



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION- MILIMANI

MISC. APPLICATION NO. E170 OF 2021

MICHAEL OCHIENG AGENGA.....ACCUSED/APPLICANT

VERSUS

THE REPUBLIC.....PROSECUTOR/RESPONDENT

RULING

1. **Michael Ochieng Agenga**, the Applicant (Accused) herein, was charged with the offence of stealing Ksh.6,915,660/- being market fund, the property of Britam Managers Limited. Having pleaded not guilty, he was granted bond of Ksh. 2,000,000/- plus one surety and in the alternative a cash bail of Ksh.500,000/- In addition conditions were set where he was required to deposit his passport and work permit in court that were to remain in custody of the court until the conclusion of the case.

2. By an application dated 5<sup>th</sup> April 2021, the Applicant seeks orders that:

· This Honorable Court be pleased to call for and examine the record of the proceedings in Chief Magistrates' Court Criminal Case No. MCCR/E102 of 2021 for the purposes of satisfying itself as to the correctness, legality or propriety of the orders disallowing the Accused/Applicant's application made on 15<sup>th</sup> February 2021.

· This Honorable Court be pleased to review the orders issued in Chief Magistrates' Court Criminal Case No. MCCR/E102 of 2021 and temporarily allow the Accused/Applicant to leave the Honorable Court's jurisdiction to his place of work in the United Kingdom at such terms as it deems fit.

3. The application is premised on grounds that on the 13<sup>th</sup> January 2021, the Applicant intimated his intention to amicably resolve the dispute out of court in the spirit of **Article 159** of the Constitution. That he engaged the complainant and offered a proposal on how to repay Ksh.7,000,000/- within one (1) year, but, the complainant continued to frustrate the Applicant who sought review of bail terms to be allowed to travel out of the court jurisdiction to his place in the United Kingdom to make arrangements on how to raise the Ksh.7,000,000/-. That failure to review bail terms to enable him travel out of the country temporarily will result into an imminent risk of loosing his job thus being unable to pay the complainant the sum in issue; that he shall re-deposit the passport in court upon return and being a Kenyan Citizen with a fixed abode he is not a flight risk.

4. The applicant swore an affidavit in support of the application where he depones that he was released on a cash bail of Ksh.500,000/- which he paid but there were other bail terms to the effect that he deposits both his passport and work permit in court which he complied with.

5. That he intends to settle the sum indicated on the charge sheet by paying Kshs. Three Million Five Hundred Thousand only, within forty-five (45) days after resuming work and a balance of Kshs. Three Million Five Hundred Thousand only in twelve (12) equal monthly instalments of Ksh.292,000/-. That the complainant, his former employer has frustrated his efforts to amicably resolve the matter.

6. That the Application for review in the lower court having been dismissed, he seeks review of the Ruling dated 23<sup>rd</sup> March 2021.

7. The application is opposed. It is stated that the intention to pay the money was communicated to the complainant but the proposal was not honored. Thereafter, the Applicant was arrested at JKIA in January 2021 as he attempted to flee the country.

8. The application was disposed through written submissions. It was urged for the Applicant that the trial court acted on wrong principles that there were sufficient grounds to review and set aside orders of the trial court. That he is not a flight risk and he undertakes to re-deposit his passport and work permit upon his return. He cited the case of **Bryan Eric Fockler -vs- Republic (2017) eKLR** where the court stated that:

*“The Director of immigration shall release the original Canadian passport to the Applicant to enable him travel to Canada to attend to his sick child. The Applicant shall surrender the said passport to the Director of Immigrations upon his return to Kenya.”*

9. That in accordance to **Article 13** of the Universal Declaration of Human Rights, 1948 and subsequently in the 1966 International Covenant on Civil and Political Rights, everyone has the right to freedom of movement and residence within the borders of each State and everyone has the right to leave any country, including his own and return to his country.

10. Further, he also cited the case of *Mary Kinya Rukwaro -vs- Santoshi & Another (2014) eKLR* where Kimaru J held that:

*“Having evaluated the facts of this application, it was clear to the court that the Applicant has no basis to doubt that the 1<sup>st</sup> Respondent will attend Court during trial. The Court was convinced, as this Court is also convinced that the 1<sup>st</sup> Respondent will not likely abscond from the jurisdiction of the court because since taking pleas, he has travelled out of the country on several occasions but has eventually returned to the county. He has not missed to attend court on the date the case has been fixed for trial.”*

11. That the prosecution ought to have proved that he would not abscond, but not to merely allege. In this regard he relied on the case of *Jimi Wanjigi -vs- Inspector General of Police and 3 Others (2018) eKLR* where **Mwita J** stated that:

