

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APP. NO. 248 OF 2019

FRANK OCHOLA OGUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant on his own filed a Notice of Motion dated 2nd May, 2019 in which the major prayer is that his bond terms in a trial case he faces be reduced. The application is supported by his own affidavit sworn on even date. His main grounds on which the application is premised is that his mother depends on him and as at now, she cannot feed herself after involvement in an accident in July, 2018. That she attends physiotherapy exercise which requires a care taker. Further that he has been awaiting the complainant to withdraw the complaint which the prosecution has insistently blocked. Finally, he stated that the bond terms were too high and beyond his ability. He urged the court to note that from where he comes, that is Kisumu most lands do not have title deeds. It was his prayer therefore, that the court grants him a lenient cash bail.

2. Learned state counsel, Mr. Momanyi conceded that there was intimation on 13th March, 2019 to withdraw the case. However, the court was informed that a gun (pistol) was involved in the offence, consequent which the request for withdrawal was declined. That since, the complainant has testified. According to Mr. Momanyi, the offence was serious as the complainant was robbed of his motor vehicle at gun point. Counsel, therefore opposed the request for reduction of bail.

3. In rejoinder, the Applicant submitted that an accused person is presumed innocent until proven guilty. He submitted that he was not arrested with any gun. That furthermore the court only indicated that the proper procedure for withdrawing the case be followed which involved the consent of the DPP.

4. The Applicant is the accused in **Makadara Cr. Case NO. 1701 of 2018** in which he is charged with the offence of robbery with violence contrary to **Section 295** as read with **Section 296(2) of the Penal Code**. The particulars are that on 25th June, 2018 at 2230 hrs at Ambassador in Kamukunji sub-county jointly with others not before court being armed with dangerous weapons namely pistols, robbed Joseph Mwangi Kuria of a motor vehicle Reg. No. KCL 579R make Toyota Vitz and during the time of such robbery threatened to use actual violence to the said Joseph Mwangi Kuria. On taking plea, the court admitted him to a bond of Kshs. 1 million with one surety of a similar amount.

5. A reading of the proceedings does not reflect that the Applicant sought reduction of bail before the trial magistrate which request was declined. Nevertheless, this court has powers to vary the bond terms or entirely admit an accused person who faces a charge before a lower court to bond. In my view, the bond of 1 million shillings would be reasonable.

6. Having regard to the fact that an accused remains innocent until otherwise proved, unless it is demonstrated that he is flight risk, affordable bond terms should be granted. It is a cardinal principle that the main factor for consideration in granting an accused bail is that he would at all times attend the trial. I have not seen an indication that the Applicant is a flight risk. It also was never submitted before this court as much. There is no reason in the circumstances to grant stringent terms of bond which the Applicant

cannot afford. Further, owing to the seriousness of the offence, the bond terms must be attached to a condition so as to ensure that the Applicant attends court. Cash bail may not be the best option in the circumstances.

7. In the upshot, I set aside the bond terms granted by the trial court and substitute them with an order that the Applicant be admitted to a bond of Kshs. 500,000/= with one surety of a similar amount. The surety should be assessed by the trial court.

Dated and Delivered at Nairobi This 28th day of November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. *Applicant in person.*
2. *Miss Nyauncho for the Respondent.*