerugoya Court matter. The said pieces of issues will have to be considered afresh by the lower court.

34. Thus I make the following orders;

1. This court quashes and sets aside denial of bond order.

2. The court orders hearing de-novo of the bond application and the matter to be heard by any other magistrate save Hon. Susan Mwangi.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 12TH DAY OF AUGUST, 2021.

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CHARLES KARIUKI

JUDGE