



IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL REVISION NO. 139 OF 2014

RICHARD LINDEL LLOYD APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. This is an application dated 6th May 2014 brought under **Section 123(2), (3), 362 and 364(1)** of the **Criminal Procedure Code**, and **Article 165(6) and (7)** of the **Constitution of Kenya** by way of Notice of Motion. In it, the applicant seeks that the proceedings in Kibera Cr. Case No. 834 of 2014 be stayed and the court to call for and examine its record for the purpose of satisfying itself as to the correctness, legality propriety or regularity of the order passed by the Hon. Onyina, Ag. Senior Principal Magistrate on 30th April 2014 in which he denied the applicant herein bond pending trial in the said case.
2. The Applicant prays that this honourable court be pleased to release him on such reasonable bond terms pending his trial in Chief Magistrate's Criminal Case No 834 of 2014 as the court may deem fit.
3. Learned counsel Mrs. Kuria appearing for the applicant submitted that the lower court did not exercise its discretion judiciously in denying bail. She contended that the applicant advanced plausible and concrete reasons to be admitted to bail, has no prior record, does not intend to interfere with witnesses and has family in the country which provides incentive to attend court. That therefore the trial court was under a duty to release him on bail because the reasons were good.
4. Secondly, Mrs. Kuria argued that the prosecution did not advance any compelling reason not to release the applicant on bail as required by **Article 49 (1)(h)** of the **Constitution**. That the right to bail is not absolute but the onus is on the prosecution to give those compelling reasons. That the prosecution only referred to the state of insecurity in the country but did not show how the applicant contributed to such a state.
5. Mrs. Kuria urged that the learned trial magistrate was under a duty to grant the said bail and that denying bail for reasons that he had no Passport and Visa to remain in the country was prejudging the applicant instead of presuming him innocent. She opined that those were matters of evidence to be determined at the trial. She also submitted that for the court to argue that if the applicant is released he might suffer arrest and deportation was an extraneous matter not up for consideration.

6. Mrs. Kuria referred the court to the case of **R v Simon Kiilu Kioko Cr. Case No. 24 of 2013**, in which the applicant, faced with a murder charge which is an offence punishable by death, was admitted to bail. She also referred to the case of **R v Ahmad Abolafathi Mohammad Cr. Rev. 373 of 2012**, in which the court denied bail but observed that the applicants could not be punished for the misdeeds of other foreigners. She

urged the court not to deny the applicant bail on account of his being a foreigner, but instead grant him bail because he was able to raise a Kenyan surety.

7. Learned counsel Miss Maina opposing the application on behalf of the state, observed that the applicant had remained in the country for 20 years without bothering to obtain a visa or work permit and was therefore a flight risk. If released, Miss Maina argued that the applicant will be faced with two options to wit, instant re-arrest or deportation.
8. I have considered the arguments from both sides. **Section 362** of the **Criminal procedure Code** is very specific. A party who approaches the court on this platform must demonstrate what the irregularity, illegality, impropriety or incorrectness was, in the lower court proceedings to warrant the court invoking its powers under **Section 362** of the **Criminal Procedure Code** to reverse the orders issued in the lower court.
9. Be that as it may, the paramount issue for determination in considering an application of this nature is whether the applicant will avail himself for trial if he is admitted to bail. The constitutional right to bail applies to all persons who come before our courts without discrimination. **Article 49(1)(h)** of the **Constitution** in which the right to bail is enshrined however, is not coached in absolute terms. The Article states as follows:

“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.”

Clearly then, the right to be released on bail or bond is constitutionally limited by the presence of compelling reasons not to be released.

10. Granting of bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. On the one hand is the duty of the court to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution. (See Court of Appeal decision In **Gerald Macharia Githuka v. Republic, Cr. Appeal No. 119/04.**)
11. In favour of the applicant the court notes that he has no previous criminal record, that he has lived in the country for a long time, 20 years or there about and has family comprising of a 14 year old son and a Kenyan wife. The trial court was told to take note of the fact that the country has suffered insecurity caused by outsiders and deny the applicant bail. As the court has stated on numerous other occasions the applicant cannot be punished for the misdeeds of other suspects who have skipped bail, no more than he can be granted bail merely because other suspects in such cases were granted bail. Each case must be determined on its own circumstances.
12. I find that the prosecution have not demonstrated that the applicant is a flight risk or is a threat to national security, while the applicant has shown that he has lived in the country peacefully for 20 years and has no antecedents. He also has a family. For the foregoing reasons, I find that the interests of justice will be best served by allowing the applicant bail. The applicant is therefore granted bond of Kshs.300,000/= with one Kenyan surety of like amount.

SIGNED DATED and DELIVERED in open court this **31st** of **July 2014**.

L. A. ACHODE

JUDGE