REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 171 OF 2012

RICHARD KIMANTHI KIILU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The applicant, **RICHARD KIMANTHI KIILU**, is one of the ten (10) accused persons in **REPUBLIC Vs JAMES KINYANJUI WANJIRU Alias JUMA & 9 OTHERS, CRIMINAL CASE NO. 146 of 2013**, before the Chief Magistrate's Court, Nairobi.

Some of the accused persons are charged with the offences of Robbery with Violence **contrary to section 296 (2) of the Penal Code**; Being in possession of a firearm **contrary to section 3 (A) of the Firearms Act;** being in possession of ammunition without a firearm certificate **contrary to section 4 (2) (a) of the Firearms Act**; Stealing **contrary to section 275 of the Penal Code**; Neglect to Prevent a Felony **contrary to section 392 of the Penal Code**; as read with **section 36 of the Penal Code.**

However, the applicant is charged with the offence of **Stealing by Servant contrary to section 281 of the Penal Code.**

He and two (2) other accused persons, are said to have been employed as cashiers at Barclays Bank of Kenya Limited. At the material time the three cashiers were working at the bank's branch at Eastleigh, Nairobi.

On 29th January 2012, the cashiers are said to have, jointly, stolen KShs.54,000,000/-, 42,000 US Dollars and 16,900 Euros, the property of their employer, Barclays Bank of Kenya Limited.

Some of the accused persons included security guards who were then overseeing security at the bank's branch at Eastleigh. The guards are believed to have either been accomplices to the persons who stole the money or, in the alternative, they are said to have neglected to prevent the robbery at the bank.

The applicant pleaded "Not Guilty". He thereafter applied to be released on bail, pending trial. The learned trial magistrate ordered the applicant to deposit cash Bail of Kshs.5,000,000/-, or in the alternative to execute a personal Bond of KShs.5,000,000/- with two (2) sureties in like sum.

Subsequent thereto, the applicant asked the trial court to vary the terms of the orders for Bail or Bond. He

said that he was the sole bread winner in his family, and also that he hailed from a humble background.

In answer to the application, the prosecution told the trial court that it was leaving the issue to the discretion of the court.

The learned trial magistrate dismissed the application. It is then that the applicant moved to the High Court, seeking a variation of the Bail and Bond terms that had been imposed by the trial court.

When canvassing the application, Mr. Ndiso, the learned advocate for the applicant, submitted that his client had been held in custody for more than 24 hours before he was first taken to court. He was arrested on 29th January 2012, but was not taken to court until 3rd February, 2012.

Secondly, the applicant was also listed as the witness No. 9, in the prosecution's list of witnesses. That might suggest that the applicant was both an accused as well as a witness for the prosecution.

This court was invited to hold that Bail should not be used to punish the accused.

The accused was not only the sole bread winner for his family, but he was also responsible for looking after his ailing father, who was a known mental patient.

The applicant demonstrated that he was an MBA student at the University of Nairobi. Therefore, his continued stay in custody was affecting his studies.

The applicant said that his family was able to raise one surety of KShs.4,000,000/- or two sureties of Kshs.2,000,000/- each.

In answer to the application, Miss Kahoro, learned state counsel, submitted that the bail terms set down by the trial court were reasonable. She therefore opposed the applicant's attempt to have the terms varied.

The respondent drew the court's attention to the fact that the accused persons (including the applicant) are said to have stolen a substantial amount of money.

The respondent also submitted that before the trial court fixed the terms for Bail or Bond, it did take into account, the circumstances of the applicant's family.

In reply to the submissions of the respondent, the applicant said that the robbery in question actually exposed the staff at the bank to the risk that they might loose their lives.

Secondly, the trial court is said to have not taken into account the circumstances of the applicant's family, because the said circumstances were not brought to that court's attention.

I have perused the entire record of the proceedings before the trial court. I note that the prosecution never opposed the applicant's application for Bail. The prosecution only asked that if Bond was granted, it should be on the basis of "substantial sureties".

Thereafter,on 23rd February 2012, Mr. Kilonzo advocate, applied for a variation of the Bond terms. The record shoes that that application was made on behalf of the 1st accused, JAMES KINYANJUI WANJIRU Alias JUMA.

In other words, it does appear that the applicant has not sought a variation of his Bail or Bond terms, before the trial court.

Secondly, pursuant to the provisions of **Article 49 (1) (h) of the Constitution,** an accused person had the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. As the prosecution urged no compelling reasons, the trial court

granted to the accused persons the option of Cash bail of KShs.5,000,000/- each, or personal Bonds of KShs.5,000,000/- each, with two sureties of similar amount.

The applicant says that he and his family are not able to raise the cash bail or the sureties. He ascribes that to the family's circumstances.

When the learned trial magistrate declined to vary the terms of the Bail or Bond (for the first accused), she noted that the said accused person;

"***has not furnished this court with evidence that he is from a poor family."***

In effect, the trial court was alive to the need to take into account the circumstances of each particular accused person, when determining the "reasonable conditions" to be imposed when releasing an accused person on Bail or Bond.

In this instance, the accused person did not provide the trial court with requisite information, which would enable the court make an appropriate assessment of what conditions were reasonable. The applicant can only blame himself for that failure, as the court could not have relied on presumptions or assumptions.

Before this court, the applicant has now made available some information about his circumstances. The court has then called in the Probation officers, with a view to getting an independent assessment of the circumstances of the applicant's family.

Mr. M.M. Adika, a probation officer, has made his report available to this court. It is dated 30th April 2012.

The report reveals that the applicant earns KShs.60,000/-, whilst his wife earns KShs.7,000/-. From his said earnings, the applicant was servicing a loan of KShs.350,000/- which he borrowed to fund his course for a Masters Degree, at the University of Nairobi.

Given his desire to complete his Masters Degree; the fact that he is deemed to be respectable in his neighbourhood, and his strong family ties, the probation officer considers the applicant to be a person who was less of a flight risk.

Having taken into account the circumstances of the applicant, including the assessment provided by the probation officer, I find that the bail terms which were imposed by the learned trial magistrate were so high that they effectively constituted a negation of the very bail or bond which that court had granted to the applicant.

When the terms of bail or bond are obviously too high for the accused person to meet, they cannot be deemed to be "reasonable conditions", as envisaged by **Article 49 (1) of the Constitution**.

On the other hand, it is also important that the court should not impose such easy conditions that the accused person would not have any difficulty in meeting the same. If the conditions were very lenient, an accused person may be tempted to abscond, because he would not feel the pain of abandoning the bail or the security deposited in court. It is therefore important that the court determining an application for bail pending trial should conduct a delicate balancing act, so as to get the reasonable conditions for the particular case at hand.

Some of the factors that undoubtedly influence the determination of the conditions include the nature of the offence; the value of the subject matter of the property (if any) involved in the case; and the sentences prescribed by law.

If the offence was of a very serious nature, it would probably attract stiff sentences. In that event, the

terms for bail or bond would correlate proportionally to the seriousness of the offence.

But then again, the court is obliged to also bear in mind the legal presumption of innocence, on the part of the accused person.

Having now undertaken the appropriate balancing act, I set aside the bail terms that were imposed by the learned trial magistrate, and I order that the applicant do execute a Personal Bond of Kshs.4,000,000/-, together with two or three sureties whose securities shall cumulatively add up to KShs.4,000,000/-. The said sureties will, of course, have to be approved by the learned Deputy Registrar.

It is so ordered.

Dated, Signed and Delivered at Nairobi, this 10th day of May, 2012.

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FRED A. OCHIENG

JUDGE