



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 597 OF 2011

CHARLES SHIVACHI LIYAIAPPLICANT

VERSUS

REPUBLICRESPONDENT

R U L I N G

1. **CHARLES SHIVACHI LIYAI**, the applicant herein, has come to court by way of Notice of Motion dated 8th November 2011, and is asking the court to review, vary and/or modify the order of the subordinate court issued on 20th August 2011 and on 31st October 2011, with regard to bail pending the determination of his trial. His prayer is that this court be pleased to admit him to reasonable terms and conditions, of bail and substitute the earlier order of the trial court declining to release him on bail, pending the hearing and determination of **Makadara criminal case No. 3409 of 2011**.

2. His application is predicated on **Articles 21(1), 49(h), 50, (2)**, of the **Constitution**. He has also invoked Section 23 of the **Criminal Procedure Code Cap 75 of the Laws of Kenya**.

3. Mr. Oira, learned counsel for the applicant, submitted that the learned trial magistrate rejected the applicant's application for bail pending trial without providing reasons thereto. Further that the pre-bail report submitted in court was favourable in regard to the applicant. To persuade the court, the learned counsel referred to the case of **VICTOR BOSIRE NYAMWAYA VS REPUBLIC [Misc. 94 of 2010]**, (unreported) in which the High Court released the applicant who had been charged with murder on bail pending trial.

4. The application was opposed by the Respondent represented by learned state counsel, Miss Mwanza. Miss Mwanza gave three grounds for the respondent's opposition to the application. She stated that:

i) The applicant is known to the complainant and there is a high likelihood that he may interfere with the complainant before the trial.

ii) The applicant may abscond if released on bail because the evidence against him is very strong

iii) The pre-bail report is one sided, since the manner in which the offence was committed is not consistent with the description of the applicant in the pre-bail report. It is alleged that the applicant and others not before the court caused serious injuries to the complainant and locked him up in the

boot of a car.

5. **Art 49(1)(h) of the Constitution** is not couched in absolute terms. It provides that an arrested person has the right.....

“to be released on bond or bail, or reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released”.

The operative words are therefore “reasonable conditions” and “compelling reason not to be released.” The primary consideration in this application is whether the accused person shall attend court and be available for the trial. At this stage the applicant has the presumption of innocence on his side since he has not yet been tried and found guilty on the charge with which he is faced.

6. I am however, not persuaded that the order of the learned trial magistrate, that the applicant should re-visit his application at a later stage, is punitive in any way in light of the seriousness of the charge with which the applicant is faced. The only anomaly on the part of the trial magistrate was in failing to give the reasons thereto.

7. The applicant is facing a charge that carries with it the death penalty if convicted, and it is important that the court strikes a balance between this reality and the presumption of innocence that operates in his favour of at this juncture. In my view the three issues raised by the learned state counsel are weighty and amount to compelling reasons not to release the applicant on bail at this point in the trial. There is however nothing to stop the applicant from re-visiting his application as soon as the evidence of the complainant is taken.

For the foregoing reasons, I therefore decline to grant the application sought. The application stands dismissed.

SIGNED DATED and **DELIVERED** in open court this *15th day of March 2012.*

L. A. ACHODE
JUDGE