REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS APPLICATION NO. 16 OF 2019

RAMADHAN IDDI RAMADHAN & 5 OTHERS.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING OF THE COURT

The Six Applicants herein were charged with the offence of conspiracy to defraud contrary to Section 317 of the Penal Code Cap 63, Laws of Kenya vide a ruling delivered on 22nd October 2018, the Applicants were granted bail on terms; a bond to the tune of Kshs. 20, 000,000.00/= (twenty million) with two sureties of similar amount. The Applicants were aggrieved with Learned Magistrate's ruling and brought the instant notice of motion application seeking the following orders:

> ***a) That this Honourable Court do call for and examine the record in Malindi Chief Magistrate's Court Criminal Case No.911 of 2018 (Republic vs Ramadhan Iddi Ramadhan & 5 Others and revise, review and aside the ruling on bail and subsequent orders conducted on 17 of October, 2018.***
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> ***b) That this Honorable Court be pleased to allocate Malindi Magistrate's Court Criminal Case No. 911 of 2018 to a judicial officer, other than the one who has handled it before.***

This Application is premised on the grounds that: that the Applicantss were arrested and charged in court on the 25th of September, 2018 with two counts of Conspiracy to Defraud contrary to Section 317 of the Penal Code, four counts of false swearing contrary to Section 144 of the penal code & giving false information contrary to a person employed in the Public Service contrary to Section 129(a) of the Penal Code & uttering false documents contrary to Section 353 of the Penal Code and that pre-bail reports were prepared for the accused which made crucial findings:

> a) The accused have resided in Malindi for most of their lives.
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> b) The accused have families who also reside in Malindi.
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> c) All the accused are elderly citizens with average age of 60 years.
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> d) The accused have never been implicated in any criminal activities.
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> e) The accused were not at flight risk.

Further the trial court in its ruling on bail on 17/10/2018 admitted that the accused had minimal chances of flight; that however the trial court set bail at Kshs. 20 million with two surety of like amount for each accused person; the bond terms set are excessive, unreasonable, punitive and contrary to the Constititonal right of an accused person to be released on reasonable bond terms; that the bail terms are so extreme that they amount to pre-trial detention and constitute abuse of judicial discretion; that the trial court grossly erred when it made a consideration of the monetary amount involved in setting harsh bail terms which is an irrelevant issue when considering bail terms; the accused are very elderly and not at flight risk, they have no previous criminal records and there is absolutely no likelihood of the accused interfering with witnesses.

Other grounds as couched in the application are that there is no likelihood of the accused disturbing public order or undermining public peace when released; that the offences of conspiracy to defraud contrary to Section 317 of the Penal Code, false swearing contrary to Section 114 of the Penal Code, giving false information to a person employment in public service contrary to Section 129(a) are misdemeanors that do not warrant the harsh bond terms meted by the trial court; that the value of land in question that purported to inform the decision for

excessive bail terms was not valued by a qualified Land Valuer. Further, that the valuation of Kshs. 700 million is mere guess work and speculation; that there was no reason for the court to impose such stiff bond terms and that the accused persons are willing to post a bond of one million each with two sureties for all of them with an option of a cash bail to guarantee their attendance in court.

The application is also supported by a supporting affidavit sworn by Ramadhan Iddi Ramadhan who deponed that the aforesaid bail amount is exorbitant and beyond their reach and that this it is tantamount to denying them bail which is a violation of their Constititonal rights. Apart from the bail amount being prohibitive, he asserted that the requirement of each of the accused persons to have two sureties of that amount is restrictive and a sure way of denying them bail.

Further, that the land in dispute legally belongs to them and the complainant herein is using extortion, bribery and threats so as to grab their ancestral land. He stated that they have been trying to find sureties of that amount to no avail and thus have been suffering in custody. He brought to the attention of the court that on the day that the application was to come for hearing on 4th April, 2019 they were not availed in court and their advocate never appeared.

