



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 575 OF 2018**

**PATRICK MWEU MUSIMBA.....1<sup>ST</sup> APPLICANT**

**ANGELA MWEENDE MUSIMBA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT**

**RULING**

1. Patrick Mweu Musimba and Angela Mwendu Musimba, hereafter the 1<sup>st</sup> and 2<sup>nd</sup> Applicants respectfully, brought the present application by way of a Notice of Motion dated 4<sup>th</sup> October, 2018. The main orders sought are that; (i) the court be pleased to set aside, vacate, quash and/or vary the orders given on 20<sup>th</sup> September, 2018 by Hon. Hellen Onkwani in Criminal Case No. 1717 of 2018 admitting the 1<sup>st</sup> Applicant to cash bail of Kshs. 5,000,000/- in the alternative a bond of Kshs. 30,000,000/- plus two sureties of a similar amount and substitute the same with an order that the 1<sup>st</sup> Applicant be admitted to similar bail and bond terms granted to the other accused persons, (ii) the court be pleased to set aside, vacate, quash and/or vary the orders given on 20<sup>th</sup> September, 2018 by Hon. Hellen Onkwani in Criminal Case No. 1717 of 2018 (Republic v. Mohammed Zafrulla & 8 others) ordering the Applicants to deposit their passports in court and substitute the same with an order for the immediate release of the passports to the Applicants, and for the costs of the application.

2. The application is based on the grounds inter alia, that after learning through media reports that a charge had been registered against them, the Applicants presented themselves to court and took plea on 17<sup>th</sup> September, 2018. That this was notwithstanding the failure to serve summons upon them and granted that the 1<sup>st</sup> Applicant was a State Officer, as a Member of Parliament, he should have been served in accordance to Section 95 of the Criminal Procedure. That upon taking plea their advocate made an application for their release on reasonable bail terms, an application that the prosecutor did not oppose but the court ordered for the Applicants to be held until 20<sup>th</sup> September, 2018 when a ruling would be delivered. That on 20<sup>th</sup> September, 2018 the 2<sup>nd</sup> Applicant's bail terms were set at Kshs. 2,000,000/- cash bail or a bond of Kshs. 10,000,000/- with one surety of a similar amount while the 1<sup>st</sup> Applicant's terms were; cash bail of Kshs. 5,000,000/- or a bond of Kshs. 30,000,000/- plus two sureties of a similar amount. Further, the court ordered that the Applicants deposit their passports in court which would hinder them from travelling outside the court's jurisdiction without the court's leave.

3. It is averred that the 1<sup>st</sup> Applicant's bail terms were inordinately higher than the rest of the accused persons. That the court in setting the terms failed to consider that the Applicants appeared in court even though they were not summoned. It is opined that the terms were punitive, excessive, prohibitive, harsh, discriminatory and tantamount to a denial of bail. The court is accordingly urged to review the bond terms and substitute the same with reasonable and just terms.

4. The application was supported by a supporting affidavit sworn by the 1<sup>st</sup> Applicant on 4<sup>th</sup> October, 2018 which basically reiterates the grounds on which the application is premised.

5. The application was canvassed on 20<sup>th</sup> November, 2018 with Mr. Kimathi representing the Applicant while Ms. Sigei acted for the Respondent. Mr. Kimathi reiterated the issues raised in the application adding that the Criminal Procedure Code was silent on when a corporate body could be charged with an offence as it is a separate legal personality from the directors and shareholders with separate responsibilities and liabilities. He submitted that the company could not therefore be involved in matters bail and bond as it cannot be arrested or sentenced to serve a jail term. That no liability could accrue to an individual unless there was compliance with the company law. He relied on an excerpt from Halsbury's Law titled "*Companies Regulated by the Companies Act 1948 to 1967*" which at para. 722 reads:

***"722. Company's liability for agents' acts. Because something in the nature of mens rea was essential to a criminal offence it***

*was formally held that in ordinary cases a company, having no mind, could not be guilty of such an offence; but modern cases have made inroads upon this immunity.”*

6. He argued that while Article 49 of the Constitution set out the rights of an arrested person it was illogical that there should be further payment of bond on the part of the 1<sup>st</sup> Applicant as a director of the company as this would cause difficulties when it came to sentencing.

