REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 438 OF 2016

KEVIN SICHINGA…………………………..…...…….….……..APPLICANT

VERSUS

REPUBLIC…………………………………………………..RESPONDENT

RULING

The Applicant in this matter is jointly charged with three others with five counts of robbery with violence in **Criminal Case No. 1308 of 2016**. He was initially charged alone in **Criminal Case No.1353 of 2016** with three counts of robbery with violence. Thereafter, the file was consolidated with Criminal Case No. 1308 of 2016. The other co-accused had also been separately charged before the files were consolidated. He denied the charges.

On taking the plea in criminal case no. 1353 of 2016, he was admitted to a bond of Kshs.5 million with two sureties of similar amount. The file thereafter was allocated to the trial magistrate during which time the consolidation was done. Due to the addition of the other two counts constituting counts IV and V, the trial magistrate enhanced the bond to Kshs. 10 million with two sureties of similar amount. In addition, he would deposit a cash bail of Kshs. 2 million. Before the enhancement of the bond, the Applicant had already secured the two sureties in terms of the bond granted by the plea court. These were his mother and sister respectively. But upon the enhancement, the two relatives could not meet the stringent terms of the bond which has compelled the Applicant to remain in remand. It has also given rise to the instant application in which the Applicant seeks a revision of the learned magistrate's order enhancing the bail terms.

This court was moved by way of Notice of Motion dated 9th November, 2016 brought under Article 49(1)(h), 50(2)(a), 159(1) & (2) and 258 (1) of the Constitution of Kenya, 2010 and Sections 123(3), 124 and 125 of the Criminal Procedure Code. The main order sought is for review of the order of Hon. K. Cheruiyot (Mr), PM issued on 7th November, 2016 enhancing the bond terms of the Applicant. Upon the review, the court is urged to reduce the bond to affordable levels.

The application is supported by the Affidavit of Mary Athieno Murgo, the mother to the Applicant, sworn on 9th November, 2016. The gist of the Affidavit is that the prosecution did not advance any compelling reasons that would warrant the enhancement of the bond. And since the bond is unaffordable, it amounts to a denial, anyway. In any case, it is the Applicant's constitutional right to be admitted to bail pending trial.

Learned Counsel Mr. Oyata for the Applicant emphasized that the prosecution had not demonstrated any

compelling reasons pursuant to Article 49(1)(h) of the Constitution to warrant the denial of bail to the Applicant. He emphasized that the plea court in Cr. Case No. 1353 of 2016 on its own motion admitted the Applicant to bail as there was no opposition by the prosecution. Surprisingly and to the dismay of the Applicant, the trial court *suo moto* enhanced the bond terms without any justifiable reasons. Mr. Oyata submitted that although the enhancement of the bail terms was due to the additional two charges, the two additional counts were not of such weighty magnitude to warrant the doubling of the bond terms. He cited that although the two charges were of robbery with violence, the subject matters were two mobile phones valued at only Kshs. 2,300/= and 3,000/= respectively. That then would not have aroused the reaction of the trial magistrate to enhance the bond terms to such high magnitude. In emphasizing that bail/bond is a constitutional right of an accused, he cited the case of **George Anyona and 2 others VS Republic, High Court of Kenya at Nairobi Misc. Cr. Application No. 358 of 1990.**

Learned State Counsel Ms. Kimiri opposed the application. She submitted that the bond terms were commensurate with the serious offences that the Applicant was facing. Moreover, the enhancement of the bond terms was informed by the additional charges that were preferred against the Applicant. In any case, the prosecution had demonstrated that the Applicant deserved the stringent bond terms as he was a flight risk. According to Ms. Kimiri, the Applicant was arrested at the Malaba boarder in possession of one of the stolen motor vehicles as he intended close into Uganda. She urged that the application be dismissed.

In rejoinder, Mr. Oyata vehemently countered the fact that the Applicant was arrested while trying to flee the jurisdiction of the court. He urged the court to look at the record and confirm that the person who was arrested in Busia was the 1st Accused, Simon Muthee Ritho and not the Applicant. In contrast, the Applicant was arrested at Consolata School as he dropped his child for learning. He emphasized that there were no compelling reasons to deny the Applicant bail or even enhance the bond terms.