It was deponed that all the Applicants were old men who are not in good health. He stated that he suffers from hypertension and diabetes and his fellow accused suffer from other terminal illnesses due to age and fear that if the bond terms are not reviewed, they might die in jail. He also stated that even though everybody should be deemed innocent until proven guilty, the current Learned Magistrate pre-judged them and that is why she practically denied them bail. He therefore appeals to the court to direct that this matter be heard by any other magistrate rather that the current one.

Further, that they are poor farmers who own the land in dispute as their inheritance and which the Complainant herein seeks to grab and that they are in no position to interfere with the witnesses who happen to be very rich and powerful men, police officers and officials of the ministry of lands. It was also stated that the review of bond terms and their release on bond will not interfere with the Respondent's case. He stated that if the orders sought are not granted they stand to suffer irreparable loss and damages.

LAW AND ANALYSIS

The question that falls for determination in the instant matter is whether, on the facts before it, the Learned Magistrate erred and misdirected herself in granting the accused persons bond on terms; a bond to the tune of Kshs. 20, 000,000.00/= (twenty million) with two sureties of similar amount.

Bail/Bond is a means of procuring the release of an accused person from legal custody upon posting sufficient security for his appearance at a time and place designated, to answer to a criminal charge. Thus the Court gives liberty to an accused person and at the same time, secures the intent of the law to punish the offender by insuring his future attendance in court and by compelling him to remain within the jurisdiction of the court.

This qualified freedom was devised to meet conflicting interests of society and the individual. Its primary purpose is to prevent the punishment of innocent persons and yet at the same time, administer criminal justice. Such an allowance is favored by law, based on the cardinal principle of justice that every man is presumed innocent until proven otherwise. However, it is an equally accepted principle of society that the guilty should suffer. These two principles work against each other from time of arrest until the suspect is finally adjudged in a court of competent jurisdiction. Any imprisonment before the decision is made would punish an innocent person.

Therefore in order to meet these conflicting interests, an interval of time is necessary to ascertain the truth of the accusation and to set in motion machinery fashioned for that purpose. During the said interval, bail/bond is generally allowed.

The rights of an accused person are firmly entrenched in the Constititon of Kenya, 2010. Article 50(2)(a) protects the right of any accused person of any offence to be presumed innocent until the contrary is proved. As a corollary to that right, Article 49(h) envisages the entitlement to bail as follows:

> ***"(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."***

It is manifestly clear in light of the above cited provision that entitlement to bail exists as of right. As a Constititonal right, its enjoyment can only be limited if exceptional circumstances are established. In interpreting the right to bail, Section 123A of the Criminal Procedure Code gives the parameters for the grant of the right to bail as follows:

> ***"123A. (1) Subject to Article 49(1)(h) of the Constititon and notwithstanding Section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—***
>
> ***(a) the nature or seriousness of the offence;***
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> ***(b) the character, antecedents, associations and community ties of the accused person;***
>
> ***(c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;***
>
> ***(d) the strength of the evidence of his having committed the offence;***
>
> ***(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person***

—

(a) has previously been granted bail and has failed to surrender to custody and <u>that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;</u>

(b) should be kept in custody for his own protection.

[Act No. 18 of 2014, Sch.]"

A closer reading of sub-section (2) goes to show that the legislature in its wisdom set out elaborated situations in which the right to bail would be limited or forfeited. The specific right of an accused to be presumed innocent until the contrary is proved, is sacrosanct and it is the basis for the entitlement to bail set out in Article 49(h) of the Constititon and Section 123A of the Criminal Procedure Code which is couched in peremptory language.

In view of the foregoing principles and provisions of law, the learned magistrate in her ruling relied on the pre-bail report which recommends bail as there are minimal chances of flight. She went further to state that the offence is serious and the amount involved is colossal and land that the dispute whose verifications are from the pre-bail report has resulted in fatalities. She therefore set the bond terms at Kshs 20 million with two surety of like amount.

I note that the amount involved in Criminal Case No.911 of 2018 is disputed. The amount of seven hundred million which is said to be the value of the land in dispute remains a speculated figure. Thus, the same was not supported with evidence in form of a valuation report prepared by a professional valuer.

