



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

MISC. CRIMINAL APPLICATION NO. 64 OF 2017

KELLY KASES BUNJIKA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a Notice of Motion dated 11th July 2017, the applicant who faces several charges before the trial court seeks orders for review [really **revisio**n in criminal procedure terminology] of the court's decision to refuse and cancel bond previously granted the applicant by the same court in a charge of robbery with violence contrary to section 296(2) of the Penal Code. The applicant also seeks review of the terms of bond initially granted in the robbery case as being "harsh, unreasonable and not favourable to the applicant". The accused faces in addition to the substantive charge of robbery with violence two other charges of escape from lawful custody and assault both offences which are alleged to have been committed while the applicant was in custody awaiting trial of the robbery charge.

2. The applicant asserts that he has good defences to the charges of escape from lawful custody and assault of inmate while in custody.

3. The DPP urges the fact that the applicant faces three criminal charges, had been granted in his robbery case a bond Ksh.250,000/- with one surety of the same amount, and that by his escape from lawful custody after he was granted, but before he could raise, bond and thereby disentitled himself to the accused's right to bail.

4. The questions that arise from the application are whether the trial court has authority to cancel bail previously granted by itself and whether a charge of escape from lawful custody as a demonstration of flight risk is a compelling reason for denial of bail in view of the accused's right to presumption of innocence.

DETERMINATION

5. An accused person is entitled to bail pending trial under Article 49 (1) (h) of the Constitution unless there are compelling reasons for refusal of bail. In interpreting the right to bail, section 123A of the Criminal Procedure Code gives the parameters for the grant of the right to bail as follows:

"123A. (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—

(a) the nature or seriousness of the offence;

(b) the character, 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.

[Act No. 18 of 2014, Sch.]”

6. The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused “*if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody*”.

7. Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court’s mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case.

8. The judicial policy on bail as set out in Kenya Judiciary’s *Bail and Bond Policy Guidelines, March 2015* at p. 25 recommends the considerations in the grant or refusal of bail:

“The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence;
or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.”

9. It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “*the accused person is likely to fail to attend court proceedings*”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.” As regards the terms of bond granted initially by the court before cancellation, the accused states that the terms were harsh and therefore urges in his supporting Affidavit that “the denial of Bond/Bail herein and or the harsh terms on Bond/Bail thereof violates my constitutional rights”.

10. The accused is charged with escape from lawful custody. It is still at trial stage and the accused has not been found guilty of the charge. Is the court entitled to consider the charge of escape as a basis for the Prosecution’s submission of likelihood to abscond?

11. Without prejudice to the accused’s right to remain silent in his trial, the accused in countering the submission of likelihood of absconding based on the charge of escape, the accused who wishes the court to find that the charge has no basis in evidence.

12. Without prejudice to the finding of the trial court, this Court having considered the certified record of proceedings in Eldama Ravine Principal Magistrate Court’s Criminal Case NO. 53 of 2016 attached to the affidavit in support application for review as exh. KKB-2, it is shown that the Prosecution on 7th July 2014 reported that the accused had escaped from custody and there was a hiatus of almost 1 ½ years in the record until 30th December 2015 when the Prosecutor is recorded as saying that “the accused had escaped and he was arrested yesterday.” There has been no challenge of inaccuracy of the Court record, and I am therefore entitled to find the Record as the true record of the trial court proceedings.

13. On a balance of probabilities in the absence of any explanation as to where the accused was during the recorded absence from the trial for 1 ½ year period and in the absence of any record that the accused had raised the bond granted by trial court and therefore released from custody, and there being no allegation and evidence that the accused was otherwise held in custody and not produced before court on account of any error by the remand authorities, this court must find that accused had, prima facie, escaped from custody. This finding is, of course, without prejudice to the determination by the trial court on the charge of escape from lawful custody, which must be proved by the Prosecution to the standard of beyond reasonable doubt at the hearing.

14. If it is accepted that there is *prima facie* evidence that the accused escaped from custody as evidenced by the charge of escape in Criminal case no. 52 of 2016 and the record of proceedings in criminal case no. 53 of 2016, the question that remains is only whether the fact is indicative of a likelihood to abscond as a compelling reason for refusal of bail within the meaning of Article 49 (1) (h) of the Constitution. I would unhesitatingly answer in the affirmative: an accused who is shown on a balance of probabilities to have escaped from custody while awaiting trial is also likely to abscond.

