REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 86 OF 2019

MARGARET SYOMBUA KYALO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(*From the original ruling of Hon. E. Muiru (SRM) in Kilungu Senior Resident Magistrate's Court Criminal Case No. 129 of 2019).*

JUDGMENT

1. **Margaret Syombua Kyalo** the Appellant is an accused before Kilungu Senior Resident Magistrate's Court vide Criminal Case No. 129 of 2019, where she is charged with the offence of trafficking of narcotic drugs (bhang) contrary to Section 4 (a) of the Narcotic Drug and Psychotropic substances control Act No. 4 of 1994.

2. She pleaded not guilty to the charge on 21st February, 2019 and was granted bond of Kshs.100,000/=. The matter was scheduled for hearing on 11th April, 2019, and when the matter came up, the court cancelled the Appellant's bond based on allegations made against her by the Investigating Officer.

3. The Appellant has challenged the cancellation of her bond on the following grounds: -

(i) **That** the learned trial magistrate erred in law and fact by cancelling the appellant's bond based on mere allegations that were unsupported by evidence.

(ii) **That** the learned trial court magistrate erred in law and fact by misdirecting herself by basing her decision on extraneous matters contrary to the law.

(iii) **That** the learned trial court magistrate erred in law and in fact by failing to appreciate that the evidentiary burden of proof rests squarely upon the Respondent.

(iv) **That** the learned trial magistrate erred in law and fact by arbitrarily cancelling the Appellant's bond, which action was extremely harsh in the circumstances.

(v) **That** the learned trial court magistrate erred in law and fact by rejecting the Appellant's countenance arbitrarily.

4. Filed with the appeal, was an application for bond pending appeal. The court directed that the appeal be heard since the Record of Appeal was ready.

5. Mr. Ngumbau for the Appellant condensed the grounds of appeal and argued them together. It was his argument that the learned trial magistrate erred in law and fact by cancelling the Appellant's bond on the strength of the Investigating Officer's affidavit.

6. He referred the court to the case of **Chikamai V- R 2016 eKLR where Justice C. Meoli** stated as follows: -

"there is no agreement as to the manner in which such compelling reasons are to be proved whether orally or by affidavit, but certainly it is important in some cases that affidavit evidence be tendered, and the deponent be cross-examined by the defence….. It is also true as Mr. Gichuki has argued that the Appellant is entitled to the right to presumption of innocence until proven guilty….. In the result, my view is that as presented, the matter raised by the prosecution did not raise compelling reasons sufficient to override the considerations of the Appellant right to a presumption of innocence. Indeed Mr. Gichuki has submitted from the bar that the Appellant has already been acquitted in one of the cases cited by the Appellant has already been acquitted in one of the cases cited by the prosecutor. And I would add that bail hearings where an objection has been raised should be no different from other

proceedings in court and the defence should be given a chance, to rebut any material brought by the prosecution in support of the objection".

7. It was therefore his submission that the Investigating Officer ought to have been cross examined on his affidavit before a ruling was made. That the Appellant had to be presumed innocent in the first instance.

8. Counsel submitted that the cancellation of the Appellant's bond was harsh and arbitrary. Finally, he contended that if the allegations against her were true, she ought to have been charged with the offence.

9. The State through Mrs. M. Owenga conceded the appeal on the ground that the averment by the Investigating Officer did not fall within the major compelling reasons for denial of bond.

It was her submission that the circumstanced did not warrant the cancellation of bond. That the most appropriate action would have been for the Investigating Officer to prefer other charges against the Appellant.

10. This is a first appeal and this court has a duty to re-evaluate and reconsider the evidence on record and arrive at its own conclusion. **See Okeno v-R 1972 EA 32, Kiilu & Anor –V R (2005) I KLR 174.**

11. In her ruling the learned trial magistrate has clearly set out what should be taken into account when the court is considering the release of an accused person on bond. She set out the criteria as follows: -

i. The nature of the charge.

ii. The strength of the evidence which supports the charge.

iii. The gravity of the punishment in the event of conviction.

iv. The previous criminal record of the Applicant.

v. The probability that the criminal may not present himself at trial.

vi. The likelihood of further charges being brought against the accused.

vii. The likelihood of accused interfering with witnesses or suppress any evidence that may incriminate him.

viii. The probability of finding the Applicant guilty as charged.

ix. The detention for the protection of the accused

x. The necessity to preserve medical or social report pending finding disposal of the case.

12. The record shows that when plea was taken the prosecutor never objected to the Appellant's release on bond. An affidavit is said to have been sworn by the Investigating Officer. The said affidavit was not filed in court nor served on the Appellant. She did not therefore not know what the contents of the said affidavit were. Secondly when the learned trial magistrate placed the Investigating Officer P.C David Kariru of Kilome police station into the witness box to testify, she never invited the Appellant to cross-examine him.

13. It clearly shows that what he told the court was evidence not tested for its veracity. The record shows that the Appellant was given a chance to respond to the Investigating Officer's evidence.

She was not placed in the witness box as her accuser. What she stated was therefore not also tested for its veracity.

14. That was the scenario before the trial court and the learned trial magistrate elected to believe the Investigating Officer's story stating as follows :-

"In this instance, the court is informed by Investigating Officer under oath that 1st accused is still engaging in the trade of selling cannabis and yet she is in court over the same offence.

The accused terms the said statement as mere allegation. I, however note that she does not in any way counter the said allegations but justifying she actually earns her living. In the circumstances, noting Investigation Officer's statement in which he avers that they sought to arrest the accused again but she escaped which statement is not also categorically denied by the accused. I do find merit in the application by the Investigating Officer".

15. The granting of bond to an accused person is guaranteed by the constitution under Article 49(1) (h) which provides that: -

An arrested person has the right-

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

The same can only be denied if there are compelling reasons to warrant the same.

16. In the present case, what are the compelling reasons that made the learned trial magistrate deny the Appellant bond by cancelling what she had been given? The answer is that she was alleged to be continuing with the selling of cannabis.

17. Besides the Investigating Officer's word there was nothing else to confirm that. If indeed the allegation was there, then it would have been clear that the Appellant was committing an offence. What happens to criminal offenders? They are arrested and charged by law enforcement officers.

18. There is no evidence that the Investigating Officer arrested or even attempted to arrest and charge the Appellant. The Appellant was in court as a very free person on 11th April, 2019. What was so difficult in arresting and charging this lady if indeed she had continued selling cannabis?

19. I am also of the view that even if she had been charged with a similar offence, that **alone** would not amount to a compellable reason for denial of bail. As has been argued in many other cases including **John Chikamai v R (supra), Abuod Rogo Mohamad & Anor v R (1011) eKLR** the curtailing of one's freedoms and rights should only be in very clear circumstances.

20. An accused person especially one not represented by an advocate must be given every opportunity to rebut any incriminating evidence against him/her. In this case the learned trial magistrate relied on untested evidence to punish the Appellant by cancelling her bond.

21. The learned Counsel for the State agrees that the Appellant's bond should not have been cancelled in the circumstances of this case. I find the appeal to have merit and I hereby allow it.

22. **The ruling of 11th April, 2019 is hereby set aside and the Appellant's bond is reinstated forthwith.**

I further direct that Kilungu SRM's Criminal Case No. 129/2019 be heard and determined by any other magistrate at Kilungu Law Court besides Hon. E. Muiru.

Orders accordingly.

DELIVERED, SIGNED & DATED THIS 27TH DAY OF JUNE, 2019, IN OPEN COURT AT MAKUENI.

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H. I. ONG'UDI

JUDGE