7. With regards to the order that the passports be deposited in court, counsel indicated that the Applicants were never a flight risk and the State did not apply for their determination. He argued that the court should have thus relied on cogent data before finding that there were compelling reasons to deny the Applicants bail. He cited clause 4:10 of the **Bail/ Bond Policy Guidelines** which provides that:

***“Courts face a number of challenges in making bail decisions. In the case of bail pending trial, the burden of proof lies on the prosecution to establish the existence of compelling reasons that would justify the denial of bail, or the imposition of suitable bail terms and conditions. Some courts have required the prosecution to present ‘cogent, very strong and specific evidence’ in order to justify the denial of bail. Mere allegations or suspicion will not be sufficient. According to these courts, where the prosecution opposes bail, it must support its objection with cogent reasons and facts, and it is not enough to ‘make bare objections and insinuations.’”***

8. Mr. Kimathi submitted that the 1<sup>st</sup> Applicant was a Member of Parliament and a member of the Information Technology Committee which requires him to travel on short notice while the 2<sup>nd</sup> Applicant was a director of Eco Bank, a position that also requires her to travel out of the country frequently. He thus submitted that the detention of the passports was unlawful, prejudicial and against justice.

9. Counsel relied on the following authorities in support of the applications; **Nasir Haiderali Jessa & 2 others v. Director of Public Prosecution & another[2016] eKLR**, **Republic v. Kokonya Muhssin[2013] eKLR** and **Manager, Nanak Crankshaft Ltd. v. Republic through City Council of Nairobi[2008] eKLR**, he wished to rely upon.

10. Ms. Sigei for the Respondent opposed the application. She pointed out that while the prosecution did not object to the granting of bail/bond it submitted that the same should be commensurate with the charges. She argued that the charges facing the Applicants were serious as they involved a large sum of money, consequent which the bond terms were aimed at meeting social justice and ensuring obedience of the law companies. That therefore the 1<sup>st</sup> Applicant, as a director of the 9<sup>th</sup> and 10<sup>th</sup> accused persons was granted more stringent terms of bail as he was under a duty to ensure that the obligations of the companies are conducted in accordance to the law. Further, that the court had the discretion to grant its own terms of bail/bond.

11. With regards to the passports, she submitted that the same should be deposited with the court to ensure that the Applicants remain within the jurisdiction of the court. She argued that a release of the passports could encourage the Applicants abscond. Additionally, she submitted that the bond terms would act as a deterrence to would be offenders. She thus urged the court to dismiss the application.

12. In reply, Mr. Kimathi submitted that accused number 5-8 were also directors of the respective companies yet their bond terms were not enhanced. He simply urged that the principle of uniformity be applied. He added that the prosecution had not demonstrated that the Applicants were a flight risk to warrant the detention of their passports. After all, should they be found guilty at the conclusion of the trial, they would be detained pending sentencing. It was his argument that the application was merited and pleaded with the court to allow it.

#### **DETERMINATION:**

13. The application before the court is seeking the revision of orders issued by a magistrate’s court. The nature of the application is regulated by Section 362 of the Criminal Procedure code which gives the High Court power to ***“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.”***

14. This provision is buttressed by **Article 165(6)** and **(7)** of the Constitution, which provides:

***‘(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.’***

Article 165 crystallizes the purpose of the revisionary jurisdiction of the High Court as in furtherance of its supervisory jurisdiction over the subordinate courts.

