



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
MISCELLANEOUS CRIMINAL APPLICATION NO.158 OF 2016

ELIJAH NGAYUNI KARIUKIAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING OF THE COURT

1. Before me is a Chamber Summons dated 9/12/2016 brought pursuant to Article 49 (1) and Article 165(6) of the Constitution of Kenya, Section 123 of the Criminal Procedure Code whereby the Applicant seeks for the following prayers:

1. That the bond terms of Kshs.1,000,000/= granted to the Applicant by the trial court at Mavoko Law courts in Criminal case No. 139 of 2014 be reduced or reasonably varied.

2. That this Honourable court be pleased to grant any other order it deems fit in the circumstances.

3. That the costs of the Application be provided for.

2. The Application is supported by an affidavit of the applicant and further on the following grounds namely:-

a. That the Applicant was arrested on the 16th February, 2015 and charged with the offence of attempted murder whose bond was set at Kshs.500,000/= or cash bail of Kshs.300,000/= .

b. That the Applicant was granted a bond of Kshs. 500,000/= but later enhanced to Kshs.1,000,000/= and the trial court has remained adamant to review the bond terms.

c. That the Applicant is unable to meet the bond terms and thus has remained in remand at Athi River Prison since then.

d. That the Applicant has the right to be presumed innocent until the contrary is proved and also has a right to reasonable bond terms.

3. The Applicant's case is that the trial court has imposed bond terms that are beyond his reach. He further states that the initial bond of Kshs.500,000/= with one surety was later enhanced to Kshs. 1,000,000/= by the trial court yet he is from a humble background with difficulties. He further states that he has a family which depends on him and who have suffered as a result of his incarceration. The Applicant finally stated that he has since secured a prospective surety who has shares worth Kshs.350,000/= and who has agreed to stand surety for him.

4. Counsels for the parties made oral submissions. Mr. Achoki for the Applicant submitted that the Applicant is unable to secure a surety for the bond of Kshs.1,000,000/= granted by the trial court. Counsel further submitted that the high bond terms go against the Applicant's Constitutional Rights pursuant to Articles 49 and 50 of the Constitution since he is presumed innocent until proved guilty. He further submitted that the bond terms be reviewed so that they do not become punitive and to that end a bond of about 300,000/= is suggested as reasonable for the Applicant.

Mr. Machogu for the Respondent urged this court to invoke Section 362 of the Criminal Procedure Code and to call for the trial court proceedings in **Mavoko Criminal Case No. 98 of 2016**. Counsel further submitted that the High Court could only interfere where the lower court acted on wrong principles. According to the Respondent's counsel, the lower court did not act on wrong principles when it enhanced the bond from Kshs. 500,000/= to Kshs.1,000,000/= and therefore urged this court to dismiss the Application for lack of merit.

5. I have considered the Applicant's Application as well as the oral submissions of both learned counsels for the parties herein. I have also perused the lower court in **Mavoko Principal Magistrate's Court Criminal Case No. 98 of 2016**. The Applicant herein has been charged with seven counts to which he returned a plea of not guilty to all the said counts. The trial court released him on a bond of Kshs.500,000/= plus one surety of like sum or alternative cash bail of Kshs.300,000/=. The said bond terms were later enhanced to Kshs.1,000,000/= and one surety of like sum with the alternative case bail also being enhanced to Kshs.500,000/=. The matter is partly heard and the first witness who is the complainant is yet to wind up her testimony due to the several Applications being made by either the prosecution or the defence. However this court is only concerned with the Applicant's request that the bond terms be reviewed. The High Court is conferred powers of Revision pursuant to Section 362 of the Criminal Procedure Code which provides thus:-

“The High court may call for and examine the record of any criminal proceedings before any subordinate court for purposes 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.”

Section 364 of the Criminal Procedure Code also gives the High Court powers with which to deal with any issues requiring revision.

6. The Applicant beseeches this court to review the bond terms so that he could secure his release. Indeed Article 49 of the Constitution grants an accused the right to be released on bond pending trial. The court record at Mavoko clearly reveals that several proposed sureties had presented their security documents in a bid to bail out the accused but when the same were forwarded to the C.I.D for scrutiny they revealed that they had some discrepancies. The Applicant herein suggests that he has secured a proposed surety who is a teacher by profession. However he has not explained why he has not seen it appropriate to refer the said proposed surety present himself or herself before the trial court for examination. A surety bond is one where a surety pledges and undertakes before a court to forfeit a certain sum in the event the accused absconds or fails to attend court as required. The proposed surety has not yet presented herself before the trial court so that she could be interviewed by the court. Again the record reveals that the Applicant had earlier through his learned counsel had approached the High Court in Nairobi for review of bond terms and it seems the court referred the matter back to Mavoko Law Courts in order for the Applicant to seek for review before the trial court. Further the trial court record reveals that the Applicant had moved to the Court of Appeal to appeal against the decision of the High Court Nairobi. This is captured on the proceedings of **28/10/2016**, **24/1/2017** and **8/2/2017**. In those proceedings the Applicant indicates that the High Court in Nairobi was to rule on bond review on the **31/10/2016** and further he indicates that his advocate has already filed an Application before the Court of Appeal being **404 of 2016**. It would therefore appear that the Applicant has filed several Applications and has failed to disclose to this court about the said Applications.

7. As noted above the Applicant is charged with seven (7) counts which comprises of attempted murder contrary to Section 220 (a) of the Penal Code, Unnatural offence contrary to Section 162 (a) of the Penal

code, indecent act with an adult contrary to Section 11 (a) of the Sexual offences Act, making a document without authority contrary to Section 357 (a) of the Penal Code, uttering a document with intent to deceive contrary to Section 357 (b) of the Panel, Personating a public officer contrary to Section 105 (b) of the Penal code. All these charges were considered by the trial court when imposing the bond conditions. The trial court had also started hearing the matter and which reveals that one of the witnesses is currently under witness protection. Under those circumstances, I am unable to find that the trial court acted on wrong principles while setting the bond terms. The trial court had exercised its discretion judiciously and as such this court will not interfere with the said exercise of discretion suffice here to add that the Applicant had been directed to seek review of bond before the trial court but he instead moved to the Court of Appeal as confirmed by him and at the same time he has moved to this court. He says he already has a pro B Vposed surety but has not directed the said surety to proceed to Mavoko Law courts so that he or she could be interviewed and documents scrutinized or verified. Again the conduct of the Applicant in filing several Applications before several courts over the same request militates against his present Application to interfere with the lower courts discretion in setting the bond terms in regard to his case. This court notes that the Applicant was not denied bond at all as all he has to do is to present his preposed surety for examination by the court. He has not indicated that the preposed surety who is said to be a teacher has been rejected by the trial court. An earlier one was found unsuitable on the ground that she had furnished misleading information after scrutiny by the relevant authorities.

8. In the result I find the Applicant's Application dated 9th December, 2016 lacks merit. The same is ordered dismissed with no order as to costs.

It is so ordered.

Dated, signed and delivered at Machakos this 10th day of April 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Elijah Nzayuni - Applicant.....

Machogu – For Respondent

C/A: Kituva.....