



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.372 OF 2017

NAPOLEON WAKUKHA MURENDE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Napoleon Wakukha Murende is facing seven (7) counts related to **obtaining goods by false pretences** contrary to **Section 312** of the **Penal Code** and **issuing bad cheques** contrary to **Section 316A (1)(a)(4)** of the **Penal Code**. He pleaded not guilty to the charges and was released on bond by the Makadara Chief Magistrate's Court. The hearing then commenced. One witness has already testified. From the court's record, it is apparent that the hearing of the case has been frustrated by the fact that the Applicant has absconded from court at least on five (5) occasions. The last time the Applicant absconded, his bond terms were enhanced from a bond of Kshs.1 million or in the alternative a cash bail of Kshs.100,000/- to a bond of Kshs.3 million with one surety of the same amount. It was this enhancement that prompted the Applicant to approach this court for revision.

According to the Applicant, the bond terms that were imposed were onerous as to amount to denial of the right to be released on bail pending trial as guaranteed by the **Constitution**. The Applicant contended that since his incarceration in custody, his health has deteriorated hence his request to be released on bail pending trial by this court. He stated that he has always been ready and willing to present himself before court when so required and therefore there was no reason for the trial court to take the drastic step to enhance his bond terms yet he had indicated his willingness to attend court on the date that the case was scheduled to be heard.

During the hearing of the application, Mr. King'ara learned counsel for the Applicant reiterated the Applicant's plea. He submitted that prior to cancellation of the Applicant's bond, he had attended the court trial on more than 20 occasions. His failure to attend court was explainable and excusable. He told the court that the Applicant was suffering from ulcers and hypertension which conditions required constant medication which could not be provided by the prison's health facilities. He urged the court to readmit the Applicant to bail pending trial.

Ms. Nyauncho for the State opposed the application. She submitted that from the Applicant's court attendance history, he was a flight risk and was unlikely to present himself before the trial court if he was released on bail pending trial. She explained that the Applicant had absconded from attending the trial court five (5) times before the trial court enhanced the Applicant's bond terms. She urged the court to disallow the application.

That the Applicant has the right to be released on bail pending trial, unless there are compelling reasons, is guaranteed under **Article 49(1)(h)** of the **Constitution**. Among the grounds that have been accepted by courts to constitute compelling reasons is whether the accused shall be a flight risk if he is released on bail pending trial. In all cases where the court is called upon to exercise its discretion in regard to whether or not it should grant bail pending trial, the most important consideration is whether the accused will attend court during trial. This point was re-emphasized by the court in **Republic –Vs- Danson Mgunya**

**& Another [2010] eKLR** when M.K. Ibrahim J (as he then was) held thus:

*“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”*

It is clear from the above cited decision that the most important consideration that the court should take into account is whether the accused will attend court to stand trial.

In the present application, it is clear that the Applicant’s past conduct militates against this court exercising discretion in his favour. The Applicant has absconded from court on five (5) occasions thus frustrating the trial. The Applicant has not given any reasonable explanation for his failure to attend court. This court cannot therefore interfere with the discretion of the trial court which sought to address the Applicant’s failure to attend court on several occasions by imposing appropriate bond terms. Indeed, this court is of the view that the Applicant is not deserving of the exercise of discretion in his favour in light of his brazen conduct of deliberately absconding from the trial court. It is apparent that the only way that the trial court can secure his attendance before the trial court is by having him in remand custody until the conclusion of the trial on the charges facing him.

In the premises therefore, his application lacks merit and hereby dismissed. The Deputy Registrar of the Court is directed to return the original court file to the trial court for further trial. It is so ordered.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF DECEMBER 2017**

**L. KIMARU**

**JUDGE**