

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.441 OF 2016

OSMAN IBRAHIM BAKO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By a Notice of Motion dated 9th November 2016, the Applicant filed an application seeking orders from this court to review the decision this court had rendered on 6th September 2016 granting the trial magistrate's court in **Nairobi CMC. CR. Case No.94 of 2016** a further six months to conclude the case. The Applicant further urged the court to call into this court the decision made by the Chief Magistrate on 11th October 2016 for the purpose of satisfying itself of the correctness, legality and propriety of the decision. Finally, the Applicant prayed that the court grants him bail pending the hearing and determination of the above criminal case. The grounds in support of the application are stated on the face of the application and supported by the annexed affidavit of Mutiso Steve Kimani, the Advocate for the Applicant. The application is opposed. The investigating officer, IP Moreen Kioko swore a replying affidavit in opposition to the application.

During the hearing of the application, this court heard oral rival submission made by Mr. Kimathi for the Applicant and by Ms. Atina for the State. Mr. Kimathi submitted that this court erred when it granted the trial magistrate's request for extension of time to conclude the hearing of the case. He took issue with the fact that the said request was made, and a Ruling delivered without the input of the Applicant. Taking into consideration that the time limit given by this court was due to the fact that it had denied the Applicant bail pending trial, it was imperative that before any extension of time was sought, the Applicant's view be sought. He submitted that so far ten (10) prosecution witnesses had testified. Only five (5) witnesses were remaining to give their testimony. He stated that the trial court should have abided by the timelines given by this court including putting into effect active case management strategies that required the hearing of the case to be prioritized and be heard on a day to day basis. The trial magistrate therefore, had no basis to seek extension of time to conclude the hearing of the case.

As regard the Ruling delivered by the trial magistrate on 11th October 2016, Learned Counsel submitted that the trial court erred in restrictively interpreting its mandate when considering whether or not to grant the Applicant bail pending trial. He explained that the Applicant was within his right to renew the bail application once it became apparent that the trial would not be determined within the six (6) months that this court had directed. He faulted the trial magistrate for refusing to consider the Applicant's renewed application for bail pending trial on the ground that he lacked jurisdiction to consider the same as the High Court already having rendered a decision on the same matter. He stated that the basis upon which the Applicant was denied bail i.e. the fact that he is a foreigner is remediable by the fact that the Applicant is willing to provide two (2) Kenyan sureties. Further, Kenya had an extradition treaty with the Applicant's country of origin and therefore the possibility that he would abscond and fail to face justice was remote. He submitted that the Applicant was married to a Kenyan and had children who lived with him in Kenya. In any event, learned counsel submitted that the evidence so far adduced did not place the Applicant at the locality where the items that are the subject of the case were recovered by the police. He urged the court to reconsider its previous decision and grant the Applicant bail pending trial.

The application is opposed. Ms. Atina for the State submitted that there was no basis upon which this court can reconsider its decision to deny the Applicant bail pending trial. She confirmed that five (5) prosecution witnesses were remaining to give their testimonies. The case has been fixed for hearing for three consecutive days starting on 24th April 2016. The circumstances under which the Applicant was denied bail had not changed: the Applicant was a foreigner with no fixed abode in Kenya. She submitted that the trial magistrate did not err when she requested the court to extend time within which to conclude the matter. She explained that the reason why the trial magistrate had concluded the matter within the stipulated period was due to the fact that that magistrate was promoted and is now a High Court Judge. The prosecution cannot therefore be blamed for the delay in the hearing and conclusion of the case. Learned counsel was certain that if extension of time was granted, the trial magistrate that will be assigned to conclude the hearing of the case will do so expeditiously. She urged the court to dismiss the application.

This court has carefully considered the rival submission made by counsel for the parties to this application. The Applicant took umbrage with the trial magistrate's request to this court to extend time upon which the court was required to conclude the hearing of the case. The Applicant submitted that the trial magistrate should not have made the request without notifying the Applicant who would be affected by the decision. The prosecution on its part was of the view that the trial magistrate acted within its mandate when it requested this court to extend time upon which it was to hear and conclude the hearing of the case. The trial magistrate's request for extension of time was made pursuant to **Section 362** of the **Criminal Procedure Code** which provides that:

“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.”

This court, in considering applications under **Section 362** of the **Criminal Procedure Code**, can do so in the absence of parties. The order that the trial magistrate sought this court's intervention was made by this court on 23rd February 2016 when it rendered its Ruling in respect of the application which had been lodged by the Applicant to be granted bail pending trial. This court was persuaded that the trial court had done all that it could within its powers to have the case expeditiously heard and determined. However, intervening factors and the court's diary meant that the case could not be completed within the period that this court had anticipated the case would be heard and determined. It was not necessary for this court to summon the parties to appear before it before granting the order extending time for the trial court to hear and conclude the matter. The court had the jurisdiction to extend the time. In any event, that order was made by this court on its own motion and in exercise of its inherent jurisdiction. This court can therefore review its decision to extend time to enable the trial court hear and conclude the trial.

In denying the Applicant bond, this court had the following to say:

“Having carefully evaluated the facts of this application, it is clear to this court that the serious nature of the charges facing the Applicants militates against this court granting them bail pending trial. This court agrees with the prosecution that the effect of the charges facing the Applicants is such that from its very nature it would have resulted in the economic sabotage of this country. Whereas this court presumes the Applicants innocent until proven guilty by a court of law, it cannot ignore the fact that the Applicant may face a multiplicity of charges in several countries of a similar nature. Further, the possibility that the Applicants may abscond from the jurisdiction of the court is real taking into consideration that the Applicants have the financial wherewithal to flee from the country if they are released on bail pending trial.”

Despite the submissions made by learned counsel for the Applicant, this court is of the considered view that the above circumstances have not changed to warrant this court to reconsider its decision declining to grant the Applicant bail pending trial. This court also notes that the prosecution is remaining with a few witnesses to testify before the trial court before it closes its case. It is clear that by now, the Applicant is aware of the strength or the weakness of the prosecution's case. This court cannot at this stage of the

proceedings, and in an interlocutory application, render its opinion regarding the innocence or guilt of the Applicant. That is the sole duty of the trial court.

In the premises therefore, this court holds that the Applicant's application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 21ST DAY OF MARCH 2017

L. KIMARU

JUDGE