



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 7 OF 2012

GIOVANNI DE CARO.....APPLICANT

- AND -

REPUBLIC..... RESPONDENT

AND

IN THE MATTER OF AN APPLICATION FOR BAIL BY GIOVANNI DE CARO

IN THE MATTER OF ARTICLE 49(1) (h), ARTICLE 50 (2) (a) ARTICLE 20(3) (B) OF THE
CONSTITUTION OF KENYA, AND SECTION 123 91) & (3) AND 124 OF THE CRIMINAL
PROCEDURES CODE AND ALL ENABLING PROVISIONS OF THE LAW

AND

IN THE MATTER OF MALINDI CRIMAL CASE

NO. 91 OF 2011

REPUBLIC VS GIOVANNI DE CARO

R U L I N G

REPUBLIC OF KENYA

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R U L I N G

1. The Applicant Giovanni De Caro was charged in February, 2009 in Malindi Criminal Case No. 91 of 2011, with the following offences:

§ **Being unlawfully present in Kenya contrary to Section 13 (2) under the Immigration Act;**

§ **Failure to register as an alien contrary to Section 3 (2) and 4 (1) of the Aliens Restriction Act;**

§ **Forgery of an endorsement for extension of validity of his passport contrary to Section 349 Penal Code;**

§ **Using a passport with forged endorsements contrary to Section 13 (1) (b) Immigration Act;**

§ **Uttering a forged document contrary to Section 353 of the Penal Code.**

The offences with which he is charged are felonies for which sentences of 3 or more years may be meted.

2. Mr. De Caro is an Italian citizen resident in Malindi and is represented by Mr. Mauko. On 25th March, 2011 he was released on a Bond of 1,000,000/= with one surety of similar amount. The record of proceedings in the lower court shows that several adjournments in the trial were occasioned by the accused's illness. He is aged 68 years and has a heart condition. After the hearing of the prosecution case, the court found that a *prime facie* case had been established, warranting Mr. De Caro to be put on his defence. That was on 19th March, 2012. At that stage the prosecution applied for the accused's bond to be withdrawn and he be remanded in custody. They pointed to Exhibit 3 (d) (ii) alleging that De Caro is required in Italy to serve a sentence. That application was resisted by Mr. Mauko. In her ruling, the Hon. L. Mutende, Chief Magistrate, cancelled the accused's bond, noting that the defence had not cast doubt on the document alluded to by the state.

3. The Applicant has now come to this court under urgency, vide his application dated 21st March, 2012. It was before Hon. Lady Justice Meoli at Malindi. Both Defence Counsel and State Counsel were present. The Hon. Judge ordered that typed proceedings be produced and the file be placed before the duty Judge in Mombasa on 3rd April, 2012, on account of the vacation. On that date, typed proceedings were not available nor did the State Counsel attend. This court therefore adjourned the hearing to 5th April, 2012, and the applicant was ordered to serve the state with a hearing notice and file a return of service.

4. On 5th April, 2012 the State Counsel did not appear again. He had been served with the hearing notice on which he wrote:

“Received under protest, the notice is too short”

The court, taking into account the question of urgency, and the non-appearance by State Counsel on both 3rd and 5th April, 2012, allowed the Applicant proceed *ex parte*.

5. The application is brought under Articles 49 (1) (h), 50 (2) (a) and 20 (3) (b) of the Constitution, and Section 123 (1) and (3) and 124 of the Criminal Procedure Code, and other enabling provisions. It is premised on the following grounds:

“(a) The offences of which the Applicant is charged with are bailable under the Constitution.

(b) The applicant has a chronic heart condition to which he is already seeking treatment for (sic) as he awaits for his cardiologists to set up his heart (sic) by surgery.

(c) The trial Court without proper cause on retiring to write a ruling on no case to answer, caused the Applicant to be unlawfully detained, this denying him his Constitutional Rights of fair (fair?) trial and presumption of innocence.”

6. Counsel submitted at the hearing that the High Court has original jurisdiction under Section 123 (7) of the Criminal Procedure Code, to direct that an accused person be admitted to bail, or that bail required by a subordinate court or police officer, be reduced.

I have considered Section 123 as a whole, and am satisfied that this court can admit a person to bail or alter the bail terms required by a subordinate court

7. Counsel recited the case history and Mr. De Caro's medical condition. He recalled that the accused had been on bail throughout the proceedings until the ruling on 21st March, 2012, when he was put on his defence. Annexed to the affidavit in support of the application deposed by Mr. De Caro, is an Annex "GD 4A". It is the document which was referred to by the prosecution as Exhibit 3 (d) (ii), pursuant to which the lower Court was urged to observe that De Caro was a convict and fugitive from justice, after conviction for offences with sentences ranging 2 – 5 years in *Italy*. Counsel argued that the said document was suspect having not been verified. However, he had no other basis for impugning the document.

Finally, Counsel argued that the accused having never absconded throughout the trial, and considering his medical condition, he is incapable of absconding.