In my view the seriousness of the offence is not seen through the lens of liquidated amount that the Accused persons are alleged to have conspired to defraud the complainant but rather through the nature and gravity of the offence. This court have in various cases of this nature stated that:

It is important to distinguish between the nature of the offence as a category and the seriousness of it as attached by the legislature in its various cluster of punishment in default. I am reminded to observe that trial courts should not take the phase seriousness of the offence on the face value. It is an inquiry to be based on the defined offence and particular facts as laid down by the state. There is no doubt my reading of the Constititonal and statutory provisions on bail point to the court to give a particular weight to the various factors and principles governing bail as illustrated in the bail and bond policy of the Judiciary. The independence of the trial court in directing the reasonable conditions applicable in each case has always been a reflection of the provisions in Article 49(h) of the Constititon and Section 123 and 124 of the code. [See the Case of Kirit BhangwandaKanabar v DPP & Another(2018)].

Applying the foregoing in the instant case, the accused persons were charged with the offences of conspiracy to defraud contrary to Section 317 of the Penal Code, false swearing contrary to Section 114 of the Penal Code, Giving false information to a person employment in public service contrary to Section 129(a) of the Penal Code. All these offences by their nature and gravity fall under the class of misdemeanors.Thus, the value of land in question that purported to inform the decision for the bail terms was not valued by a qualified Land Valuer. Neither does the speculated value of the property in dispute may be used as the reflection of the seriousness of the offence.

The question to answer is whether the Honorable trial magistrate imposed an excessive bail. I turn to the Eighth amendment of the American Constititon which prohibits the use of excessive bail. The **Supreme Court of the United States of America** in the case of **Stack v Boyle U.S. 1.3.1951**

"the court provided guidelines in assessing "whether bail is excessive starting from the premise that the traditional right to Freedom before conviction permits the unhampered preparations of a defence and serves to prevent the infliction of punishment prior to conviction. The court defined excessive as: Bail set at a figure higher than an amount reasonably calculated to assure the presence of the accused. Significantly, the court tied the question of whether a bail determination is excessive to the purpose of bail. As the court explained, the purpose of bail is to help assure the presence of the defendant at subsequent proceedings. Since the freedom of bail is limited, the filing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."

In the case of **Bearden v Georgia 461 U.S 660. 672-73 1983 Griffin v Illinois 351 U.S 12 19 1956** it has been reaffirmed that: ***"there can be no equal justice where the trial a man gets depends on the amount of money he has".***

I wish also to draw the attention to a report by professor **Friedland; On Detention before trial ,a study of criminal cases tried in Toronto magistrates courts**, **Toronto Press 1965**, where he observed.:

"The practical challenges of setting the quantum of cash deposit, as well as the fairness it produced. System which requires security in advance often produces an insoluble dilemma. In most cases it's impossible to pick a figure which is high enough to ensure the accused's appearance in court and yet low enough for him to raise. The two seldom if ever overlap. The ability of the accused to Marshall Funds or property in advance whether he or she would be released pauses even a bigger challenge"

One may add that a court of law shall not deprive an accused person right to life security and liberty for reason that he or she is facing a criminal charge without due process of law. In determining the amount of cash bail or surety covenant with the court as a condition for release the legitimate goal is to ensure the attendance of the accused on all future schedules set down by the trial court. I hold a strong view that imposing financial conditions or surety terms that result in pretrial detention of the person is in violation of the Constititonal due process and right to equal protection before the law. The Constititonal and statutory provisions emphasise on reasonable terms. It is therefore not

clear given the available data where trial courts find their influence to assess high bail terms for accused persons. There is indeed need to adhere to canons of Constititonal interpretation on procedural due process and an opportunity to be heard meaningfully on the ability to raise cash recognizance or surety bonds. It is necessary for the trial court to make an express finding on the record that the accused has the ability to pay the cash bail or raise the recognizance by the sureties. The resulting effect of excessive bail is punishment without conviction.

