



REPUBLIC OF KENYA

High Court at Meru

Criminal Miscellaneous Application 21 of 2013

JOSES KIMATHI MURUMU & 3 Others.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

This application is brought by way a Notice of Motion under Articles 40(I) (h), 50(2) (a), 159(1)&(2) and 258(1) of the Constitution Of Kenya and under sections 124, 125, 126, 362 and 364 of the Criminal Procedure Code. It seeks the following orders:

- 1. That the honourable court be pleased to certify this application as extremely urgent and hear it ex-part in the first instance.**
- 2. That the honourable court be pleased to review the Maua Chief Magistrates order on bond terms for the Applicants made on 5/12/2012 and reduce the same to affordable levels while waiving the requirement for cash bail.**
- 3. That the honourable court be pleased to issue any further and/or better orders as may meet the ends of justice herein.**

The application is supported by the following grounds.

- 1. The Maua Chief Magistrate has given very stiff and unaffordable bond terms to the Applicants.**
- 2. The Applicants herein are not a flight risk.**

The application is also supported by two affidavits. The first affidavit is by the 1st Applicant in which he sets out the facts of the case. The gist of that affidavit is that the four Applicants are charged before the Maua Chief Magistrates court with Criminal Case No. 3558 of 2012. They face one count of Trafficking in narcotic drugs to wit 60 Kilos and 50 rolls of cannabis sativa with an estimated street value of Ksh.600,000/- . He contends further that each of the Applicants was granted bond of 600,000/- with surety and in addition cash bail of 100,000/-. The 1st Applicant avers that he was able to get a surety who was approved by the court and secured the bond terms of 600,000/- upon which he was released on 16th

January, 2013. The 1st Applicant states that just like himself the court misunderstood the bond terms set by the Plea Court and assumed that the order of cash bail of 100,000/- was an alternative to providing security of a surety of 600,000/-. The 1st Applicant states that he was summoned on 25th February, 2013 and asked to deposit cash bail of 100,000/- failure to which he was to be returned to custody; and that his bond was cancelled as he was unable to raise the amount of cash bail ordered.

The 2nd affidavit is sworn by Kirimi Mbogo, advocate to the Applicants. He deposes that all the Applicants are youthful peasants whose families cannot afford the stiff bond terms imposed by the trial court, and that it would be proper to have them revealed to affordable terms. He also deposes that all the Applicants had assured him that they shall abide by the court terms.

The application was argued on behalf of all four Applicants by Mr. Mbogo Advocate, counsel for the Applicant urged that the bond terms given by Maua Chief Magistrate Court are too high and that the Applicants were now seeking a review of the said bond terms from this court.

The state was represented by Mr. Makori learned state counsel and opposed the application. In his submissions Mr. Makori urged that the offence was serious and carried a heavy penalty. He urged that the value of the drugs the subject matter of the case was Ksh.600, 000/-, which was the similar amount demanded for the bond terms. He urged that there were no exceptional circumstances that warrant the court's intervention.

In this application it is not disputed that the Applicants have been granted bail by the chief magistrate's court. It is also not disputed that the Applicants had come before me at an earlier date seeking a review of their bond terms, but I declined to consider then for reason they had come to this court for a review while at the same time a ruling for a similar application was pending before the learned trial magistrate. I see from the record that the Application for review before the trial court was dismissed and the reasons given for that dismissal are on record as follows:

"I have considered the application, bond is a constitutional right. The court recognizes that and for that reason admitted the accused to bond at plea even when they were not represented. The terms of bond were assessed by the court, having regard to the seriousness of the case of trafficking in narcotic and also considering the colossal amount of drug involved. Though it does not appear in record one of the accused had jumped bail in a similar matter. The bond of Ksh.600,000/- with surety and a cash bail of Ksh.100,000 is in my view not unreasonable or harsh. I am unable to review the terms of bond just yet and particularly to suit the accused who was released from custody erroneously. He has to meet the terms of bond set by the court."

Now that the Applicants are before this court for review of the bond terms granted by the Maua Court. It is imperative that I consider the ruling of the learned trial magistrate made in regard to the application for review of bond terms, in order to determine whether the correct principles were applied by that court when considering the bail terms granted to the Applicants.

The principles that should guide a trial court when considering whether or not to grant bail to an accused person, and also when considering the terms of the bond it will grant, if in the exercise of its discretion it decides in favour of the accused persons. These principles are well settled by precedent in the case of **Ng'ang'a vs Republic 1985 KLR 451** where Hon. Chesoni J, as he then was held:

"1. The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should consider the following factors:

(a) In principle, because for the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:

- (i) The accused will fail to turn up at his trial or to surrender to custody;**
- (ii) The accused may commit further offences; or**

(iii) He will obstruct the course of justice.

