



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION CASE NO. 61 OF 2019

LESITT, J

BIRENDE MGAWA HERMAN....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application is a **Notice of Motion** dated 4th March 2020. It has been brought under **Article 49(1)(h)** of the **Constitution** and **sub section 362** and **364** of the **Criminal Procedure Code**. It seeks six orders.

1. That the Honourable Court be pleased to order the Review of Bond and Cash/bail terms and that the Executive Officer be ordered to verify the surety submitted by the applicant upon review.

2. That this honourable court be pleased to grant me the prayers sought bearing in mind that it is my constitutional right to be granted affordable/reasonable cash bail/bond under Article 49(1)(h).

3. That the case is not of a capital nature and that the applicant has been in custody for a long time since he was arrested.

4. That the applicant is of refugee status and a citizen of Congo DRC with no relatives in Kenya.

5. That the Applicant's family has suffered immensely since he was the sole dependent prior to his incarceration.

6. That this application is duly supported by annexed affidavit upon such orders grounds to be addressed during the application.

2. The application is supported by an affidavit sworn by the Applicant. In brief the Applicant deposes that he has been in prison awaiting trial for 1 year 2 months. That he has acute diabetes for which prison is unable to provide the necessary medical attention. He deposes further that he has a family back in his home country who solely depended on him and are suffering. He concludes by saying offence he is facing is bailable and seeks a Free Bond.

3. The Applicant in his verbal submissions started by stating he was denied bond or cash bail. Then he said that his sureties whom he sent to bail him out were rejected for reasons he does not know.

4. The application was rejected by the State. Ms Ndombi learned prosecution counsel submitted that the State was opposed to a review of the bond terms given to the Applicant by the lower court for reasons the Terms were reasonable given the charges he was facing. Counsel urged that since Applicant was a foreigner the requirement by a Kenyan surety was necessary to secure the attendance of the Applicant at trial.

5. The Applicant is facing two counts of offences before Chief Magistrate's Makadara Court. Count 1 is obtaining by False Pretence contrary to **section 313** of the **Penal Code**. Count 2 preparation to commit a Felony contrary to **section 308 (1)** of the **Penal Code**. The Applicant pleaded Not Guilty to both terms and on the same day was granted bond of KShs.50,000/= with one surety Kenyan Surety of same amount.

6. Having heard the Applicant, it is clear to this court that he is confused claiming on one hand he was denied bond by the lower court. Then

on the other hand he claims that his proposed sureties have been rejected by the court for no reason. These two facts cannot both be correct. It is either one or the other.

7. The court looked at the lower court record and read to the Applicant the bond terms granted to him by that court. In addition, the record does not have any proceedings relating to examination of a surety which would mean either none has offered to stand surety for him in court or whoever offered did not meet requisite terms and so could not be assessed as to suitability at all.

8. By this I mean that a person wishing to secure release of a person in custody for a sum stated by the court should have something to offer as security commensurate for the sum of the bond. If the proposed sureties had nothing to offer, it would be in order for the court not to convene to interview such a proposed surety.

9. I have also considered at the terms of the bond. The court granted the Applicant a bond as shown above. The court also ordered that no cash bail would be granted in the case.

10. The Applicant is a Congolese from DRC. I agree with the trial court's discretion not to grant cash bail. Failure to attend court is an important consideration when considering bail to a foreigner. I see nothing wrong in declining to consider cash bail as an option of the bond terms given.

11. As for bond with a surety of 50,000/-, I find this also reasonable. The Applicant faces a charge of obtaining KShs.40,000/= and a second of preparation to commit a felony as earlier stated in this ruling. The terms of bond ordered are reasonable taking into account the two offences the Applicant is facing.

12. The result of the application is that same has no merit and is dismissed. The Applicant should avail suitable sureties for the court to access as to suitability.

13. Those are the orders of this court.

LESITT, J

JUDGE

17/9/2020