



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.516 & 151 OF 2020

HILLARY WACHIRA WANJIKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Hillary Wachira Wanjiku has been charged in two criminal cases before the Chief Magistrate’s Court at JKIA Nairobi. The cases are **Criminal Case No.158 of 2019** and **Criminal Case No.74 of 2019**. In both cases, the Applicant’s bid to be released on bail pending trial failed. The trial court, in both cases, held that the Applicant was a flight risk. It is apparent from the Rulings delivered by the trial court that the determinant factor in denying the Applicant bail pending trial was an allegation that was made by the prosecution that the Applicant escaped from custody. The investigating officers in both cases did not indicate to court under what circumstances the Applicant is said to have escaped from custody. Indeed, one of the trial courts in its Ruling noted that the Applicant had “*mysteriously*” escaped from custody. Without the benefit of an affidavit sworn by the investigating officers setting out the circumstances in which the Applicant is said to have escaped from custody, it is not clear how the trial courts could have reached a definitive determination that the Applicant had indeed escaped from custody. What is unchallenged however is that the Applicant was arrested and brought to court pursuant to a warrant of arrest issued by the court. This was four months after the charges were laid against him.

Aggrieved by this decision, the Applicant has filed two applications challenging each decision denying him bail pending trial. In summary, the Applicant asserts that there was no basis upon which the trial court could have reached the decision that he was a flight risk on the basis of unproved assertion by the prosecution that he had escaped from lawful custody. The Applicant complained that this assertion appeared to have influenced both courts in reaching a determination that he was a flight risk. The Applicant claimed that there was no evidence placed before the court to support the assertion that he was a flight risk or that he did not have a fixed abode. He was aggrieved that he had been treated in a discriminatory manner as compared with his co-accused on the basis of mere allegations that were not substantiated. In the premises therefore, he urged the court to revise the decision of the trial courts in the two cases in denying him bail pending trial. He told the court that he was willing to abide by any terms that the court may impose to secure his release on bail pending trial.

During the hearing of the application (via Microsoft Teams), Mr. Wandugi for the Applicant amplified the grounds in support of the application as contained in the two applications. Learned counsel submitted that there was no legal basis upon which the two courts would deny the Applicant his constitutional right to be granted bail pending the trial of the two cases. He explained that the grounds put forward by the prosecution were not compelling reasons that could persuade the trial courts from denying the Applicant bail pending trial. Learned counsel cited several authorities including **George Anyona & 3 Others –vs- Republic Miscellaneous Application No.358 of 1990**, **Njehu Gatabaki –vs- Republic Criminal Application No.43 of 1993** and **Republic –vs- Thomas Muthui Nzii Criminal Case No.13 of 2010**.

Mr. Momanyi for the State opposed the application. While conceding that bail was a constitutional right to every accused person, he reiterated that that right was not absolute. In the case of the Applicant, there were compelling reasons to deny the Applicant bail pending trial. He submitted that the Applicant had no place of fixed abode. The pre-bail report was clear in that regard. The Applicant had previously absconded from court. He was subsequently brought to court after a warrant of arrest issued by the court had been executed. In that regard, he was of the view that the trial courts rightly concluded that the Applicant was a flight risk. Learned prosecutor asked the court to balance between the Applicant’s right to be granted bail and the overall imperative that the administration of justice must be allowed to run its course without being sabotaged by an accused who fails to attend court on the date scheduled for trial. If the court was persuaded to allow the Applicant’s application, Mr. Momanyi urged the court to grant stringent conditions which will secure the Applicant’s attendance before court in the two criminal cases that he is charged in.

This court has carefully considered the rival submission made by the parties to this application. It is without doubt that the issue for determination by this court is whether the Applicant made a case for this court to revise the decisions rendered by the two trial courts denying him bail pending trial. That this court has jurisdiction to revise any order issued by a trial court is not contested. **Article 165(6) & (7)** of the **Constitution** is clear in that regard. This **Article** read with **Section 364** of the **Criminal Procedure Code** grants this court jurisdiction to review any decision made by a magistrate’s court.

In the present application, it was evident that the Applicant was denied bail pending trial on the grounds that he was a flight risk. The basis upon which the court reached this verdict was the assertion made by the prosecution orally from the bar that the Applicant had escaped from custody. One of the trial courts indeed was concerned that the investigating officer had not sworn any affidavit to explain the circumstances in which it was alleged that the Applicant escaped from custody. That notwithstanding, the trial court went ahead and agreed with the prosecution that the Applicant was a flight risk on the basis of such unproven and unsubstantiated ground that the Applicant had escaped from custody. While there is no doubt that the Applicant was taken to court after a warrant of arrest issued by the court had been executed, the Applicant asserted that he was not aware that he was required to be in court. This assertion by the Applicant went unchallenged by the prosecution before the trial court.

This court agrees with Mr. Wandugi that as a matter of constitutional imperative, court should lean towards granting accused persons bail pending trial unless irrefutable compelling reasons are placed before the court by the prosecution. Odunga, J in **Grace Kananu Namulo -vs- Republic [2019] eKLR** held thus:

***“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 interest 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:***

- ***Endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or***
- ***Not stand his or her trial or appear to receive sentence; or***
- ***Attempt to influence or intimidate witnesses or to conceal or destroy evidence; or***
- ***Undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system...the ties of accused to the place of trial; the existence and location of assets held by the accused; the accused’s means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the Court should be taken into account...***

***In considering any question...the Court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular and prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;***

***(iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused’s defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the Court should be taken into account...***

***In assessing the risk of abscondment, the established approach is for the Court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be (Emphasis mine).***

In the present application, it was clear to this court that, without proof that the Applicant had escaped from custody, this court cannot in good conscious, make a finding that the prosecution established a compelling reason to deny the Applicant bail pending trial. Escape from custody is a serious offence. It is not something that can be stated orally from the bar without actual proof in regard to circumstances in which the Applicant is alleged to have escaped from lawful custody. Those circumstances should include the date when, and place where, the Applicant is alleged to have escaped from custody. It is no wonder that one of the trial court held that the Applicant “**mysteriously**” escaped from custody. This mystery must be resolved by actual evidence placed before the court that the Applicant escaped from custody. In the circumstances therefore, this court agrees with the Applicant that the assertion that he escaped from custody is a mere allegation which should not be foisted to deny him his constitutional right to bail pending trial. As regard the allegation that he was a person without a fixed abode, that will be resolved by the terms that this court will impose when granting the Applicant bail pending trial.

In the premises therefore, this court holds that the Applicant established a case for this court to revise the decisions by the two trial courts denying him bail pending trial. The two decisions are hereby set aside and substituted by an order of this court granting the Applicant bail pending trial in the two cases on the following terms:

- I. The Applicant shall post bond in each case of Kshs.1 million with two sureties of the same amount. One of the sureties must be a close relative of the Applicant.
- II. If the Applicant shall not be able to post bond, he shall deposit cash bail of Kshs.500,000/- in each case with two sureties who shall each execute a bond. One of the sureties must be a close relative of the Applicant.
- III. The Applicant shall be required to attend court on the scheduled dates for trial without fail. He shall not be in contact with the prosecution witnesses prior to the hearing of the case.

IV. The Applicant shall be required to appear before the trial court once every month (after the COVID 19 curfew has been lifted) until the conclusion of the trial in the two cases or until further orders of this court.

It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2020**

**L. KIMARU**

**JUDGE**