



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

CRIMINAL MISCELLANEOUS APPLICATION NO.85 OF 2011

JACKSON MWANGANGI KITI..... APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

RULING

On 30th September, 2011, **Jackson Mwangangi Kiti**, hereinafter “*the applicant*” lodged an application seeking to be released on bond pending the hearing and final determination of the Criminal case Number 670 of 2010 pending in the Chief Magistrate’s court at Machakos in which he is the co-accused with one, Francis Kyalo Nzioka. Secondly, the applicant prayed that the said criminal case be transferred from court number 4 of the Chief Magistrate’s court to any other court. Lastly, he pleaded that this court be pleased to give orders for the case to be heard on priority basis.

The applicant swore an affidavit in support of the application. Where pertinent, he deponed that he was initially a police reservist based in Nairobi. That he was charged before the chief magistrate’s court with two counts of capital robbery. He pleaded not guilty and applied for bond but he was denied. That as far as he was concerned, he was a victim of police harassment and that the case was a frame up calculated to fix him following a burst up with an inspector of police who was then the official driver of the then police commissioner.

When the application came up for hearing before me on 30th November, 2011, the applicant informed the court that he wished to abandon the prayer in the application for the transfer of the case. He was only keen to pursue the application for bond. That also meant that he had abandoned the prayer for an order for expeditious disposal of the criminal case.

In support of the application he submitted that though the co-accused and himself had applied for bond pending trial in that court, his co-accused was granted bond of KShs.1,000,000/- plus one surety of the same amount, but he was denied on the grounds that he had not demonstrated that the other cases he was involved in at both Kibera and Embu had been concluded in his favour. However, he now had official documents from these courts showing that he had in fact been acquitted of the charges in those courts. 17 witnesses were scheduled to testify in this case. However, only 1 witness had so far testified. That the Constitution was clear that an accused should be released on bail unless there were compelling reasons. The state had not demonstrated any compelling reasons. Further, there was a presumption of innocence. The case had dragged on for about 23 months yet only 1 witness had testified. He had not interfered with witnesses all this time though.

Mrs. Gakobo, Principal State Counsel opposed the application stating that the charges facing the applicant were serious. He faced 3 counts of capital robbery. The case was part-heard and the applicant was aware of the evidence that will be led against him and the identity of the witnesses. It was also evident that a rifle was lost during the commission of the offence. There was thus real likelihood that if the applicant is released on bond, he will abscond and even interfere with witnesses. Since the charges carry a mandatory death sentence, that may act as incentive to abscond. The foregoing were compelling reasons as to why the applicant should be denied bond.

I have carefully read and considered the application, the supporting affidavit and rival oral submissions. From the record, it appears that the applicant and his co-accused applied separately to be released on bond pending trial in the subordinate court. Whereas the applicant's co-accused made the application on 27th July, 2011, the applicant made his on 3rd August, 2011. Both applications were however opposed by the Prosecution. For the applicants co-accused, it was claimed that he faced a similar charges in a case in Embu Law Courts being criminal case number 833 of 2010 and that he had threatened to kill the complainant. It was further claimed by the prosecution that the co-accused knew the complainant's home and could carry through the threat.

In a ruling delivered on 3rd August, 2011, **Hon. J. M. Munguti, SRM** held that the prosecution had not shown any compelling reasons to warrant the co-accused being denied bond. The co-accused had exhibited an order from Embu Law Courts showing that the case had been ruled in his favour. He went on to observe that though the co-accused faced 2 counts of robbery with violence which were serious offences attracting death sentence on conviction, nonetheless he was prepared to release the co-accused on bond terms of KShs.1,000,000 plus a surety of similar amount. He also directed that on being released, the co-accused should be reporting to the DCIO, once every month.

However, when it came to the applicant, the court surprisingly declined to grant him bond on the ground that the applicant was facing a charge of robbery in Criminal case No.833 of 2010 in Embu Chief Magistrate's court. He was also facing another Criminal case being number 1999 of 2010 at Kibera Law Courts. Claims by the applicant that he was acquitted were not proved and in the absence of a clarification on the fate of those cases, the court's hands were tied, the learned magistrate so ruled. He went further to state that it was up to the applicant to provide proof of the alleged acquittal. The court then found those to be compelling reasons to deny the applicant bond.

I must hasten to say that it appears that, the learned magistrate dealt with the two applications in a discriminatory manner. The grounds advanced by the prosecution in opposing both applications were the same. So how come on the same grounds, the magistrate granted the co-accused bond and he denied the applicant bond, when similar grounds were advanced. In the case of the co-applicant, it was even serious since he had actually threatened the complainant with death. It was not proper exercise of discretion on the part of the learned magistrate in my view to grant bond to the co-accused and deny the applicant the same. The co-accused just as the applicant had a criminal case in Embu Law Court. That is the same case in which the applicant was involved as co-accused. The magistrate commented on the issue thus:-

“On the issue of a pending criminal case the defence has exhibited an order from Embu Law Courts stating the case was ruled in favour of the accused person. That being the position, it is my finding that the prosecution has not shown any compelling reason to warrant the 2nd accused to be denied bond...”

Having so held, why did the magistrate make such a big about-turn when it came to the application of the applicant. The applicant in the same vein as the co-accused had been acquitted of the same charges. Just like the applicant, the co-accused, was also facing 2 counts of robbery with violence. Yet the magistrate was prepared to overlook that fact in the case of the co-accused, but when it came to the applicant, they were treated as a stumbling block to the grant of bond.

My reading of the ruling by the magistrate with regard to the bond application of the applicant tells me that had the applicant demonstrated to the court that he had been acquitted in the Embu Law Court case (which fact was already in the knowledge of the court anyway) and that the Kibera court case had

been concluded, he would definitely have allowed the application. The applicant has amply demonstrated by court documents from Embu and Kibera Law courts, that both cases have been concluded. The documents have been authenticated by the learned state counsel as being genuine.

That being the case, I do not see any reason why the applicant should be treated any different from the co-accused. Accordingly, I allow the application. He will be admitted to bond on the same terms as the co-accused to wit; he will execute a personal bond of KShs.1,000,000/- plus a surety of similar amount. In the event that he is so released, he will be reporting to the D.C.I.O., Machakos, once every month on a date to be agreed between him and the D.C.I. O.

Ruling dated, signed and delivered in Machakos this 15th day of March, 2012.

ASIKE-MAKHANDIA
JUDGE