



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION 256 OF 2017**

**SAMUEL MBURU NJENGA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Background**

Samuel Mburu Njenga, by amended Notice of Motion dated 29<sup>th</sup> September, 2017 sought the following prayers; (i) a revision of the denial of bail in Criminal Cases No. 1152,1153,1154, 1175, 1601 and 1602 of 2015 pending before the Chief Magistrate’s Court at Nairobi, (ii) revision of the bond terms in criminal cases No. 1494,1792 and 1504 of 2017 pending before the Chief Magistrate’s Court at Kibera (iii) a consolidation of the bond terms in the criminal cases aforementioned. The application was brought under Sections 123, 124, 362 and 364 of the Criminal Procedure Code, **Sections 72 and 60 of the Constitution** (which appears to wrongly refer to Sections of the Constitution, 2010), Section 72 of the Interpretation of General Provisions Act, the Judicature Act, the High Court(Practice and Procedure) Rules and all enabling provisions of the Law.

The application is based on the grounds that the offences forming the basis of the charges were bailable, that the Applicant’s co-accused in the cases had all been admitted to bail, and that given the similarity in the cases it was only fair to consolidate the bail/bond terms.

**Submissions**

The application was canvassed before me on 29<sup>th</sup> September, 2017 by way of oral submissions. Learned counsel, Mr. Madowo and Ayuo represented the Applicant whilst learned State Counsel, Ms. Akunja represented the Respondent. Mr. Madowo, the lead counsel for the Applicant submitted that bail/bond was denied in all the cases at Milimani law courts and bail/bond terms in cases before Kibera law courts were too high for the Applicant to afford and therefore urged for a reduction of the same. He submitted that no evidence was adduced to demonstrate that the Applicant had no fixed abode. In the contrary it was trite that he was a resident of Rongai within Kajiado County and a Kenyan citizen and that evidence establishing his likelihood to flee from the jurisdiction of the court was never tendered. He submitted that although the offences before the Milimani Chief Magistrate’s Court were instituted in 2015 the Applicant only took plea in July, 2017 as he was previously not aware of the existence of the matter.

Counsel submitted that the allegations that there were threats against witnesses constituted an indictable

offence but that no report had been made of such threats. He was of the view that the affidavits that were filed opposing the bail application did not disclose any threats. He submitted that no evidence was adduced relating to the purported threats. He submitted that given the lack of evidence the allegations of threats were merely hearsay.

Mr. Ayuo stated that for the matters before the Kibera Chief Magistrate's court, the Applicant was given bond of Kshs. 1 million, Kshs. 4 million and Kshs. 200,000/= in criminal cases No. 1792, 1504 and 1494 of 2017 respectively. He submitted that the bond terms were too high and could not be met by the Applicant. He submitted that in the spirit of **Article 49(1)(h) of the Constitution** the bond terms should be reasonable and not punitive. He thus urged the court to reduce the terms to affordable amounts. He submitted that the Applicant was willing to abide by any terms set by the court. He submitted that the Appellant was a family man and the sole bread winner. He told the court that the offences in question were civil in nature and that the Applicant was ready to pursue an out of court settlement and that given time he would try and pay the complainant.

Ms. Akuja submitted the investigating officers in the various matters, namely CPL Owaga and PC Maranga had sworn affidavits which were a testament that the Applicant was aware of the matters as his co-accused were his colleagues who were arrested and charged. She submitted that the Applicant went underground for two years and efforts by the investigating officers to trace him were futile as he kept changing his residence. She submitted that the affidavit by Caroline Mumbi, the main complainant showed that the Applicant threatened her and her family and that she informed the investigating officer of the threats. Furthermore, the witness recorded her statement prior to the Applicant's arrest. She submitted that given the amount of money lost and the public outcry about the matter it was in the interest of justice that the Applicant remains in custody. With regard to the suggestion that that the Applicant was willing to settle the matter out of court, counsel submitted that this could be done even when the Applicant was still in custody. She objected to the reduction of the bond terms as the same were informed by the value of the subject matter in the cases.

In reply, Madowo submitted that the State had not placed evidence to demonstrate perceived or actual interference with witnesses. He submitted that such evidence must directly or indirectly show that there was communication between the accused and the witness. He reiterated the fact that there was no knowledge on the part of the Applicant that the charges were filed against him and that the investigating officer tried to track him. He submitted that the complainant organization ceased to exist in late 2014 and that therefore the Applicant had no contact with his employees. He urged this court to apply the principle of consistency given that the rest of the accused had already been admitted to bail. After all, no compelling reasons had been adduced to show that the Applicant would not attend court if admitted to bail. He concluded by stating that the Applicant was ready to present a surety and to comply with any bail terms.

