



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC. CRIMINAL APPLICATION NO. 207 OF 2018

1. SAMUEL IRUNGU
2. REUBEN NGUNGI
3. NICHOLAS GITHINJI
4. VINCENT MUSAU
5. BENJAMIN MBATHA
6. HILLARY OLIECH
7. DANIEL MAINA
8. MAASAI MIKIDADI
9. GEOFFREY MBURU
10. JOSEPH KIMONDO
11. HARMA RACHORO
12. BRILLIANT MWANGI
13. BRIAN MWENESI
14. DAVID OCHIENG
15. ABDI AZIZ
16. DERRICK MUTINDA
17. BENSON KAMAU
18. BRIAN GITAU
19. JOHN NDERITU
20. EDWIN MANDELA
21. PATRICK WANGAI
22. JAMES MAINA
23. MUTUKU KYALLO.....**APPLICANTS**

VERSUS

REPUBLICRESPONDENT

RULING

1. The 23 Applicants through their Learned Counsel Mr. Kenyatta filed an application under a certificate of urgency dated 5/11/2018 and filed on even date. The said application is brought pursuant to Section 123, 124 of the Criminal Procedure Code and Article 49 of Constitution. It seeks orders *inter alia*: that the cash bail of Kshs.50,000/= given to each of the accused persons be reduced.

2. The application is supported by the affidavit of Aggrey Odiwuor Kenyatta who is the Applicants Learned Counsel sworn on even date. The application is further supported by grounds on the face of the application namely:-

a. That the Applicants are currently in remand at the Kitengela G.K. Prison because they have been unable to raise Kshs. 50,000/= cash bail which was given to each of them in Criminal Case Number 696 of 2018 on the 21/10/2018.

b. That the Applicants have therefore been in custody for over three weeks.

c. That the Applicants who are all jobless young men without any source of income have been able through well-wishers and relatives to raise Kshs.10,000/= each which they are willing to deposit in court as cash bail.

d. That the Applicants however live within Kitengela and Nairobi and have undertaken to attend court without fail and are therefore not a flight risk.

e. That the amount of Kshs.50,000/= is too high considering the economic status of the Applicants and has consequently unfairly fettered their right to bail under Article 49 of the Constitution.

f. That it is therefore in the interest of justice and fairness that the Applicants application herein be allowed as prayed.

3. The Applicant's application was duly served upon the Respondent who however did not file a response thereto.

4. Learned Counsels for the Applicants and Respondent made oral submissions.

It was submitted by Mr. Kenyatta that an oral application before the lower court at Mavoko for review of bond was declined. It was further submitted that the Applicants are unable to secure sureties. Learned Counsel added that there are land disputes which are subject of determination by various courts and it was as a result of the Applicant's presence on the land that they were arrested and charged. He submitted that bail is a constitutional right which should be accorded to the Applicants who are not a flight risk. It was finally submitted that the Applicants will abide by the terms to be granted by this court.

Mr. Machogu Learned Counsel for the Respondent submitted that he has no objection to the application lodged by the Applicants save that they should provide details of their residences, contact numbers and an alternative contact person.

5. This court called for the record of the **Mavoko Law Courts Criminal Case Number 696 of 2018** which was duly availed. The said record shows that the Applicants had been charged with an offence of preparation to commit a felony contrary to Section 308 (1) of the Penal Code as well as forcible detainer contrary to Section 91 of the Penal Code. It is noted that the Applicants denied the said charges and each was granted bond terms of Kshs. 100,000/= plus a surety of similar amount or cash bail of Kshs. 50,000/= with an additional condition that each was to avail a contact person preferably a government employee. A request for review of bond by the trial court was declined on the 30/10/2018. It would appear that since then some of the Applicants have managed to secure sureties and have been released.

6. This court ordered for pre-bail reports in respect of the Applicants by the Machakos County Probation Officer. The said reports were duly availed in respect of fifteen (15) of the Applicants herein. The said reports are detailed and comprehensive about the Applicants backgrounds. The common denominator in these reports is that the Applicants hail from informal settlements within Mathare, Kiamaiko and Kayole within Nairobi City and Kitengela area. The reports further established that their relatives or parents are persons of straw who try to eke out a living in those areas. The Probation Officer has described their conditions as that of abject poverty and majority of them are unable even to raise cash bail of Kshs.5,000/= and that the Applicants relatives are pleading that they be released on free bond. They also claim that they are unable to secure the contact persons who are required by the trial court to be government employees.

7. I have considered the Applicants application and the oral submissions by the learned counsels herein. I have also considered the pre-bail reports in regard to the Applicants. Indeed the Applicants were duly granted bond by the trial court. The only obstacle to the Applicants is that the bond terms are beyond their reach and which has been confirmed by the Probation Officer vide the pre-bail reports. The issue for determination is whether sufficient grounds have been shown by the Applicants to warrant this court to interfere with the bond terms set by the trial court.

8. The purpose of bail is to ensure that an accused person is able to enjoy the freedom of being out of prison custody and to be attending court as and when required to do so. As long as an accused person has presented to court sufficient guarantees that he or she will attend court whenever required then a trial court would have no hesitation but to release such person on bond pending the trial. Under the provisions of Article 49(1) (h) of the Constitution 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. Already the Applicants have been granted bond but they are unable to secure their release on bond as the bond terms appear to be beyond their reach and means. It is now about two months since they were arraigned

before the trial court and they are yet to post bail due to the fact that their relatives are unable to bail them out as they are persons of straw. As per the provisions of Article 49 of the Constitution, the bond terms should be reasonable. An application for review of the bond terms has since been rejected by the trial court. It is thus clear that the bond terms according to the Applicants are not reasonable. The pre-bail reports appear to attest to the situations of the Applicants and their families. It is trite that bond terms ought not to act as impediments to the enjoyment of rights by accused persons. The economic circumstances of the Applicants should be considered so that they also enjoy the benefits granted by the Constitution of Kenya 2010.

9. Looking at the bail conditions set by the trial court, *vis a vis* the pre-bail reports it is highly likely that the Applicants might end up remaining in custody for the duration of the trial. I find this will seriously interfere or impede the Applicants rights of access to justice and will amount to a denial of bond so to speak. The first two conditions of bond set by the trial court might be reasonable since the Applicants could avail their relatives to appear before the trial court for examination and if found suitable then they may be approved. However, the third condition namely that a contact person preferably a government employee might be way out of reach by the Applicants and their relatives. It is common knowledge that a majority of the Kenyan citizens do not have their relatives who work as government employees and hence the order by the trial court that each of the Applicants should get a contact person who is an employee of the government in addition to the other conditions amounts to discrimination as far as the Applicants are concerned. If the Applicants relatives are able to appear before the trial court to be examined on the bond terms and found to understand those conditions then that should be sufficient. This will give effect to the provisions of Article 27 of the Constitution on equality and freedom from discrimination.

10. In view of the foregoing observations, the Applicants application dated 5/11/2018 is allowed in the following terms:-

a. The Trial court's third condition on bail requiring the Applicants to secure a contact person who should be a Government employee is hereby set aside leaving the first two conditions.

b. The pre-bail reports prepared by the Probation Officer Athi River be availed to the trial court for perusal and reference during the examination of the Applicants sureties.

c. There shall be no order as to costs.

It is so ordered.

Dated and Delivered at Machakos this 20th day of December, 2018.

D. K. KEMEI

JUDGE