15. The main argument in the present case is that the trial court improperly exercised its jurisdiction in enhancing the bail terms for the 1<sup>st</sup> Applicant. It is argued that the harsh terms under which he was released amounted to a denial of bail altogether. Article 49(1)(h) of the Constitution gives every arrested person the right; ***“to be released on bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”***

16. Over time, courts have set out consideration for the grant of bail to secure the attendance of an accused person in court as required. Some to these conditions are outlined in Section 123A of the Criminal Procedure Code which provides as under:

**(1) Subject to Article 49(1)(h) of the Constitution 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 –**

**(b) the nature or seriousness of the offence;**

**(b) the character and 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 that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;**

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

17. The underlying consideration for the grant of bail is to secure the attendance of the accused in court when required. As stated in the case of *Republic v Danson Mgunya & Another Cr. Case No. 26 of 2008 [2010] eKLR*

***'The main function of bail is to ensure the presence of the accused at the trial...Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.'***

18. Denial of bail is a limitation of a fundamental human right and freedom as per the guiding constitutional principles under **Article 24(1)** which provides that:

***A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***

**(a) the nature of the right or fundamental freedom;**

**(b) the importance of the purpose of the limitation;**

**(c) the nature and extent of the limitation;**

**(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**

**(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**

19. A balancing act is required between the rights of the individual and public interest. The **Bail and Bond Policy Guidelines** recognize this principle under **para. 3(e)** at pp. 9-10, acknowledging that in certain instances: ***'The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.'*** The Guidelines proceed to provide that: ***'it must therefore be demonstrated with convincing evidence that his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions'*** (Emphasis added).

20. In the present case, the argument is that the 1<sup>st</sup> Applicant was granted higher terms of bail than other accused persons merely because he was a director of his own company. In my view, the granting of the bail was not applied uniformly if this argument were to carry any weight. This is so because some of the other accused persons are directors of their respective companies and therefore similar bond terms should have attached. Furthermore, the 1<sup>st</sup> Applicant is jointly charged with other accused persons in the same counts. In that respect, bail terms ought to have been uniform.

21. As earlier noted, the paramount consideration in the grant of bail is to ensure the attendance of an accused person in court. It is in this respect I concur with counsel for the Applicant that enhancing the 1<sup>st</sup> Applicant's bail terms to very stringent terms is tantamount to denying him bail. It matters not that he paid the bail, as securing the same may have been through painful means.

22. It was not demonstrated in either the trial court or this court that if the 1<sup>st</sup> Applicant were granted similar bail/bond terms as other accused persons, he would fail to attend court. Simply stated that there was a risk of his likelihood to abscond. It is for this reason I find concurrence with the learned counsel for the Applicants that there was lack of application of uniformity in granting the bail terms. I have earlier delivered myself of this issue stating that failing to apply uniformity in granting bail terms would lend credence to the perception that the court is influenced by extraneous matters in granting stringent terms to some parties and not others. Furthermore, such variance in granting the bond terms ultimately fetters an accused person's right to bail as enshrined in the Constitution. It also dispels the presumption of innocence until proven guilty by demonstrating that such an accused person committed a more heinous crime and was likely to be convicted more than the other accused persons.

23. In no uncertain terms the learned trial magistrate improperly applied his discretion in granting the bail terms to the 1<sup>st</sup> Applicant which were discriminatory. There is no reason why he should not deposit the same bail/bond terms as his co-accused persons.

24. As regards the deposit of the passports of both Applicants, I have already spelt out the factors that a court must consider in granting bail/bond. In this regard, the terms must be commensurate with the offences and must attach to them conditions that will ensure that an accused person remains within the jurisdiction of the court. Of course, the more serious an offence is, the more likely an accused can abscond. And therefore, apart from the ordinary bail/bond terms, the court is under a duty to attach further conditions that will ensure the attendance of the accused in court.

25. As I have noted that the principle of uniformity must apply, just as other accused persons were ordered to deposit their passports, both Applicants are not special and similar terms must attach. The mere fact that the 1<sup>st</sup> Applicant is a Member of Parliament and a member of Information Technology Committee in Parliament and the 2<sup>nd</sup> Applicant a Director of Echo Bank does not preclude them from adhering to the terms commensurate with the charges they face. Furthermore, they are at liberty to apply for release of the passport whenever they are required to travel out of the country. My view is that the court would be objective enough to note the short notice, if any, given to any of the Applicants requiring them to travel. The court will accordingly decide on the request as and when circumstances dictate. On this ground, I find no merit in varying the order requiring them to deposit their passports with the trial court.

