



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

CRIMINAL DIVISION- MILIMANI

MISC. CRIMINAL APPLICATION NO 337 OF 2021

PETER ONGERI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. **Peter Ongeri**, the applicant (Accused in Makadara CRC NO. 2580 of 2021) approached this court through a Notice of Motion dated 1st October, 2021, seeking revision and setting aside orders of bond terms given by the lower court. The applicant was charged with the offence of Stealing by servant contrary to **Section 281** of the Penal Code. The particulars of the offence were that on diverse dates between 1st July, 2020 and 31st July, 2020 at Obradleys Investment Ltd in Nairobi being a servant of the said Obradleys Investments Limited, stole 337 crates of assorted brands of beer, 69 crates of assorted brands of beer and cans all valued at Ksh 1,432,294/= which came to his possession by virtue of his employment. He pleaded not guilty and was granted bond of Kenya Shillings five hundred thousand (Ksh 500,000/=) with a surety of a similar sum.

2. The application is premised on grounds that the terms of bond are excessive, unreasonable and contrary to constitutional rights of the accused which amounts to Pre-trial detention and that the court erred when it considered the monetary amount when setting the harsh bond terms. That the monetary amount was an irrelevant issue when considering bond terms as there was no proof that the amount was stolen.

3. Further, that the applicant is sickly and that he is not a flight risk, he has no previous record and that there is no likelihood that he would disturb the public order. That stealing is a misdemeanor and the offence does not merit harsh bond terms such as the terms issued by the trial court. That he is ready and willing to post reasonable bond with an option of cash bail.

4. The applicant swore an affidavit in support of the application where he reiterates the grounds on the face of the application.

5. The State/ Respondent did not file any response but opted to make oral submissions before the court.

6. During hearing of the application, Mr. Evans Mogire, learned counsel for the applicant urged that the court granted bond terms that are unreasonable, punitive and against the applicant's constitutional rights with no order of cash bail and the applicant has been in custody ever since which amounts to pre-trial detention. That the bond terms should be commensurate with the offence, items alleged to have been stolen being worth Ksh 1.4 Million. That attempts made to have the application heard before the lower court were thwarted following network failure hence the trial court proceeded to maintain the bond terms.

7. Ms. Akunja, learned counsel for the respondent opposed the application and argued that the purpose of bail is to ensure the applicant attends court and terms granted should not entice the accused to abscond.

8. This court has been approached pursuant to the provisions of **Section 362** of the Criminal Procedure Code (CPC) that spell out the statutory power of the court to review proceedings or orders of the subordinate court, and it provides thus:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

9. In exercising powers of revision the court also acts as provided by **Section 364** of the CPC that state thus:

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may in the case of any other order other than an order for acquittal, alter or reverse the order.”

10. In the instant case, this court must query whether there was any irregularity in the proceedings and orders of the court that calls for intervention. The trial court has discretion to review its own bond terms. Therefore, the High Court intervenes when a party is aggrieved by the lower court's orders. *In the case of Harish Mawjee & another vs. Republic [2020] eKLR* Lessit J had this to say:

“It is settled that an accused can apply for review of bond terms given by the trial court. The application should be made before the trial court which granted the bond. If, however the accused is still aggrieved by the decision of the trial court, he can still approach the higher court for relief.”

11. Through a letter dated 20th September, 2021 the applicant's counsel sought the file to be placed before the trial magistrate on 27th September 2021 for purposes of making an application for variation of bond terms. Consequently, the matter was mentioned by the court in chambers in the absence of parties and it was directed that the matter be mentioned on 28th September 2021. On the stated date, the accused was present but it was indicated that his counsel had not logged in. The applicant sought to be released on cash bail and the court concluded that the bond terms were sufficient. The court did not indicate the reasons for declining the applicant's prayer. The decision to maintain the terms without affording the application a fair hearing and determining the issues with finality was a fatal error on the part of the court.

12. According to paragraph 3.1 (d) of the Bail and Bond Policy Guidelines, an accused person has the right to reasonable bail and bond terms. It is provided that:

“Bail or bond amounts and conditions shall be reasonable, given the importance of the right to liberty and the presumption of innocence. This means that bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial. Accordingly, bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial.

13. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.

14. An accused person is presumed innocent until proven otherwise, for this reason his/her liberty is of crucial importance. Such a person should be released on reasonable bail terms. Restrictions and conditions can be put in place where it is suggested by the prosecution that the person is likely to infract terms to be set. But, of utmost importance is ensuring that the individual turns up for trial. Although a trial magistrate has the discretion to set the amount of bail, bond should not be viewed to be discriminatory, such that in some cases it is low while in other cases it is too high so as to be viewed unreasonable.

15. In the case of *Foundation for Human Rights Initiatives -Vs- Attorney General (2008) 1 EA 120*, the court held that:

“The court has discretion to grant bail and to impose reasonable conditions without contravening the constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken account in deciding whether or not to grant bail, the applicants must be presumed innocent until proven guilty or until the person has pleaded guilty....that bail should not be presumed merely as a punishment as this would be in conflict the presumption of innocent.”

16. In this case, although the accused was charged with stealing by servant which is a felony, it would be unreasonable to deny him cash bail on such terms that he would be able to comply with. The alleged value of the goods that were allegedly stolen cannot dictate the courts discretion, the prosecution was silent, an expression of not objecting to the accused being released on bail, there having been no existence of compelling reasons requiring the applicant to be denied bail he should have been granted reasonable bail terms. The applicant has been in custody despite being granted bond soon after he took his plea. This is sufficient proof that he is unable to meet the bond terms.

17. The upshot of the above is that I review and set aside the order of the trial court dated 28th September 2021 declining to vary bail terms and refer the matter back to the trial court for purposes of taking down proper proceedings and to exercise it's discretion pursuant to the law.

18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY,

THIS 16TH DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Mogire for Applicant

Kiragu for the ODPP