(b) The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

(i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;

(ii) The strength of the prosecution case;

(iii) The character and antecedents of the accused;

(iv) The likelihood of the accused interfering with prosecution witnesses.

2. Where more than one person are jointly charged with a criminal offence, the case of each accused person must be examined on its own facts and this applies also to an application for bail in which each accused person's application is to be considered on its own facts, circumstances and merit."

Before considering the principles in the case I have quoted above I wish to mention that the law regarding granting of bond to accused persons changed with the (new) Constitution, 2010. Under the Constitution all persons facing any charge in a court of law may be granted bond irrespective of the offence they face, and irrespective of the penalty they will be liable to face if convicted for the offence. In spite of that new constitutional provision opening up the granting of bond to all categories of offences under the Penal Code and other laws, the principles that should guide a court when considering bond have not changed, if anything they have been added to by the condition set under Article 49 (1) (h), which I have underlined, which stipulates:

"49. (1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."(emphasis mine).

I now turn to the principles set out by Hon Chesoni J in the case of **NGANGA**, supra. The principles that guide a court in exercising its discretion in granting bail are whether:

(i) The accused will fail to turn up at his trial or to surrender to custody;

(ii) The accused may commit further offences; or

(iii) He will obstruct the course of justice.

Other principles considerations are:

(i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;

(ii) The strength of the prosecution case;

(iii) The character and antecedents of the accused;

(iv) The likelihood of the accused interfering with prosecution witnesses.

In this case the learned trial magistrate was guided by those principles, as is clear from his ruling on the same. It is upon the application that the court granted each of the Applicants bond of Ksh.600,000/- with surety and a cash bail of Ksh.100,000/-.

What has brought the Applicants before this court is that the application for review of bond terms was

rejected by the Chief Magistrate. Looking at the ruling of the learned trial magistrate, the refusal to review the bail terms was advised by the fact that the bond terms set by the trial court were based on the fact that the offence was serious and involved the trafficking of narcotics, and the fact that value of the drugs involved was colossal, and finally, as the learned trial magistrate stated in his ruling, it was informed by the fact that one of the accused persons had jumped bail in a similar matter. For these reasons the learned trial magistrate was of the view that the bond terms he gave in the case were neither unreasonable nor harsh.

The learned trial magistrate, in exercise of discretion whether or not to grant bail to all the accused person jointly charged in this case, would have been perfectly justified to give varying bond terms to the accused persons depending with the merits, circumstances of their case and the factors unique to each of them. The learned trial court is mandated to consider the bond application by each accused person and to examine each accused person, based on the peculiar facts of each accused person, and the circumstances pertaining to their respective case and also the merits of the application. Having done so, the trial court would then be expected to determine which of the accused person qualify to be granted bond, and which ought not to and give reasons for each decision. To give an example a court would be in order to give a child bond and deny an adult based on the age and unique circumstances of each accused. In the instant case, the learned trial magistrate would have been in order to grant higher bond terms, or to deny bond to the accused who previously jumped bail in a similar case.

In this case the learned trial magistrate granted all the Applicants bond, and also gave them similar bond terms. In his ruling in respect of the application for review of bond terms, he indicated that one of the reasons why the bond terms granted to the Applicants were set at the level they were is because one of the Applicants had jumped bail in a similar case. With due respect to the learned trial magistrate it is clear that he misapplied the principles applicable in exercise of his discretion in granting bond to the Applicants. It is clear in his mind he raised the bond terms higher because one of the accused persons before him had jumped bail in a similar matter. The learned trial magistrate was in error when he made the bond terms of all the accused persons high just because one of them whom he did not identify in his ruling, had jumped bail in a similar matter.

I do find that the learned trial magistrate took into consideration extraneous matters to the detrimental of the Applicants. For that reason I will not hesitate to review the bond terms granted to the Applicants.

The Applicants are facing an offense of trafficking narcotics namely cannabis sativa it has a street value of 600,000/- at this point the accused persons have a right to be presumed to be innocent until proved guilty after the trial or if they decide to plead guilty to the charge. I will review the bond terms by setting aside the terms of bond granted by the learned Chief Magistrate and in substitution thereof I grant each Applicant bond in the sum of Ksh.300,000/- with one surety of similar amount. The bond should be examined by the Chief Magistrate or the trial court or the court on duty, whichever is applicable at the Chief Magistrates Court Maua.

DATED SIGNED AND DELIVERED THIS 18TH DAY OF APRIL 2013.

LESITT, J.
JUDGE.