#### **Whether the Applicants and their companies were properly charged**

26. Mr. Kimathi, submitted that while the Criminal Procedure Code is silent on the charging of companies it was trite that a company was a separate legal personality from its directors and shareholders with separate responsibilities and liabilities. She submitted that a company cannot be involved in matters to do with bail/bond as it cannot be sentenced to a jail term. That no liability could accrue to an individual unless there was compliance with the company law.

27. The record of trial court proceedings shows that the 1<sup>st</sup> Applicant's advocate applied on 17<sup>th</sup> September, 2018 for the trial court to allow his client to take plea on behalf of the 9<sup>th</sup> and 10<sup>th</sup> accused persons. This was in view of the fact that the 1<sup>st</sup> Applicant was the director of the two accused persons.

28. The law is that companies can be charged in criminal offences as separate legal entities. The rationale behind this position was ably set out by Lord Reid in **Tesco Supermarkets Ltd. v. Natrass[1971] UKHL 1**, that;

***“A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporate has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company... He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or one can say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.”***

29. Thus, while companies are separate legal personalities they act under the instructions of other natural person(s). Therefore, where they are involved in criminality they and the parties under whose instructions they act are deemed responsible and can be charged jointly for the offence in question.

30. The Companies Act, 2015 foresees this situation. It provides at Section 1002 that ***“if the business of a company is carried out for fraudulent purpose, each person who knowingly participates in carrying out the business commits an offence”***.

31. It is clear that the company law groups the offenders together and does not single out the natural person as the sole as an offender. However, given their lack of corporeal nature a company can only be charged with an offence that is punishable by a fine as imposing an imprisonment term would be academic exercise. It is clear that counts 1 and 2 relate to offences under the Penal Code where a fine is a proper sentence under Section 26(3) of the proceeds of crime and Anti-money Laundering Act.

32. As regards count 5 and 6 the sentencing provision is set out as **Section 16(1)(a) of the Act** which clearly relates to sentences set out for natural persons. Thus, the 9<sup>th</sup> and 10<sup>th</sup> accused persons were improperly joined in the counts as the companies are only liable, if found guilty, under **Section 16(1)(b) of the Act**.

33. On the issue of the 1<sup>st</sup> Applicant taking plea, he freely took plea as a director of the companies. He could not thereafter turn around and state that he had been coerced into taking the plea. From the foregoing, it is my view that the 1<sup>st</sup> Applicant and the 9<sup>th</sup> and 10<sup>th</sup> accused were properly charged and that the 1<sup>st</sup> Applicant voluntarily applied to act as a representative of the 9<sup>th</sup> and 10<sup>th</sup> accused. Other technical errors noted above can be corrected by the prosecution.

34. In the end, the application partially succeeds with the following orders:

(a) The order of the learned trial magistrate releasing the 1<sup>st</sup> Applicant on a bond of Kshs. 30 million with two sureties of a similar amount is hereby set aside and substituted with an order that the 1<sup>st</sup> Applicant shall deposit a bond of Kshs. 10 million with a surety of a similar amount or a cash bail of Kshs. 2 million.

(b) The 1<sup>st</sup> and 2<sup>nd</sup> Applicants' passports shall remain in the custody of the trial court until the determination of the trial. The Applicants are however at liberty to apply for their release if need be before the trial magistrate.

(c) The court finds no merit in the 1<sup>st</sup> Applicants assertion that he was coerced to take plea on behalf of the 8<sup>th</sup> and 9<sup>th</sup> accused persons. Consequently, it is the finding of this court that the plea was properly taken.

(d) I give no orders as to the cost of this application.

(e) The excess cash bail of Kshs. 3,000,000/= paid by the 1<sup>st</sup> Applicant shall be refunded to the payee.

**DATED and DELIVERED** this 29<sup>th</sup> day of **NOVEMBER, 2018**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

*1. Ms. Kipkoeh & Mr. Kimathi for the Applicants*

*2. Ms. Sigei for the Respondent*