



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**CRIMINAL MISCELLANEOUS APPLICATION**

**NO. 76 OF 2015**

GUILHORMO DOMINGOS NDJOLI ..... APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**RULING**

The Applicant has vide an undated Notice of Motion filed on 2. 09. 2015 and supported by an affidavit sworn by himself, applied that he be accorded a cash bail instead of bond/bail as stipulated by the law under Article 49 (i) (h) of the Constitution.

The application is brought under the provision of Article 22 (i) of the Constitution.

The accused person is charged with the offence of obtaining credit by false pretences contrary to section 316 (a) of the Penal Code.

In his affidavit the applicant admit that he was granted bail of kshs.200,000/= and that he wishes to be accorded cash bail for he has been in custody for seven (7) months.

The state through M/S Ogweno opposed this application for the reason that the applicant is not Kenyan but Mozambican hence the likelihood of him jumping bail if granted cash bail.

M/S Ogweno also submitted that the offence the applicant is charged with provides for a jail term if found guilty.

She further submits that the applicant has not given good reasons as to why he should be accorded cash bail in the alternative. That he was granted bail with surety and has not shown that he has failed to get one. In response, the applicant admits that he is a Mozambican citizen. He admitted that he was arrested with people who are not Kenyans such as the 1<sup>st</sup> accused person

The applicant goes on to admit that he is an African and cannot see why a white foreigner can be granted bail and not him.

He then submits that the offence, for which he is charged, provides for only 1 year imprisonment if he is found guilty and yet he has already been in custody for 8 months.

He then prays that he be granted cash bail he and deposits his passport in court.

In considering the application by the applicant, I have read through the proceedings in Mombasa Criminal case No. 526 of 2015, where the applicant is the 3<sup>rd</sup> accused person, having been charged with the offence of obtaining by false pretences contrary to section 316 of the Penal Code.

The applicant pleaded not guilty to the offence on 25. 3. 15 and was granted bond of kshs.200,000/= with one surety of a similar amount. The court further ordered that since the applicant was from Mozambique, he provides a Kenyan surety and deposit his passport in court.

In regard to this, I found that Article 49 (1) (h) of the Constitution provides that

- i. An arrested person has the right.....
- h. To be released on bond or bail on reasonable conditions, pending a charge in trial, unless there are compelling reasons not to be released.”

It is clear here that the trial court granted the applicant bond and hence did not contravene the provisions of Article 49 (i) (h) of the Constitution.

The applicant deponed and even argued that his co-accused was released on cash bail and therefore wanted the same order extended to him.

I wish to point out that I have gone through the proceedings and confirm that the 1<sup>st</sup> accused person who is also not a Kenyan was released on a cash bail of kshs.100,000/=. However, this happened after his wife, who is a Kenyan came up and stood as a surety for him. Also his advocate Mr. Egunza filed a professional undertaking in court on 19. 4. 15 to ensure the 1<sup>st</sup> accused person attends court as required.

In this case, the state submitted that the applicant being a foreigner is likely to abscond even after depositing a cash bail, and rightly so, because cash bail in a case involving a foreigner, may not be sufficient security.

Article 22 (1) of the Constitution, which the applicant has based his application on grounds that:

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of right has been denied, violated or infringed or threatened.”**

In his application, the applicant is seeking to be accorded cash bail, and he says, like his co-accused person whom I have established is 1<sup>st</sup> accused person in the case before the lower court.

I have established that the applicant was granted bail and conditions attached thereto as per his nationality and country of abode.

He can therefore not claim that his right or fundamental freedom has been denied when what is keeping him in custody is his inability to meet the conditions required of him by the court. These conditions are necessary as they are made to ensure that the applicant attends court as and when required. There can be no case if the accused person absconds.

I have perused the records of the lower court file but I have not seen an instance where the applicant has applied for his bond term to be reviewed. His co-accused person, that is the 1<sup>st</sup> accused person, applied to be released on cash bail and his wife and advocate Mr. Egunza undertook to stand as sureties.

I would urge the applicant in this case to do the same before the trial court.

And if he fails to meet the condition attached to his release on bail, and he has to remain in custody, I would urge that the case be heard on priority basis.

In the circumstances, I found that the application by the Applicant lacks merit and dismiss the same accordingly.

Ruling delivered, signed and dated this 29<sup>th</sup> day of October, 2015.

D.O. CHEPKWONY

JUDGE

In the Presence of:

M/S Ocholla for the state

Applicant

C/A Mr. Kiarie,