I am in agreement with the legal principles expressed in persuasive authorities cited above as relevant to the matter at hand. Bail is a Constititonal right. There is no evidence linking the Accused Persons to allegations of absconding and if the Accused Persons were found to be a flight risk, their travel documents could be lawfully with-held. Respectfully, the reasons given by the Learned Trial Magistrate as to why she imposed such an amount are not sufficient to justify the same. In the pretrial stage right to the presumption of innocence under Article 50(2)(a)of the Constititon ought to play a significant role in grant of bail and corresponding terms. More importantly courts should restrain themselves from conducting a mini-trial without the evidence having been tested as provided for under the Evidence Act.

In the instant case we are not told that the accused persons are a risk in subjecting themselves to the jurisdiction of this court, or they pause a risk of interfering with witnesses thereby obstructing justice, or they face risk as to their own safety to life and security. Finally, that their detention is for the preservation of public order and security of the state. The bail and bond policy of the judiciary was clearly designed as a tool to aid trial courts in making determination on bail conditions and terms. Before adverting to any bail decision or any other material a number of approaches are prescribed to be taken into account on criminal bail proceedings.

Taking into consideration the facts of this case and the standards of review and supervisory jurisdiction in terms of Article 165(6)(7) of the Constitution and Section 362 of the Criminal Procedure Code and the guiding principles illustrated in this ruling, in the case of **MWANGI V WAMBUGU 1984 KLR AT 453** the court held on the jurisdiction of an appellate court over the decision made by the trial court that:

> ***"A court of Appeal will not normally interfere with a finding by the trial court unless such finding is based on no evidence or on misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the finding, and an appellate court is not bound to accept the trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence ,or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally"***

The Applicants in this matter are aggrieved due to the grant of excessive bail terms inconsistent with the laid down principles under the Constitution and the Criminal Procedure Code. There are incidental failures identified inherent in the exercise of power by the trial court. Bearing in mind the principles analysed above, the impugned ruling ought to be interfered with on grounds of being punitive, excessive and unconscionable in the circumstances of the case facing the Applicants.

I take the following view of the matter: the Learned Trial Magistrate factual findings on how she arrived at the monetary bond of 20 million Kenya Shillings or two surety of similar amount is not supported by the evidence or reasons given for the decision. Bail conditions should not be equated with punishment against the offender for committing an offence yet to be proved by the prosecution. The pre-bail report shows that the other conditions on grant of bail were responsive and in favour of the Applicants. Having said so, I have no reason to go by the excessive bail terms imposed by the Learned Trial Magistrate.

It is also noteworthy mentioning that during the pre-bail application the State did not object or place before court any existence of compelling reasons for the accused not to be released on bail or any special conditions be attached to their release order.

Additionally, by virtue of the ruling by Justice Thande delivered on 23rd June 2017, it seems to me that parties have not complied with the order to have the dispute determined before Environment and Land court. This follows from the definitive findings that there was a need for a distinction to be drawn between the sanctity and indefeasibility of certificate of title to the suit land subject matter of the dispute. There is therefore high possibility that the interplay of issues simultaneously being ventilated at different Constitutional organs with similar crosscutting claims may occasion a failure of justice..

So to this extent the application on revision is allowed by setting aside the trial court order on bail terms and it is substituted with the order that the accused persons be released on cash bail of 50 000/= or in the alternative each signs a personal bond of Kshs. 50,000/= with a surety of identical amount. Recusal being one of the declarations in this notice of motion I rule that it is a matter for discretion of the trial court.

Accordingly the notice of motion dated 15th April, 2018 is partly allowed.

Dated, delivered and signed in open court at Malindi this 29th day of April, 2018.

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HON. R. NYAKUNDI

JUDGE

Representation

Mr. Mwabonje holding brief Mr. Kyalo Matata for the Accused/Applicants

Ms. Sombo for the State

Mr. Mbura watching brief for Mr. Kilonzo for the complainant

All 6 Applicants present