8. I think it appropriate to first set out what the law is on bail, then apply the same to the circumstances herein. Article 50 (2) (a) of the Constitution provides that:

“ Every accused person has the right to a fair trial which includes the right –

a)

b) to be presumed innocent until the contrary is proved”

Two key rights are established thereunder; the right to a fair trial, and the right to presumption of innocence.

9. I do not understand the applicant to be asserting either that he has not as yet had a fair trial, or that the court has already presumed him guilty. What I understand from the application is that, having had access to bail on terms during trial, the mere fact that the same has been cancelled, creates the perception and impression that either he is guilty, or that there is a measure of unfairness in the cancellation of bail. Counsel did not argue the point as directly as I have put it, but that was his implication.

This view is buttressed by the Applicant's deposition where, at Paragraph 5, he states:

“5. That while attending to my Criminal Case No. 91 of 2011, the trial Magistrate put me on my defence and the same time without constitutional reason ordered for my arrest and detention despite the fact that I was on bail thereby infringing my constitutional rights to fair trial and denying me the enjoyment of presumption of innocence as provided for under Article 50 (2) of the Constitution.”

I will deal with this point later when dealing with the question of bail.

10. The main concern of the Applicant is his right to bail as enshrined in Article 49 (1) (h) of the Constitution, which provides:

“ An arrested person has the right –

a)

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

Clearly, the right to be released on bail or bond is constitutionally circumscribed by the presence of “compelling reasons not to be released”. The right to be released on bail is, with the greatest respect, not “an inalienable right” as stated by Hon Ibrahim J (as he then was) in **Republic Vs Danson**

Mgunya & Another HCCC No. 26 of 2008 (Mombasa).

By definition, an inalienable right is a sacrosanct right, an absolute, unassailable and inherent right and not transferable. A non-negotiable right. Like the right to life, a fundamental, inviolable right. Later, in his decision, however, Hon Justice Ibrahim did refer to the exception of “compelling reasons” as a qualification to the right to bail.

11. The principle of the right to bail is more poignantly described in **Republic vs Ahmed Mohammed Omar & 6 Others [2010] CKLR** where Ochieng, J. agreed with the assertion that the constitutional provision gives the accused person:

“ . . . a qualified constitutional right to be released on bond or bail on reasonable conditions”

That was the assertion made by the applicant in that case. The learned judge went on to state:

“ In effect the applicant has readily conceded that his right to bail pending trial is not absolute. That position has been accepted as correct by the state. And, with respect, I find that the parties have accurately interpreted the said legal position”

12. What considerations may be taken into account in determining “compelling reasons” not to release an accused person on bail?

In **Republic vs Danson Mgunya (Supra)** Hon. Justice Ibrahim referred to several criteria in the decision of the Supreme Court of Nigeria in **Alhaji Mujahid Dukubo – Asari vs Federal Republic of Nigeria SC 20A/2006** in which that court set out several criteria on whether or not to grant bail. In that case, Justice Ibrahim Tanko Muhammed JSC stated:

“ When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include, among others, the following:

- i). The nature of the charges**
- ii). The strength of the evidence**
- iii). The gravity of the punishment in the event of conviction**
- iv). The previous criminal record of the accused, if any,**
- v). The probability that the accused may not surrender himself for trial**
- vi). The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him**
- vii). The likelihood of further charges being brought against the accused**
- viii). The probability of guilt**
- ix). Detention for the protection of the accused**
- x). The necessity to procure medical or social report pending final disposal of the case.”**

13. Justice Mohamed Ibrahim then made the following observation from that decision:

“ I am of the view that, in time, trial courts in Kenya may need to set out a basic criteria for

our own situation and circumstances

I think criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence.

14. In a Malawian case referred to by Justice Ibrahim, **M. Lunguzi vs Republic, Misc Appeal No. 1 of 1995**, the Supreme Court of Malawi includes another ground for refusal to grant bail, namely, where **“the court is satisfied that the interest of justice so requires”**.

In **Republic vs Milton Kabulit & 60 Others [2011] eKLR**, Justice Emukule in a well reasoned decision said:

“ My understanding of Section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right of an automatic bond or bail are those charged with offences (which maybe referred to as “petty offences”) the punishment of which (if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months”

In the above case, the Judge reviewed a number of international instruments, pointing out the most commonly accepted grounds for deprivation of liberty. He then opined that bail or bond can be denied or curtailed upon:

“ considerations of public interest” (where the society’s sense of fairness and justice would be hurt);

“ gravity of the offence; and in Malawi,

“ in the interests of justice”

I do not think that the list of grounds or considerations which would, as “compelling reasons” inform the refusal to grant bail are exhaustively identified, nor are the categories closed.

