



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERICHO**  
**CRIMINAL MISC. APPL. NO.17 OF 2014**

**ABDI MOHAMMED ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**R U L I N G**

1. This is the application dated **4<sup>th</sup> December, 2014** asking this court to alter or reverse the lower court's order dated **27<sup>th</sup> November, 2014** in Bomet Senior Resident Magistrate's Court Criminal Case No. 1216/14.

The said order denied the applicant bond.

2. The application is supported by the grounds on the face of the application. The main ground being that the applicant was admitted to bail of Cash Bail of Shs. 5,000,000/=. Further, an application to the court for the variation of the bail terms was declined.

3. It is also supported by an affidavit of the applicant.

4. The State was served with the application and Ranger Evans Odhiambo of Kenya Wildlife Service Narok filed an affidavit opposing the release of the applicant on bond.

He avers that the applicant is a notorious wildlife trophy dealer who has cases at Narok Law Courts. He further says the identity of the applicant is questionable.

5. When the application came for hearing **Mr. Mutai** holding brief for **Mr. Ongoto** asked this court to vary the bail terms and admit the applicant on bond. He referred the court to the case of **Alexander Boru Wanjiku V R High Court Muranga Criminal Case No. 3/13** where the court laid down the objective and conditions for release on bail.

6. He submitted that the averments in the affidavit of the investigating officer supported their prayer for bond with sureties.

7. In reply **M/S Munyolo** the learned state counsel relied on the investigating officer's affidavit and opposed the applicant's release on bond. She submitted that the applicant's identity was unknown as he had failed to produce his identity card. She urged the court not to vary the bail terms. She also indicated that the Applicant has another matter at Narok Law Courts namely PCR NO. 711/14.

8. The Bomet Senior Resident Magistrate Criminal Case No. 1216/14 and the applicant's identity card

No. xxxxxx were forwarded as per the court's direction of **11<sup>th</sup> December, 2014**.

9. The applicant herein was arraigned before Bomet Senior Resident Magistrate's court on **21<sup>st</sup> November, 2014** and charged with the following offences;

### Count I

Being in possession of wildlife trophy contrary to **Section 95** as read with **Section 92** and **Section 105(1) (a)** of the **Wildlife Conservation and Management Act, 2013**.

### Particulars

*On the 20<sup>th</sup> day of November, 2014 at 2200hours at Longisa area within Bomet County, the accused was found in possession of 2 pieces of elephant tusks weighing 10.5kgs with a street value of Kshs. 1,050,000/= without a permit.*

### Count 2

Dealing in Wildlife trophy contrary to **Section 95** as read with **Section 92** of the **Wildlife Conservation and Management Act, 2013**.

### Particulars

*On the 20<sup>th</sup> day of November, 2014 at 2200hours at Longisa area within Bomet County, the accused was found dealing in Wildlife trophy namely 2 pieces of elephant tusks weighing 10.5 kgs with a street value of Kshs. 1,050,000/= without a permit.*

10. A perusal of the record shows that on this day of plea, there was no presentation made by the prosecution in respect of the applicant.

The court on its own motion made two important orders which are:

- i. *Applicant to be supplied with a copy of the charge sheet and witness statements.*
- ii. *Applicant to be released upon payment of Cash bail of shs. 5,000,000/=.*

11. **Article 49(1)(h)** of the **Constitution** provides;

***“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”***

What comes out of this provision is that:

- i. *An arrested or accused person has a right to bail or bond.*
- ii. *The bail and/or bond must be on reasonable conditions.*
- iii. *Bail/bond can only be denied in exceptional circumstances.*
- iv. *It is the prosecution's duty to prove the existence of any exceptional circumstances in case of denial of bail/bond.*

### 12 Reasonable conditions

Would a cash bail of Shs. 5,000,000/= to a common citizen be said to be a reasonable condition? What made the court arrive at such a hefty sum for the applicant in terms of cash bail? The record does not show that the prosecutor said anything that could have informed such a decision. If indeed what **Ranger Evans Odhiambo** is stating in his affidavit is to be believed why was this information not relayed to the prosecutor in the court that took plea? Why was that court not informed of the issues of similar cases at

Narok Law courts plus the issue of failure to produce an identity card?

13. Having failed to present that information to the court of first instance the investigating officer cannot come before this court and purport to act as if this information is what justified the slamming of the cash bail of Shs. 5,000,000/= on the applicant. I would have expected the State to support the order of the learned trial magistrate with facts presented to the court below. This is not the case here.

14. When the Applicant applied for variation of the bail terms the same was rejected for the reason that if convicted the applicant faced a mandatory sentence of 20 years imprisonment or a fine of shs. 20,000,000/=. This was on the prompting of the prosecution which in response to **Mr. Ongoto's** application had said;

***“As the court considers variation of the bond terms, we wish the court to take cognizance of the fact that this has been on persistent offence for the last years and the offence if proven guilty attracts a heavy penalty”***

15. In the first instance the Law is that one is presumed innocent until proved guilty. Secondly, as rightly put by my brother Justice J. Ngaa in the case of **Alexander Mburu Wanjiku** – (*supra*) bond/bail may only be denied when the prosecution raises substantial grounds believing that:

- a. *The accused will fail to turn up at his trial or to surrender to custody or*
- b. *The accused may commit further offences.*
- c. *He/she will obstruct the course of justice.*

16. The prosecution has not in anyway established any of the above grounds. There was an allegation that the applicant has a similar case before Narok Law Courts whose particulars were given as PCR NO. 711/14. This must be a police case number and not a court file number. It was also claimed that the accused's country of origin was unknown and the police were investigating. The applicant had been first arraigned in court on **21<sup>st</sup> November, 2014**. The prosecution did not apply to have him remanded in custody for further investigations on his nationality. In fact after this court ordered that the applicant's identity card be produced in court on **16<sup>th</sup> December, 2014** the same was produced. It is therefore not true that any investigations on his nationality were being carried out.

After the said production the learned state counsel informed the court that the State was now agreeable to the Revision of the bond terms. I find this to be an abdication of duty by the officers concerned.

17. After this whole narrative, I do find that the bail terms set by the Bomet Senior Resident Magistrate's court are too excessive. And the magistrate's refusal to vary the bail terms was without any valid reason. I therefore set aside the orders by the Resident Magistrate issued on **27<sup>th</sup> November, 2014** in respect of the application for variation of bond terms.

I proceed to review the bail terms issued by the said court on **21<sup>st</sup> November, 2014** and set new terms which are as follows:

- a. *The applicant may be released on a bond of shs. 2 million with a surety in the sum of shs. 1 million.*
- b. *In the alternative he may be released on a Cash bail of Shs. 500,000/=.*

Orders accordingly.

**Dated, signed and delivered this 17<sup>th</sup> day of December, 2014**

**H.I. ONG'UDI**

**JUDGE**

**In the presence of :**

M/S Munyolo for State

Mr. Mutai for Ongoto for applicant

Applicant- absent

Lagat– Court Assistant