15. The trial magistrate in the criminal case no 53 of 2016 where the applicant is charged with robbery with violence, on 22nd February 2016 declined to review sought by the accused of the bond terms of Ksh.250,000/- with one surety for the same amount previously ruling that-

“considering the nature of the offence the court shall not revise the bond terms but that the accused’s bond terms of ksh.250,000/- + 1 surety of the same amount remains.”

16. There was nothing in the affidavit in support of the Notice of Motion to show that these terms were unfavourable to the applicant as alleged, and the seriousness of an offence is one of the primary consideration in the grant or refusal of bail. Although the trial court did not, despite submissions thereon by the prosecution and the accused, rule on the issue of escape from law custody – and although the accused had only been charged and not been found guilty – the allegation which is crystallized in the charge of escape has a direct bearing to the consideration whether the accused will attend his trial and does also indicate the accused as a flight risk, and therefore unsuitable for bail.

17. In the criminal case no. 52 of 2016, in which the accused faces the charge of escape contrary to section 123 of the Penal Code, the trial magistrate on 28th November 2016 said of the bond application by the accused:

“Regarding the accused application for release on bond, I find the same not merited. One of the reasons for denial of bond is the possibility of accused escaping and not attending court. The accused is alleged to have escaped from lawful custody for which he is charged with the offence under section 123 of the Penal Code. I therefore decline the application for bond pending trial.”

18. I do not find that the trial court improperly exercised discretion to grant or refuse bail taking into account the charge of escape from lawful custody which reasonably raises the very fear of accused absconding as is one of the compelling considerations for the grant of bail. The possibility that the accused had escaped from lawful custody could not be ruled out and it would be taking a risk that the accused would not attend his trial by releasing him on bail. The proper direction should have been for the court to order an expedited trial for the question of escape from lawful custody.

Conclusion

19. As I discussed above, the charge of escape from custody provided an indication of likelihood to fail to attend the trial as prescribed under the ***Bail and Bond Policy Guidelines***, and the same is a compelling reason for refusal of bail. Section 123A of the Criminal Procedure Code requires the Court to consider “*the nature or seriousness of the offence*” when determining the grant or refusal of bail. The very nature of the charge of escape from lawful custody raise the issue of flight risk and the Court must be cautious not to release on bond an accused who, if the charge is true, will most definitely abscond. The proper direction in such a matter, in my respectful view, is to order an expedited hearing of the charge of escape.

20. I do not find merit in the applicant’s contention that bond terms of Ksh.250,000/- with one surety for the offence of robbery with violence was harsh and unfavourable to the applicant. I also do not find merit in the complaint against refusal of bail in the trial for the offence of escape from lawful custody, which although not proved, provides reasonable ground for finding that the accused would be likely to fail to attend his trial. The court considers that in cases of the charge of escape from lawful custody, because of the possibility that the accused may have escaped from custody making the likelihood of his failing to attend his trial a real probability, the court should direct an expedited trial and determination of the charge of escape, unless there are exceptional circumstances in the interest of justice, which is always a consideration in all cases, that require the accused to be released on bond.

21. The Court will direct that in view of the charge of escape and its impact on the question of accused’s bail in the trial for robbery with violence, the said charge of escape from lawful custody should be expedited to quick determination so as to determine the accused’s guilt or otherwise thereon for purposes of bail consideration in the robbery trial.

ORDERS

22. Accordingly, for the reasons set out above, the applicant’s application for review of the trial court’s decisions on bail pending trial by Notice of Motion dated 11th July 2017 is declined.

23. The Eldama Ravine Principal Magistrate’s Court is directed to set the trial in Criminal Case No. 52 of 2016 for an expedited hearing on a date to be fixed at a mention thereof for that purpose within seven (7) days hereof.

24. There shall be no order as to costs.

DATED AND DELIVERED THIS 23RD DAY OF AUGUST 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Nyarotso for the Applicant.

Ms. Macharia Ass. Deputy Director of Public Prosecution for the Respondent.