



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

H.C.CR.MISC. APPLICATION NO. 42 OF 2015

JAPHETH OCHIENG APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

Japheth Ochieng, (the applicant), moved this court by way of a Notice of Motion application in which he sought the following orders:-

- 1. THAT the applicant be admitted to bond/bail or the bond/bail which had been granted by the trial magistrate be reinstated.*
- 2. THAT such order as deemed fit and proper in the circumstances (sic).*

The application is grounded on the facts appearing on the face of the motion and the affidavit of the applicant sworn on 29th July 2015. There are annexures too attached to the applicant's affidavit which also support the applicant's position this application.

The undisputed facts as they emerge from the record are that, the applicant was arrested and charged before the Senior Principal Magistrate's court at Butere with the offence of impersonation contrary to section 382 of the Penal Code in ***Criminal Case No.140 of 2014***. The applicant was granted a bond of Kshs.200,000/- with a surety of similar amount. The applicant was able to raise surety and was thus released. He continued to attend court but with some difficulty and on 16th December, 2014 the applicant failed to attend court and a warrant of arrest was issued at the prompting of the prosecution and summons were to issue to his surety. The applicant appears to have presented himself to court on 29th December, 2014 and on explaining why he did not attend court on 16th December, 2014, the court lifted the warrant of arrest and fixed the matter for hearing on 17th March, 2015.

As fate would have it, the applicant failed to attend court again on 17th March, 2015 and at the request of the prosecution, a warrant of arrest was once again issued and the matter fixed for mention on 31st March, 2015. The applicant did not appear in court until 23rd April 2015 when he was presented to court under a warrant of arrest. The applicant explained to the court why he was unable to attend court but the court was not impressed thus cancelled the bond and discharged the surety. The applicant was then committed to GK prison, Kakamega pending the hearing and determination of his case. He renewed his application for reinstatement of his bond on 27th July, 2015 but the request was declined. The applicant has therefore come before this court seeking reinstatement of his bond.

In moving his application the applicant explained in detail the difficulties he has had in attending court and pleaded with the court to grant him a personal bond. He explained that he suffers from a multiple health problems which have largely hindered his court attendance and that he has always tried to inform the court his inability to attend court whenever he was not able to do so. He submitted to the court that he has other cases pending before other courts including the Chief Magistrate's court at Kiambu and Milimani Law Courts where he has been granted personal bond and asked this court to do the same.

Bail is a constitutional right and should be given to an accused person unless there are compelling reasons for the court not to do so. That is why Article 49(1)(h) is in the following words:-

“An arrested 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.”

It is in appreciation of this constitutional right that the trial court released the applicant on bond when he was charged before that court. The essence of granting an accused bond/bail, is to enable him/her prepare for trial and enjoy his freedom of movement but an accused person must also comply with the conditions pertaining to that bond/bail. One of the foremost requirements is that an accused person will attend court whenever required to do so.

In the present situation, the applicant was granted bail but failed to attend court on some days when he was supposed to do so. The applicant in his application, affidavit and annexures says that he was prevented by factors beyond his control namely ill-health. The applicant as an accused person must attend court at all times when he is required to do so and when prevented by reasonable grounds, must bring to the court's attention that ability to attend court. He cannot fail to attend court and expect that court to take it casually. He must abide by his bond terms.

I have considered the application and the circumstances that the applicant says prevented him from attending court on 23rd March, 2015 leading to cancellation of his bail. I have also noted the fact that the learned State Prosecutor does not oppose reinstatement of the applicant's bond granted by the trial court. Although I cannot find fault with the learned magistrate's reasoning in cancelling the applicant's bond, I am inclined to exercise my discretion in favour of the applicant given the circumstances he finds himself in especially regarding his health and give him a second chance.

The applicant has asked that he be given free personal bond just like in the cases pending in Kiambu and Milimani Chief Magistrate's courts. This court cannot grant this wish without appearing to interfere with the discretion of the trial court. The applicant can make an application before the trial court for variation of bond terms and the trial court is well placed to handle such an application and make orders it may deem fit. Since the trial court has not been moved and has not expressed itself on that aspect, that request by the applicant is declined.

In the end, the applicant's undated application is allowed as follows:-

- 1. The applicant's bail granted by the trial court in Butere Senior Principal Magistrate's Criminal Case No. 140 of 2014 of Kshs. 200,000/- with one surety is hereby reinstated.*
- 2. The applicant may present the same surety or some other surety if approved by the trial court.*
- 3. The applicant to abide by the conditions of his bond and attend court as required.*

Dated and delivered at Kakamega this 24th day of September, 2015.

E. C. MWITA

J U D G E