REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO. 228 OF 2017

FRANCIS NEHEMIA OLUOCH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An application under Article 50(2) of the Constitution and Sections 362 and 364 of the Criminal Procedure Code).

RULING

1. The Applicant made the present application by way of Notice of Motion and prayed that the court consolidates bond terms in two cases he was facing at the Chief Magistrate's Court at Makadara; namely, **Criminal Cases 427 of 2014 and 1271 of 2017.** The court ordered that the files be forwarded. It was discovered that the Applicant was actually facing three criminal cases at the Makadara Law Courts, namely; **2206 of 2010, 247 of 2015 and 1271 of 2017.** The Applicant sought to have the bond terms in the cases consolidated and that the new terms should be preferably a surety of Kshs. 500,000/- with the alternative of Kshs. 100,000/- cash bail.

2. The application was supported by his supporting affidavit in which he submitted that he was a family man with three sons and eight grandchildren, which spoke to his age. Further, that his wife was ailing and he was therefore the sole breadwinner to his family. He swore that his continued stay in custody was irreparably affecting him as he was suffering from hypertension and is also diabetic whereas the medical treatment he was receiving in custody was substandard. He submitted that he was a responsible person with no foreign links and he had no intention of absconding. He added that he would undertake to attend all the hearings until the cases were heard and determined.

3. Ms. Sigei for the Respondent opposed the application. She submitted that the offences were serious and were not committed in the same transaction. That the Applicant had demonstrated that he could not offer another surety given that in Criminal Case 2206 of 2010 he had initially availed a brother to stand as his surety but the surety was discharged under unclear circumstances. That in that case he did not severally attend court which led to warrants of arrest being issued which delayed the case. That in criminal case No. 247 of 2015 the surety was discharged and the Applicant had not made efforts to date to avail another one. She left it to the court to decide on the appropriate terms of bond to grant but opposed any reduction in the two files.

4. The Applicant submitted that the surety in Criminal Case No. 2206 of 2010 had never been discharged and that in Criminal Case No. 247 of 2015 the surety withdrew because he needed to sell the collateral. That he had been in custody for the last 9 months and that he has never failed to attend court in Criminal Case No. 247 of 2015. That in Criminal Case 2206 of 2010 he had never absconded unless when he was in custody and that no warrants of arrest had been issued against him.

5. I perused the original record of proceedings. The bail terms are as follows:

i. In Criminal Case 2206 of 2010: Bond of Kshs. 100,000/- with surety of a similar amount.

ii. In Criminal Case 247 of 2015: Bond of Kshs. 300,000/- with a surety of a similar amount.

iii. In Criminal Case 1271 of 2017: Bond of Kshs. 500,000/- and a surety with the alternative of Kshs. 600,000/- cash bail.

It is also clear that in Criminal Cases 2206 of 2010 and 247 of 2015 the Applicant did meet the bond conditions and was released.

6. The offences in all the files appear to be similar in nature being Obtaining by False Pretences contrary to Section 313 of the Penal Code and Personating a Person Employed in the Public Service contrary to Section 105(b) of the Penal Code. Upon arriving at this realization the court must therefore consider the propriety and legality of admitting the Applicant to bond or bail in light of what appears to be a re-offending party. This is informed by the fact that the alleged offences forming the basis of the cases against the Applicant occurred at

different times and were allegedly committed when the Applicant was out on bond in one case or the other.

7. The court is alive to the cardinal principle that an accused person is presumed innocent unless otherwise proven guilty. However, in a case such as the instant one where the Applicant has shown the risk of re-offending, an admission to bail must be treated with caution. And even if bail were to be granted, court must have regard to the fact that the risk of re-offending is a compelling reason, not only for denial of bail but of granting stringent bail terms. See **R *v.* Collie(No. 2)[2002] SASC 247** that:

> ***"The court is required to make an assessment of the strength of these allegations and make predictions about the applicant's future conduct. The scope of a bail hearing is much broader than many other criminal proceedings. There is a level of informality about the entire process. The rules of evidence are not strictly enforced as the court is assessing risk, not determining guilt."***

8. I bear in mind that in making a determination as to possibility of re-offending, the court is merely making an analysis of risk but not determining the guilty of an accused. This statement guides the rationale of always upholding the tenet of the presumption of innocence unless otherwise proven. The manner of analyzing this likelihood was set out in **R *v.* H, IM[2006] SASC 94,** viz.:

> ***"…, the phrase "likelihood(if any)" that the applicant would do certain things contemplates that there is a range of possibilities that must be considered by the court from a very small likelihood, or a mere possibility, to a very strong likelihood, or a high degree of probability. The greater the likelihood of the events happening, the more inclined a court would be to hold that the presumption in favour of bail is displaced."***

9. The court must therefore interrogate the cases before it and make a calculation on the probability of the Applicant re-offending. Such a calculation is not meant to fetter the right to bail set out in Article 49(1)(h) of the Constitution but rather ensure that ends of justice are met. The reasons why re-offending is such a paramount consideration in the refusal to grant bond or bail was ably stated in **R *v.* P, AC[2005] SASC 451,** viz.:

> ***"That is, to protect members of the public from the effect of possible offending by the accused pending trial of the offences with which he is charged. In my opinion, it requires the Court to have regard to the likelihood of conduct on the part of the accused which could give rise to further charges for alleged breaches of the criminal law. So construed, it is proper to take into account both the risk or likelihood of that happening and the consequences to members of the public if it does happen, notwithstanding the presumption of innocence in favour of the accused on the charges subject of the bail application."***

10. However, possibility of re-offending cannot on its own form a basis of a decision to deny an applicant bail or bond. It is only of importance alongside other factors that point to a likelihood of re-offending.

11. In the present case, there were no allegations of re-offending raised by the Respondent. However, this was informed, as set out above, by the nature of the offences that form the crux of this application. The Applicant faces several counts in the three trials that all involve allegations that he under some guise or the other gained financially from the complainants, much to their detriment. The offences were allegedly committed in diverse transaction. Of particular importance, the offences in Criminal Case files 247 of 2015 and 1271 of 2017 were allegedly perpetrated while the Applicant was out on bail. Thus, the court, without imputing guilt on the Applicant, finds that the frequency of the offences suggests that the Applicant's probability of re-offending is high. This has the effect of rebutting the Applicant's right to be admitted to bail under Article 49(1)(h) of the Constitution.

12. I will however consider the mitigating factors offered in this application for which I will give him the benefit of doubt in not denying him this paramount constitutional right to bail. I order that he meets the bail/bond terms as granted in each of the respective files. I will fetter the same though by declining to consolidate the bail terms. I also decline to reduce the terms of bail granted as the same are not only lenient but reasonable. The application is accordingly dismissed. All the trial court files shall be forthwith remitted back to the respective trial courts for mention on 8th June, 2088. P.O. to issue for the Applicant to appear in the respective courts. It is so ordered.

DATED and DELIVERED this 30th day of May, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Applicant present in person.*

2. *Miss Sigei for the Respondents.*