



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CRIMINAL APPLICATION NO. 8 OF 2018

MARY ANNE MUENI DENIS.....APPLICANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. This is a ruling on an application dated 14/03/2018 seeking for orders that:-

(a) That the Honourable court be pleased to review the court orders granted on 26/07/2017 by the Senior Resident Magistrate Hon. V.O. Nyakundi suspending the applicants bail terms.

(b) That this court do order the termination of charges in CM Criminal Case No. 209 of 2009 for disclosing no offence.

(c) That in the alternative this matter be transferred to another magistrate within Embu law courts for hearing and final disposal.

2. The application is supported by the application of the applicant Mary Anne Mueni Denis. She deposes that she is facing charges of obtaining by false pretences in CM Criminal Case No. 209 of 2009 where she was released on cash bail of Kshs.80,000/=. The bail terms were later suspended on 26/07/2016 for absconding court. The applicant states that she explained to the trial magistrate that she was very sick at the time she did not attend court and that she had also lost her mother.

3. The applicant further states that the trial court has taken long to finalize the case despite her being held in remand for over seven (7) months. The applicant has learnt her lesson and may never again fail to attend court as and when required. She claims to be ailing and is scheduled for an operation to remove her uterus. The applicant claims that the charges against her are unfounded and that she is suffering in remand while the complainant is occupying her land.

4. The applicant was represented by Messrs Victor L. Andande & Co. Advocates. He submitted that the applicant explained herself before the trial court and gave sound reasons for not attending court due to a long illness. He cited the case of *JAPHETH OCHIENG VS REPUBLIC [2015] eKLR* where in a case with similar facts, the applicant therein was given a second chance by the court due to his ill health. The counsel urged the court to exercise its discretion and release the applicant on favourable bail terms.

5. It was contended that the dispute before the court is purely of civil nature and the charges against the applicant are a continued violation of her constitutional rights.

6. The counsel argued that the reason for the prayer for transfer of the case to another court is that the

case has taken too long to be concluded. It is alleged that the court has granted several adjournments in favour of the prosecution thus rendering the trial unfair. Further that the trial court has failed to discharge its mandate in an impartial manner. It is therefore important that this court exercises its discretion to terminate the charges or in the alternative transfer the case to another court.

7. The application was opposed by the respondent on grounds that the delay of the case was caused by the applicant absconding court for a long period. This was after a relentless pursuit of the surety through the relevant authorities. When the applicant was finally arrested and arraigned in court, her bail terms were suspended.

8. The respondent argued that Section 362 of the Criminal Procedure Code deals with revision of criminal proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding. It was submitted that the trial court was correct and justifiable in law to suspend the bail terms of the applicant. Article 50 (2) requires that the accused be present during the trial and that the trial should begin and conclude without reasonable delay. The delay in the trial was caused by the applicant herself and the prosecution should not be blamed in any way.

9. The respondent further states that the applicant has not passed the test for transfer of the case to another court as provided for by Section 81 of the Criminal Procedure Code.

10. This application is brought under Section 362 of the Criminal Procedure Code which provides:-

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.

11. The plea in this case was taken on 3/02/2009 and a plea of not guilty entered. Thereafter the accused was granted bail in terms of Kshs.200,000/= which was later reviewed to Kshs.100,000/= with one surety or cash bail Kshs.40,000/=. The applicant absconded court on 9/02/2017 and a warrant of arrest was issued with summons to the surety.

12. The surety appeared in court several times and was given time to avail the accused in court. The accused was availed in court on 26/07/2017 and she told the court that she was unwell and that she had lost her mother. The court was not satisfied with her explanation thereby canceling her bond and remanding her in custody. The surety was discharged.