*“The Petitioner’s right to movement is undoubtedly granted by the Constitution, is unlimited and must be enjoyed to the greatest extent. This Court as a state organ is bound by the Constitution and must obey the Constitutional command in Article 4(1). It is also bound by Article 20(1) which states that the Bill of Rights applies to all law and binds all state organs and all persons. This Court sitting as a Constitutional Court is the custodian of the Constitution and enforcer of rights and fundamental freedoms in the Bill of Rights. It is the ladder citizens must scale to reach the fountain of justice. Conscious of the values and principles of our Constitution, this Court must not be the one to assist in the curtailment of rights and fundamental freedoms.”*

12. According to the respondent the main purpose of bond is to secure the Accused person’s attendance during trial. In that regard he cited the case of *Ng’ang’a -vs- Republic (1985) where Chesoni J* (As he then was) stated that:

*“The primary purpose of bond is to ensure the accused person’s attendance at court to answer the charge at the specified time. I would therefore agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial.”*

13. It was urged that the Applicant posted bail which he would like the court to review to enable him to travel to the United Kingdom, a place he claims to be his place of employment, but orders sought go against the spirit and purpose of bond as his attendance to court will not be guaranteed. That the offence was committed in 2014 which begs the reason why he has not made any payment so far, therefore the undertaking to return to the court’s Jurisdiction is not sufficient to review the court order.

14. I have considered the application, affidavit in support, the response thereto and rival submissions. In the impugned ruling the trial court opined that there was no guarantee that the Applicant would return to the country. That the Applicant was economical with information regarding his place of work and residence in the United Kingdom such that it would be hard to reach him. That negotiations within the parties having failed, the case could be fast tracked to enable the Applicant return to work.

15. When the terms and conditions of bail were set by the trial court, the Appellant did not appeal against the order of the trial court, but he complied. He opted to file an application for review expressing an intention to make an arrangement to embrace alternative dispute resolution. In the case of *Republic -vs- Diana Suleiman Said & Another (2014) eKLR* Muriithi J. stated that:

*“The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.”*

16. Courts have the Jurisdiction to review bail terms. This would however be done in the interest of justice. What should be considered would be whether there are compelling reasons that would deter the court from granting the orders sought. The interest of the complainant and that of the accused must be taken into consideration.

17. This is a case where the Applicant was found to be a flight risk hence the trial court setting conditions that would hinder him from fleeing the country just like he found in the process of leaving the country. The court was also concerned by the fact of the proposal having been made and not honored for a period of six years. It therefore behooved the Applicant to demonstrate that there was no risk of absconding trial which he failed to do before the trial court.

18. The right to Liberty and Freedom of movement is indeed an accused person's constitutional right. But, this right may be limited. **Article 24(1) (d)** of the Constitution provides thus:

*(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-*

.....

.....

*(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others.*

19. To ensure that the interest of justice is upheld, entering or leaving the country by an accused person in the course of a trial may be restricted.

20. Having said that, I must determine whether this court has Jurisdiction to review orders of the trial court. According to **Section 362** of the Criminal procedure Code (CPC) this court is limited to correcting errors, omissions, irregularities and illegalities on the trial court's record. And in case of a miscarriage of Justice the court must intervene. In the case of **George Aladwa -vs- Republic (2016) Wakiaga J.** held that, Wherein the court in revisionary jurisdiction cannot sit in appeal and re-appreciate the evidence. Jurisdiction under Section 362 and 368 as read with Article 162 of the Constitution is only exercised to correct manifest error in the order of the subordinate courts but should not be exercised in a manner that turns the revisional court into appeal.

21. In the **Defense Forces Council and 6 others -v- Gabriel Kirigha Chawana & 26 Others (2015) eKLR** it was stated that:

*"...In its supervisory jurisdiction, the High Court must maintain a delicate balance, distinguishing its role of an arbiter from that of an overseer whose mandate is to consider and review the procedure and conduct of proceedings in the subordinate courts with a view to determining the legality or otherwise of the process, including any actions undertaken without jurisdiction. The supervisory jurisdiction is not intended to usurp the role of the tribunal but to ensure that the inferior tribunal acts within its bounds."*

22. Looking at what transpired before the trial Magistrate, there was no miscarriage of justice. The trial court exercised its discretion within set principles of granting bail. It took into consideration measures that go towards safeguarding the administration of justice in the criminal justice system. In the result the application is unmeritorious, consequently, it is dismissed.

23. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2021.

L. N. MUTENDE

JUDGE

**IN THE PRESENCE OF:**

*Mr. Cliff Oduk for the Applicant*

*Mr. Chebii for the State*

*Mr. Lumumba holding brief for the complainant*

*The applicant*

*Court Assistant -Mutai*