I have considered the respective submissions and take the following view of the application. In considering an application for bail pending trial, I am minded that bail granted to an accused or arrested person is a constitutional right as enshrined under Article 49(1)(h) of the Constitution which provides that;

> ***"An accused person has the right -***
>
> ***to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."***
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> Therefore, bail can only be denied if there are compelling reasons that have been advanced. In the present case, it was argued by the Respondent that the Applicant is a flight risk because he was arrested whilst intending to cross into Uganda and in any case, additional charges had been filed. **Section 123(2) of the Criminal Procedure Code** requires that in determining bail terms, the circumstances of the case should be given due regard and the terms ought not to be excessive. On the other hand **sub section (1)** gives some guidelines on factors to be considered as follows;
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> **a) The nature and seriousness of the offence;**
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> **b) The character, antecedents, associations and community ties of the accused;**
>
> **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.**

Over time, case law has also settled on factors such as public interest, victim protection, gravity of the offence, gravity of the punishment in the event of a conviction, the security of the accused person upon his release, personal reasons such as the health of the accused and interference of witnesses.

In addition, the bail and bond policy guidelines were developed so that they too could guide court in

making decisions regarding release of accused persons on bail/bond. They recognize the need of a balanced approach in preserving the public interest and the right of an accused person to a fair trial. In this respect, courts must be very cautious not to deny an accused bail unless there are well considered compelling reasons.

In my view, the omnibus of all factors is whether an accused will avail himself for trial when required to do so.

As was set out in **Republic *v.*Dansin Mgunya & Another [2010] eKLR,** to wit:

> ***"The main function of bail is to ensure the presence of the accused at the trial … Accordingly, this criteria is regarded as not only the omnibus one but also the most important."***

Also in the persuasive ruling in **George Anyona & 2 others vs Republic, HC, Misc. Cr. Application No. 358 of 1990**, the court delivered itself, inter alia, as follows:

> **"The primary purpose of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would therefore agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend the trial the following matters must be considered:**
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> **a) The nature of the charge and the seriousness of the punishment to be awarded if the applicant is found guilty; where the charge against the accused is more serious and punishment heavy there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.**
>
> **b) …**
>
> **c) The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail."**

Although this is not an application for bail *per se*, but a revision of orders enhancing the bail terms, nevertheless, the court must address itself based on the facts of the case whether there existed any compelling reasons to warrant the enhancement of the bail terms. That would be in consonance with Article 49(1)(h) of the Constitution which provides that bail can only be denied where there are compelling reasons. I say so because if a court grants such stringent bond terms that an accused cannot afford them, amounts to a denial of the bail anyway. This is a case that must be looked at with the simplicity of the facts on record.

The bond terms of the Applicant were enhanced merely because there were two additional counts. Suffice it to say, bond terms must always be commensurate with the offence that an accused is charged with. Although the value of the subject matters in the additional counts were not so high, what is paramount is the offence itself and the circumstances it was committed. The charges are of robbery with violence and it is alleged that at the time of the robbery the Applicant with his co-accused were armed with dangerous weapons namely pistols. And, that at the time of robbery they used actual violence against the complainants. Therefore, it does not much matter what was robbed from the complainant as in any event, had the complainants been found with more valuable goods, the assailants would still have stolen them. That is why bond terms should be matched with the circumstances of an offence. In the instant case, the circumstances were grave and cannot be wished away. That said though, it must not be lost in the mind of the court the cardinal principle that an accused is presumed innocent unless otherwise proved. That explains why the constitution places the rider that bail should not be denied unless there are compelling reasons.

Having made the above observations, I discount the learned State Counsel's submission that the Applicant was arrested while trying to flee the jurisdiction of the court. The record attests that the person who was arrested at Busia was the 1st Accused, Simon Muthee Ritho who was initially charged alone in Cr. Case No. 1308 of 2016. At no time did the prosecution oppose the admission of the Applicant to bail. Nevertheless, a court on its own motion may enhance bond terms depending on the circumstances of the case. I believe that is why the trial magistrate on his own motion, after the additional charges were filed enhanced the bond terms. However, in my view, the two additional charges did not warrant the magnitude with which bond terms were enhanced. Indeed, even with the five counts, a bond of Kshs. 5 million with 2 sureties of similar amount would suffice. The bond is also affordable to the Applicant. I emphasize that when bond terms are so stringent that an accused cannot afford them, defeats the very purpose for which bond was granted. That scenario is represented in the present case. Bond terms must be granted with the reasonableness reflected in each particular case. I find that no compelling reasons existed to warrant the enhancement of the bond terms.

In the result, I recall the orders of the learned trial magistrate issued on 7th November, 2016 enhancing the bond terms of the Applicant. I substitute it with an order that the Applicant be and is hereby admitted to a bond of Kshs. 5 million with 2 sureties of similar amount to be assessed by the trial magistrate. It is so ordered.

DATED and **DELIVERED** this **23rd** day of **NOVEMBER, 2016.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Ondari h/b or Mr. Oyata for the Applicant.

2. M/s Kimiri for the Respondent.