



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CRIMINAL APPLICATION NO. 18 OF 2020

DAVID KUMBATHA MASHA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Dennis Kinaro Advocate for the Applicant

Ms. Sombo for State

RULING

This is an interlocutory revision by way of a notice of motion filed in Court on 22.4.2020 brought pursuant to Articles 49 (1) (h), 50 (2) (a), 159 (1) (2) and 258 (1) of the Constitution, Section 124, 125, 126, 362 and 364 of the Criminal Procedure Code. The applicant seeks an order to review bond terms granted by Kilifi Principal Magistrate in Criminal Case No. 282 of 2019 of Kshs.500,000/= with a surety of identical amount or cash bail of Kshs.300,000/=.

The application is supported by an affidavit of Learned Counsel **Mr. Kinaro** for the applicant.

Background

The applicants have been charged with the offence of stealing contrary to Section 268 as read with Section 275 of the Penal Code.

By way of information

It is alleged that at diverse dates in the month of April 2019 at Bofa area in Kilifi North, Sub-county, the accused jointly with others not before Court stole a generator valued Kshs.3,500,000/= locally made stone cut of Kshs.2,500,000/=, a three phase 200 meters long electrical cable valued at Kshs.200,000/=, two gas cylinders valued at Kshs.35,500/=, 30 assorted spanners valued at Kshs.30,000/=, three circuit breakers valued at Kshs.150,000/=, seven rails of 20 ft valued at Kshs.350,000/= total value of stolen goods Kshs.6,905,000/=.

After hearing both parties at the pretrial stage, Learned trial Magistrate released the accused persons on the respective bonds which became a subject of the present application.

Determination

For purposes of this application, the real issue sought to be addressed by this Court is whether the Learned trial Magistrate was right or wrong in granting the disputed bail terms of Kshs.500,000 with a surety and on alternative a cash bail of Kshs.300,000/=.

In many of the contexts in which this question arises I am in no doubt that what is being challenged is the judicial discretion of the Learned trial Magistrate.

The term judicial discretion as defined in the **Blacks Law Dictionary 9th Edition Byran Garner Edition** refers to:

“exercise of Judgment by a Judge or a Court based on what is fair under the circumstances and guided by the rules and

principles of Law, a Court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right."

This question which confronts the Superior Courts most of time was nevertheless addressed in the comparative precedent of **Ani v State {2002}217 1NWLR, Eyu v State {1988} 2NWLR 602** where the Court set out the following criteria in which the exercise appellate judicial discretion can grant or withhold the remedy on review of bond terms:

- (1). *The nature of the charge.*
- (2). *The strength of the evidence which supports the charge.*
- (3). *The gravity of the punishment in the event of conviction.*
- (4). *The previous criminal record of the accused if any.*
- (5). *The probability that the accused may not surrender herself or himself for trial.*
- (6). *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him or her.*
- (7). *The likelihood of further charge being brought against the accused.*
- (8). *The probability of guilt.*
- (9). *The detention for the safety and protection of the accused.*

As stated above, an important consideration underlying the release of an accused person on bail under Article 49 (1) (h) of the Constitution is the duty for him or her to attend Court on the scheduled dates pending the hearing and determination of the charge.

It is therefore always possible for existence of a rebuttal presumption that an accused person threatened with capital punishment or long incarceration sentences to have a greater incentive to flee than those indicted for misdemeanors subject to a fine or short sentences in custody. Under Section 123 (A) of the Criminal Procedure Code, the Law sets out situations in which the Court may deny bail to an accused contemplated under Article 49 (1) (h) of the Constitution.

I have perused the arguments being advanced by the applicants and the legal components to address the question adequately in their quest to satisfy this Court to interfere with the impugned decision on bail. In this regard let us return to Article 49 (1) (h) of the Constitution on the release of an accused person on bail with reasonable conditions. The appropriate Court is therefore required first to make a determination that on the facts and circumstances of the case what constitutes reasonable bond terms. It becomes the duty of the trial Court to proceed and assess the various grounds in the first instance which includes the corpus under Section 123 (A) of the Code and any other relevant factor.

As reiterated elsewhere in illustrating the main objective of bail under Article 49 (1) (h) of the Constitution, the author **Okagbue {1996-5}** stated:

"Bail serves to give life to the abstract concept of the right to liberty by acting as a reconciling mechanism whereby the defendant's interest in pretrial liberty and security's interest in the defendant's presence at trial are both accommodated. Bail also serves to give substance to the presumption of innocence under which every person who is charged with a criminal offence is presumed innocent until he is proved guilty."

Here I am invited to interfere with the judicial discretion of the Learned trial Magistrate, in considering various parameters so as to settle on a particular reasonable bond terms. At this stage all I have to decide is whether there is a misdirection or application of wrong principles in determining the question of the appropriate bond terms for the applicant. The importance of the matter in the present case lies in general terms on the yardstick an appellate Court has to invoke in relation to judicial discretion which **Bouvier's Law Dictionary (first edition, published in 1839)** defines as follows:

"The discretion of a Judge is said to be the Law of tyrants; it is always unknown; it is different in different men; it is casual and depends upon constitution, temper, and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly, and passion, to which human nature is liable. Optima lex quae minimum relinquit arbitrio iudicis; optimus iudex qui minimum sibi."

Bail as a matter of judicial discretion is so dependent on constitutional and statutory provisions of the trial Court jurisdiction in question. The factors underlying the discretion are as illustrated above to the extent that the status of the accused, the moral turpitude of the offence, extent of penalty and its gravity as viewed by society sometimes influences that exercise of discretion.

In the result, it seems to me that without new evidence or risks of substantial injustice judicial restraint is essential to deal with a further finding or the re-exercise of discretion to interfere with the order or decision of an inferior Court. This of course does find favour with the principles in **Mbogo & Another v Shah {1968} EA, p.15**:

"An appellate Court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is

manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

I have carefully considered the submissions made by counsel for the applicant on all these grounds, but they do not make any inroads into the decision that has already been expressed by the Learned trial Magistrate on conditions to be met by the applicant before his release from custody.

Having taken that view there is no substance at all in which the Learned trial Magistrate erred in Law and in fact in resolving the application to have the applicant be released on reasonable bond terms. Accordingly, the application must be rejected; and the primary file be remitted back to the trial Court to hold trial hearings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 5TH DAY OF AUGUST 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Ms. Gicharu for Kinaro for the applicant
2. Mr. Kirui for the state