



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 199 OF 2013

HUMPHREY NGURE MUNENE1ST APPLICANT

ANN NASERIAN WAIHUMBI.....2ND APPLICANT

FRIDAH MWENDE WAMBUA3RD APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. **Humphrey Ngure Munene, Ann Naserian Waihumbi and Fridah Mwende Wambua** the applicants herein, have come to court by way of Notice of Motion dated 12th July 2013, under **Section 123(3)** and **Section 81** of the **Criminal Procedure Code**. Their prayers are that this court be pleased to reinstate their bond terms which were cancelled on 4th July 2013 by the subordinate court in Kibera **Criminal case No. 1017 of 2012** and order for stay of further proceedings in the said case as well as its transfer to any other court within Nairobi with similar jurisdiction, for hearing and determination.
2. Mr. Kadebe, the learned counsel for the respondent opposed the three prayers urging that the application must and could only be supported by the documents accompanying it. Mr. Kadebe averred that a record of the proceedings was attached to the application and that the trial magistrate considered the evidence at that juncture and found that, faced with this evidence the applicants may not turn up for the next hearing. The magistrate examined their demeanor and found that it was prejudicial to their bail terms.
3. Secondly, the applicants have not demonstrated what prejudice they would suffer if their trial continues in Kibera court, and what bias would necessitate transfer of proceedings to another court. Mr. Kadebe wondered whether courts of law are not supposed to form opinions, and whether such opinions are to be characterised as bias. He urged the court to decline the application.
4. The backdrop of this application is that the applicants were arrested on 22nd February 2012 and arraigned before Kibera court on 23rd February 2012, charged with the offence of robbery with

violence and kidnapping. A plea of not guilty was entered and bond of Kshs.800,000/= granted to each applicant with a surety of like amount. They all met the bond terms and were released on bond.

5. On 4th July 2013 they duly attended court, where upon the 3rd applicant sought an adjournment on grounds of ill health and not having been supplied with witness statements. This however, was declined by the court and one witness allowed to testify. Upon hearing the one witness the court observed that with such evidence against the applicants, if they were allowed to go home they may not turn up for the next hearing. Their bonds were therefore cancelled and the applicants remanded in custody.
6. Mr. Waiganjo learned counsel for the applicants opined that the evidence of a single identifying witness, without corroboration, could not form the basis of a conviction in a criminal case.
7. Further Mr. Waiganjo faulted the learned magistrate for holding that the applicants' conduct before the court was not good, and that they were likely to abscond, although the record had no reflection of any such complaint about the applicants prior to this holding. That this showed bias on the part of the court since the applicants had attended court dutifully.
8. It is now well settled that the court's main consideration, when determining an application for bail is whether or not the applicant will voluntarily and readily avail himself or herself for the trial. Once the court concluded that the applicants would probably not present themselves at the trial voluntarily and readily, it would have been imprudent to grant them bail.
9. The provisions of **Article 49 (1)(h)** of the **Constitution** repose within **Chapter 4** of the **Constitution of Kenya, 2010**. The said chapter is titled "The Bill of Rights". **Article 19(3)(a)** of the **Constitution** makes it abundantly clear that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state. The said rights and fundamental freedoms are subject only to the limitations contemplated in the Constitution. **Article 49 (1) (h)** stipulates the rights of persons who have been arrested, as follows:

"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."

Therefore, all arrested persons are now entitled to seek their release on bond or bail, pending charge or trial, but their release shall be circumscribed by the existence of compelling reasons that commend themselves to the contrary position.

10. In **Republic v Danson Mgunya & Ano. HCCR NO. 26 OF 2008**, Hon. Ibrahim J, as he then was comprehensively considered the issues to be taken into account in determining "**compelling reasons**" not to release an accused person on bail. Among them were reasons such as the nature of the charges, the gravity of the punishment in the event of conviction and the strength of the evidence which supports the charge.
11. **On the nature of the charges, and the gravity of the punishment in the event of conviction:** Ordinarily, where the charges against the accused person are serious, and punishment prescribed is heavy, there is more probability and incentive to abscond, whereas there may be no such incentive in cases of minor offences. The charges herein being under **Section 296(2)** and **Section 259** of the **Penal Code** respectively, the nature is grave. The punishment in the event of conviction which is death in **count 1** and seven years imprisonment in the **count II** is severe indeed.

12. In **Philip Anyanya vs Republic Cr. 23 of 2010**, Ibrahim J stated:

“Whatever the court will decide, the fear and anxiety exerting on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing a capital offence is real and cannot be wished away. It is therefore true that the seriousness of an offence and the sentence for which is possible upon conviction is a matter which can bear on the accused and can affect his decision to attend trial or not.”

13. In the case of **Watoro v Republic (1991) KLR 220 at 283**, Porter, J had this to say:

“The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody..... What I think is important for the court to bear in mind, and the reason for the caution to remember the presumption of innocence, is that it would be wrong to leap to the conclusion that the accused was guilty merely because he had been charged and decide the bail application on that basis.”

Nevertheless the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether they should skip bond or not. Such a possibility is real and it has happened before in similar cases.

14. This is not to say that because other accused persons went into hiding rather than face prosecution, these applicants will do so. Every decision must be arrived at on the circumstances of each case. Emphasis is on the fact that the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction.

15. **On the strength of the evidence which supports the charge:** The courts are usually, not willing to remand an accused person in custody where the evidence against him/her is tenuous, even if the charges are serious. On the other hand, where the evidence against the accused person is strong the court may consider it justifiable to remand him/her in custody. The court should not be seen as pre-empting the outcome of the case, or being biased for basing its decision on only part of the evidence. The applicants have not been convicted and the decision to acquit or convict shall only be arrived at after all the evidence has been adduced.

16. Without losing sight of the fact that by dint of the provisions of **Article 50(2) (a)** of the **Constitution**; **“Every accused person has the right to a fair trial”** I am persuaded for the foregoing reasons and observations that the trial court exercised its discretion properly and that no bias has been proved. The application is therefore lacking in merit and is dismissed with an order that the trial be expedited and that, if possible, the hearing should proceed on a daily basis.

SIGNED DATED and DELIVERED in open court this **31st** day of **October 2013**.

L. A. ACHODE

JUDGE