15. I now come to the next point which is who should shoulder the burden of proving compelling reasons? In all the cases cited above, the general consensus is that it is for the prosecution to adduce and prove compelling reasons. The standard of proof has been repeatedly said to be on a balance of probabilities (**See Republic vs Danson Mgunya (Supra); Republic vs Mohamed Ahmed Omar (Supra)**). It was also so held in **John Zenus Ungapake Tembo & 20 Others vs The DPP, SCCA CR Appeal No. 16 1995 Malawi** where it was pointed out that the burden is on the prosecution to prove “on a balance of probabilities that it will not be in the interest of justice for the applicant to be released on bail”.

16. In the present case, the State Counsel did not turn up for the hearing. Counsel for the Defendant did, however, indicate that one of the key documents on which the question of bail was decided in the lower Court was Exhibit 3 (d) (iii), now annexed to the Applicant’s affidavit as exhibit “GD 4A”.

I have perused that document. It is an English translation (indicated to have been done by one Michael Kigen Psenjen on 7th November, 2011) of an official document from the Office of the Prosecutor-General at the Court of Appeal in the Florence, Penal Execution Office. It is entitled, and reads in part as follows:

“ Revocation of Decree for the suspension of Orders of execution for Imprisonment as per Article 6656, Paragraph 8 of the Penal Code and Reinstatement of the Same Order”

The document cites the accused as having been:

“ Acknowledged as guilty of the following crimes:

1) BANKRUPTCY FRAUD IN ASSETS AND IN DOCUMENTS 1988 – 1991 ACCC 21.9.93 and sentenced to Main Sentence

Imprisonment: 5 years

Collateral Sentences:

Inability to occupy managerial offices in any Company:10 years

Permanent Disqualification from public offices . . .”

That three page document concluded:

“ . . .

ORDERS

the imprisonment of the convicted persons for the serving out of the sentence indicated above if 2 years and 5 months 25 days; Fine of €258.23

ORDERS

the Officers of the Investigative Police to accompany the convicted person, ensuring his identity and subject to delivery of a copy of this order, to the nearest prison;

ORDERS

The Registrar of this Court to send this Order:

§ to the FLORENCE Police Headquarters, for execution with the power to sub delegate

§ to UNEP FLORENCE for service to the Advocate”

The document is then stated to be stamped and signed by the Prosecutor General, Dr. Paolo De Felice.

17. As I stated earlier, the above document was before the lower court. I have not seen from the record of proceedings any serious attempt by the defence to impugn it. At the hearing before me, Counsel said the document was suspect because it cannot be verified.

I have noted that the document from the Italian Prosecutor-General was in the hands of the State prosecutor since at least November, 2011. What is not clear is why, when the document first came into their hands, the prosecution did not immediately apply for the cancellation of the accused’s bail, as they would have been entitled to.

To my mind, if the accused is a fugitive from justice after a conviction in Italy, there would be a strong case for his extradition or repatriation. That, in my view, would be a compelling reason for refusal of bail.

It was earlier noted that amongst the criteria that are considered for refusal of bail were: the previous criminal record of the accused and the gravity of punishment in the event of conviction.

18. In this present case, the offences are all felonies and carry prison sentences of upwards

of three years. In addition, as noted earlier, where the accused has been put on his defence, there is an indication that there is strong evidence against him. It has been urged by the defence that De Caro also has a sensitive medical condition affecting his heart, and did not abscond throughout the proceedings. I have perused the medical records availed, and note that they relate to periods prior to 2012, indeed most are for 2010. Nothing has been produced to show his current state of health, and certainly nothing is on record showing a current urgent medical condition.

Nonetheless, I have taken all these matters into consideration and have balanced them; noting that the liberty of an accused person is the crucible in which other fundamental freedoms are melded.

19. I think it would be an improper mode of administration of justice if I were to ignore the document disclosing the accused's offences in Italy. Further light needs to be shed concerning it.

Given all the foregoing, the orders that commend themselves to me are as follows: I decline to grant the application for now, and I therefore order as follows:

1. **The State Counsel shall verify and ascertain from the relevant Italian authorities the status of the accused in relation to the crimes allegedly committed in Italy, and shall report back to court with due expedition, but not later than twenty one (21) days from the date hereof.**
2. **Accordingly, there shall be a mention on 2nd May, 2011, to review this matter.**
3. **In the event that the State Counsel shall not comply and report back as ordered herein, the following orders shall automatically become effective:**
 - a. **The Applicant shall be released on bail of Shs. 1,500,000/= with one surety of similar amount;**
 - b. **The Accused shall every Monday and Thursday report to the nearest Police Station;**
 - c. **Should the accused fail to do so, the bail bond shall stand cancelled and arrest warrants shall issue for both the applicant and his surety.**
4. **A copy of this Ruling shall be transmitted to the State Counsel with due expedition.**

Orders Accordingly.

Dated, and signed this 12th day of April, 2012.

R. M.

MWONGO

JUDGE

-

Read in open court on : (by HON. JUSTICE FRANCIS TUIYOTT)

SIGNED:.....

In Presence of Parties/Representative as follows:

a)

b)

c)

d)