



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI LAW COURTS)

Miscellaneous Criminal Application 237'A' of 2012

JAMES NG'ANG'A MUGOAPPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

1. The Applicant then filed the application presently before me seeking a revision of the Bail terms granted to him.
2. The Applicant James Ng'ang'a Mugo who is charged with robbery with violence contrary to **Section 296(2)** of the **Penal Code** in Chief Magistrate's Cr. Case No. 250 of 2012, was granted a cash bail of Kshs.5,000,000/- with a surety of a similar amount.
3. Mr. Ndeda the learned counsel for the applicant asserts that the spirit of **Article 49(1)(h)** of the **Constitution** may be said to stem from the provisions of **Article 50(2)(a)**. That Article provides for a universally accepted right which an accused person enjoys, which is the right to be presumed innocent until proven guilty.
4. The learned counsel urged that the very essence of the provisions above is to ensure that an innocent person does not suffer the hardships of long spell in custody for an offence he may later be acquitted of. The unfortunate reality of the Kenyan Criminal Justice system is that cases tend to take a long duration, a fact which can only be mitigated by allowing the accused persons reasonable bail/bond terms during the pendency of the trial.

5. Mr. Ndeda learned counsel for the applicant urged that whereas the applicant was granted bail the amount of bail the accused was allowed is so exorbitant and excessive in the circumstances as to render the entire process nugatory. The court was urged to consider that the applicant is a young man of limited means, with no prior record and is not a flight risk. That his family is willing to stand as his sureties during the trial.

6. To fortify the case for the applicant learned counsel referred me to the case of: **Patrick Irungu Maina v Republic [2006] eKLR**, and **Perry Muhindi Achega v the Republic [2006] eKLR**.

7. Mr. Kiprop, the learned stated counsel filed no response and opted to leave the matter to the discretion of the court.

8. The paramount issue for determination, in considering an application of this nature is whether the respondents will avail themselves for trial if they are admitted to bail. It cannot be denied that the constitutional right to bail applies to all persons who come before our courts no matter the charges they face. **Article 49(1)(h)** of the **Constitution** in which the right to bail is enshrined however, sets its own limitations. The Article states as follows:

“An arrested person has 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.”

The right to be released on bail or bond is therefore, constitutionally limited by the presence of compelling reasons not to be released.

9. **Article 49(1)(h)** of the **Constitution** vests discretion in the court to consider whether the reasons advanced are compelling to warrant an applicant being denied bail. In the present case the trial court had already set bail at Kshs. 5,000,000/=, which the applicant has stated to be so exorbitant and excessive as to render the whole process nugatory.

10. In setting bail the court must balance the rights of the individual and the interests of the state. I have considered the nature of the charge and find it to be grave indeed. Although the presumption of innocence enshrined in **Article 50(2)** of the **Constitution** operates in favour of the applicant in this case, and such evidence as the prosecution may have is yet to be tendered and tested at the trial, I do note that the applicant is charged under Section **296(2)** of the **Penal Code** and that the particulars of the charge sheet indicate that a life was lost during the robbery. The punishment in the event of conviction is death.

11. Ordinarily, where the charges against the accused person are serious, and the punishment prescribed is heavy, there is more probability and incentive to abscond, whereas there may be no such incentive in cases of minor offences.

12. For the foregoing considerations I revise the bond terms granted to the applicant by the trial court in the following terms:

(i) The applicant be and is hereby released on a bond of Kenya

Shillings 1,000,000/= with two sureties of like amount.

(ii) That the sureties be approved by the trial court.

(iii) That the applicant shall present himself in court whenever required.

(iii) That the applicant shall not interfere in any manner howsoever with the witnesses for the respondent.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **28th** day of **September** 2012.

L. A. ACHODE

JUDGE