



**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS APPLICATION 106 OF 2013**

**MOHAMED ISSACK DAHIR.....1<sup>st</sup> APPLICANT**

**DENNIS MULU WAMBUA .....2<sup>nd</sup> APPLICANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being a Review Order from the original Order in Kajiado Principal Magistrate's Criminal Case No. 535 of 2014 by Hon. M.A. Achieng, Ag SRM on 15/5/2014)*

**RULING**

1. The applicants have come to this court by way of Notice of Motion seeking review of bail terms imposed by the Lower Court.
2. The basis of the application is that the terms of bond/bail imposed are harsh and unfordable; the applicants have been in custody for over one (1) month and they will suffer irreparable damages.
3. In support of the application, **Mohammed Issack Dahir** the 1<sup>st</sup> applicant depones that he was granted bond of **Kshs. 10,000,000/=** with two sureties or cash bail of **10,000,000/=** which he is unable to meet. He therefore prayed for variation of the said terms of bail.
4. In a replying affidavit, **Moses Matongo O'Mirera** the Senior Assistant Director of Public Prosecution who is in conduct of the matter deponed that the State opposed the applicant's release on bail in the lower court following compelling reasons that existed as provided by **Article 49 1(h)** of the **Constitution**. The applicants did present themselves as minors wanting the court to invoke the provisions of the **Children's Act** and release them. The report from the **Kajiado District Hospital** sought to conceal the truth from the court indicating that both applicants were aged **17 years**. Further investigations carried out however, revealed that they were adults and holders of identity cards. The persons having been untrustworthy were flight risks.
5. I have taken into consideration oral submissions of both counsels for the applicants and respondent. My duty is to reconsider what informed the learned trial magistrate in reaching the decision to impose terms of bail sought to be varied.
6. The applicants are charged with **three (3) counts**. The first count is of assaulting a Police Officer. The second and third counts are of contravention of the **Wildlife Conservation and Management Act**. The learned trial magistrate analyzed facts presented following the state's vehement opposition of the applicants' release on bail; she took into consideration conditions that would be imperative in denying the applicants bail. At the outset, she denied them bail. Thereafter she reviewed her order and granted them bail of **ten (10) million** with similar sureties. In the alternative, they were to deposit a cash bail of **10,000,000/=**. The magistrate has been faulted for being harsh.
7. According to the **Constitution of Kenya, 2010** bail is not absolute since there is a limitation. **Article 49 (1) (h)** of the **Constitution** clearly stipulate that where there are compelling reasons bail cannot be granted. At the outset as I have aforesated, the trial court found the reasons

- advanced by the State to have been compelling enough to have the applicants incarcerated. However, as the case progressed the court found it necessary to review the application.
8. The constitution also provides that where bail is granted, the terms must be reasonable. Therefore the most important issue to be determined at this stage is whether terms of bond/bail set were reasonable.
  9. In answering the question posed, I must emphasize the presumption of innocence in regard to the applicants and the right not to be denied reasonable bail without just cause. The State has demonstrated that the applicants herein were deceitful. They must have colluded with medical practitioners at the **Kajiado District Hospital** who gave wrong information in respect of their age. This was done while the applicants had full knowledge of the fact that they were adults and in possession of National Identity Cards. This brought their character into question.
  10. Further, the State has demonstrated that the applicants are facing charges that attract a severe penalty; a fact the trial magistrate properly directed herself to in imposing bail terms. The circumstances prevailing would show that the terms granted were reasonable.
  11. I wish to point out that the trial magistrate has heard the case expeditiously. The applicants have been in custody for **two (2) months**, four prosecution witnesses have testified; only one is remaining. I would urge her to hear the matter and have it determined on priority basis. Otherwise, I see no reason to interfere with the orders of the Lower Court. Bail terms shall remain as imposed.
  12. In the result, the application is dismissed.
  13. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 13<sup>TH</sup> day of AUGUST, 2014.**

**L.N. MUTENDE**

**JUDGE**