### **Determination**

The court will first address itself on the issue of denial of bail in the cases at Milimani Law Courts and thereafter the prayer for consolidation of bail terms. The court recognizes an accused person's right to bail as enshrined under **Article 49(1)(h) of the Constitution**. The same reads as follows;

***“(1) An arrested person has the right to-***

***(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”***

In view therefore, this court's task is simple; to address itself as to whether the respective trial courts properly determined that there were compelling reasons to warrant a denial of bail. The ruling by Hon. Andayi for denial of bail in Criminal Case No. 1152 of 2015 applied mutatis mutandi to criminal cases No. 1153 and 1154 of 2015. Equally, the ruling made by Hon. Mutuku in Criminal Case No. 1175 of 2015 applied mutatis mutandi to Criminal cases No. 1602 and 1601 of 2015. It must be stated for clarity that bond terms have been granted in what I shall from here forth refer to as the Kibera cases, the only

issue being that they are deemed to be unreasonable.

Both magistrates made rulings refusing to admit the Applicant to bail due to objections by the prosecution that the Applicant would pose a flight risk and that he was a threat to witnesses. With regard to the threats to witnesses it was set out in the affidavit sworn by Caroline Mumbi Njau on 5<sup>th</sup> July, 2017 in which she deposed that the Applicant had threatened her. This threat was also referred to in the affidavits sworn by CPL Owaga and PC Maranga who were the investigating officers in the criminal cases. The Applicant submits that the trial court erred when it agreed with the prosecution that he posed a threat to the witnesses in the matter as no evidence was adduced in that respect. The affidavit having been deposed under oath, the Applicant was legally obligated to counter the evidence alluded to thereon which he has not. The court would have no reason to doubt the content in the said affidavit especially because it was sworn before the Applicant was arrested, a testimony that it was not specifically intended to persuade the court to deny the Applicant bail.

The next issue is the contention by the prosecution that the Applicant poses a flight risk. This was predicated on the fact that the Applicant has been on the run since the charges were filed in 2015 until he took plea in July, 2017, two years down the line. The Applicant replied to this by stating that he was not aware of the proceedings in the cases in question. He submitted that he was a Kenyan with a fixed abode. Further, that the investigating officers did not indicate what steps they took to locate him. The investigating officers on their part indicated that the Applicant kept changing residences. Ms. Akuja submitted that this was all part of an active plan to avoid arrest as he was aware of the ongoing criminal matters.

It is clear that warrants of arrest were issued in the Milimani cases in 2015 when the rest of the accused persons took plea. Whether the Applicant was aware of the cases is neither here nor there but it is clear that the police could not track him for two years to execute the warrants in question. Given that bond is granted so as to ensure the accused's attendance of court, the two year period when the warrants were not executed is troubling. This is compounded by the fact that the police did not even discover that the Applicant was arrested and facing charges at the Kibera Law Courts. They were informed of his arrest by the complainant, Caroline Mumbi Njau, who swore an affidavit to this effect. I find that this does not bode well for future attendance of court if he is admitted to bail.

In light of the foregoing observation, the principle of consistency can only apply where circumstances of a case are similar. The case of the Applicant as I have demonstrated does not augur well for grant of bail. He purposes a flight risk. Therefore, denying him bail would not amount to a discrimination against him. In so holding, I find solace in the words of Chesoni J., as he then was, in **Nganga v. Republic[1983] eKLR**, that:

***“Just as finding one accused charged with others jointly guilty or innocent does not implicate or set free the co-accused and is not discriminatory treatment, so is the case with granting or refusing bail to one or more accused persons charged jointly with others some of who may be out on bail. This is because the facts, circumstances and merit of one co-accused may be such that granting him bail is justified, whereas those of his co-accused may mitigate against bail. Each case must be considered on its own merit, facts and circumstances before the court exercises its discretionary powers of granting or refusing bail.”***

On the reduction of bond terms, the offences before the Kibera Law courts particularly Criminal Cases 1494 and 1792 of 2017 all involve offences of a similar nature spanning the period from 24<sup>th</sup> August, 2016 to 23<sup>rd</sup> January, 2017, a period when the warrants of arrest above were still in force. Although an accused is presumed innocent unless otherwise proved, the fact that he is alleged to have committed similar offences is an indicator that he is likely to re-offend. That is to say that his antecedents demonstrate his lack of willingness to change; to commit similar offences. See **R v. Nottingham Justices, Ex parte Davies[1981] QB 35** where the court delivered itself as follows:

***“The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also of***

*circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider than “Has there been a change?” It is “Are there any new considerations which were not before the court when the accused was last remanded in custody?”*

Furthermore, the amounts involved also give an indicator that if he is convicted the attendant penalty will be hefty. This is a persuasive reason that he is a flight risk. I also find that the bond terms are commensurate with offences and nothing necessitates their reduction.

In the end, I do not find any good basis on which the orders of Hon. Andayi, CM and Hon. Mutuku, PM refusing to admit the Applicant to bail should be revised. They were based on sound evaluation of the circumstances of the cases. The learned magistrates also properly addressed themselves to **Article 49(1)(h)** of the Constitution in holding that there existed compelling reasons to warrant a denial of bail. Accordingly, the application is dismissed with no orders of costs. I however order that the trials be fast tracked and be heard on a priority basis. The order shall be served on the respective trial magistrates for compliance. It is so ordered.

*Dated and Delivered at Nairobi This 19<sup>th</sup> October, 2017.*

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Madowo & Mr. Ayuo for the Applicant.
2. M/s Atina for the Respondent.