13. The record shows that the accused had earlier absconded during the period Hon. L. K. Mutai was conducting the trial. She was absent on 28/10/2009 and a warrant of arrest issued against her. The accused re-appeared in court on 2/06/2015 which was about six (6) years later. It is not clear from the record whether the accused was under warrant of arrest or was availed by the surety. The trial court appears to have released the applicant on fresh bond terms without demanding any explanation as to her absconding which was not only irregular but failure to do his duty.

14. In this application, the applicant absconded court for over five months before she was availed by the surety. She did not come on her own volition which would have been a mitigating factor for reinstatement of bond. Although she claimed to have been sick she did not avail any medical documents. Neither did she produce any evidence to prove that she had lost her mother during the period that she absconded. Even assuming that she had lost her mother during that period, there was no justification to abscond for that long period and to wait until she was arrested.

15. The trial magistrate has discretion to suspend bail terms in the event that an accused person absconds and does not offer a satisfactory explanation as to her absence. In this case, the period of five months was indeed quite long. I am of the view that the trial magistrate did not earlier peruse the file to know that the applicant had earlier absconded court for a period of over six years and that no action had been taken against her. Notwithstanding the earlier prolonged period that the applicant absconded, the magistrate was

justified in respect of the second instance to cancel the bond.

16. In this regard I find that the magistrate exercised his powers to suspend the bond judiciously. For that reason, the facts leading to this application and the decision of the trial magistrate do not call for revision under Section 362 of the Criminal Procedure Code. There is no mistake or irregularity for revision by this court.

17. The court will be guided by Section 81 of the Criminal Procedure Code in regard to the prayer for transfer of the case.

18. Section 81(1) provides:-

(1) Whenever it is made to appear to the High Court—

(a) that a fair and impartial trial cannot be had in any criminal court subordinate thereto; or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or

(d) that an order under this section will tend to the general convenience of the parties or witnesses; or

(e) that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order—

(i) that an offence be tried by a court not empowered under the preceding sections of this Part but in other respects competent to try the offence;

(ii) that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction;

(iii) that an accused person be committed for trial to itself.

19. The grounds provided under Section 81 on which transfer of a case may be considered include a situation where a fair and impartial trial cannot be achieved before the trial court. The applicant has not advanced any reason provided for under Section 81 to transfer. I have perused the proceedings, and noted that the criminal was handled by several magistrates. Hon. L. K. Mutai Principal Magistrate commenced the trial on 14/07/2009 and heard 2 witnesses. The case was taken over by Hon. R. O. Oigara, Principal Magistrate who commenced the trial afresh and heard 2 witnesses. Hon. V.O. Nyakundi Senior Resident Magistrate took over the case one year ago, that is on 21/03/2017. This was followed by the applicant absconding for over five months.

20. The delay complained of cannot be visited on the prosecution or on the court. The delay of more than six (6) years was occasioned by the applicant herself. Absconding for six years is a serious issue which does not justify granting bail a second time. The applicant ought to have been charged with failing to attend court for the first and second time in addition to cancellation of bond.

21. The applicant has not pointed out the current trial magistrate is likely to be partial in the trial. He has not been accused of any single misconduct.

22. It is my considered view that the applicant has not established a case for transfer.

23. The charges against the applicant are several. It is alleged that they are defective in that the parcel

number given in the file does not amount to a reference number of land or give any location where the land is situated.

24. The other issue was the dispute before the trial court is of a civil nature. The law provides for remedies open to the accused in the criminal procedure code in case of defective charges. These avenues have not been utilized and remain open.

25. The applicant may also raise these issues in the submissions at the close of the prosecutions case for the trial court to address.

26. As for the ill health of the accused, it is my considered opinion that the prison have health facilities for all remandees. If an operation or other advanced treatment is required, the remandees are treated in the nearest county or referral hospitals in the county or region. The applicant is entitled and should be provided with the necessary treatment through prison or by order of the trial court.

27. I find no merit in this application and I hereby dismiss it with costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 26TH DAY OF JUNE, 2018.

F. MUCHEMI

JUDGE

in the presence of:-

Mr. Andande for Applicant