REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 479 of 2012

OMAR KORIO ABDALLAH.......................................APPLICANT

VERSUS

REPUBLIC..RESPONDENT

R U L I N G

The applicant, **OMAR KORIO ABDULLAH**, is on trial before the Chief Magistrate's Court, Kibera. He is alleged to have stolen by agent, **contrary to Section 283 (b) of the Penal Code.**

The particulars of the offence were that the applicant, on diverse dates between 17th November 2009 and 17th January 2012, in Nairobi city, being an agent of ALI ABDI NASRI HAJI, stole KShs.40,000,000/-, the property of the said Abdi Nasri Haji which had been entrusted to him for the purpose of trading by the said Ali Abdi Nasri Haji.

In Count II, the applicant is said to have stolen KShs. 33,000,000/- from BARICHALDE ALI JAMAL SABRUYE, which the complainant had entrusted to him for the purpose of purchasing sugar from Mumias Sugar Company.

In Count III, the applicant is said to have stolen KShs.8,988,357/- from ABDURAHMAN ABDULLAHI HALANE, which the complainant had entrusted to him for the purpose of buying sugar from Mumias Sugar Company.

The offences in Count II and Count III are said to have been committed between 1st August 2010 and 2nd February 2012.

It is the applicant's contention that the charges were instigated by his business partners, as the same were based purely on a civil dispute.

The applicant was arrested in Garissa on 22nd August 2012. He was thereafter brought to Nairobi, where he was taken to court on 24th August 2012.

Immediately after plea, the applicant applied for bail. However, the trial court directed that the applicant be held for a period of 4 days, in order to enable the police finalise their investigations.

In principle, the prosecution did not oppose the grant of bail. They only asked the court to impose stiff terms. That request was premised on the total value of the money which the applicant is alleged to have stolen.

The trial court ordered that applicant to execute a Bond for KShs.20 Million with 2 sureties of

KShs.10million each.

Thereafter, the trial court sought and obtained a report from the Probation Officer. Having given consideration to the said report, the court revised the terms downwards to KShs.3 million for Cash Bail or a Bond of KShs.5 Million together with 2 sureties of KShs. 5 million each.

As the persons who had offered to stand surety had come from Garissa, the trial court approved the sureties, subject to verification of the securities that had been tendered by the said sureties.

At the time of verification, the court felt that the securities offered were very questionable. In particular, one vehicle which had been presented by the applicant's son, was found not to belong to the said son. When the court raised questions, the applicant said that the applicant's son had bought the vehicle, but had only delayed the transfer thereof to his name.

As the applicant's son was 16 years old at the date when he allegedly bought the vehicle from his father, the alleged sale could not have been authentic.

In any event, the logbook for that particular vehicle could not be a security being offered by a surety who did not own it.

In the light of what had transpired, the court imposed the following terms;

"I. Bond of KShs.5 million with two (2) sureties of the same amount.

II. The accused person shall deposit his passport with the court pending the hearing and determination of the case herein."

The applicant feels that the terms imposed were onerous and prohibitive. Effectively, the said terms are said to constitute a denial of the very right which the trial court had given in theory.

The applicant also points out that when he was out on bail, he did attend court without fail. He therefore says that he is not a flight risk.

But Mr. Kadebe, learned stated counsel has submitted that the applicant had not been honest in his conduct. He is said to have been actuated by malice.

Furthermore, the trial court is said to have been very kind to the applicant, by even accepting securities whose value did not match the Bond sum, imposed by the court.

Mr. E.K. Mutua, the learned advocate for the applicant asked this court not to consider the fact that one surety had a questionable security. He asks the court to allow the applicant to bring alternative sureties, who would comply with such terms as the court may impose.

In this instance, the vehicle which was a questionable security was actually registered in the applicant's name. However, the logbook was then presented to the court by the applicant's son, who had allegedly bought the vehicle from the applicant.

The court was told that the son had purchased the vehicle over 2 years before he offered it as security. But, the son could not possibly have done so because he was a minor by the time he is alleged to have bought the vehicle.

If the vehicle did not belong to the applicant; and if the person who had offered it as security was not the applicant's son, it would have been in order to suggest that the court should not have taken into account the fact that one surety had a questionable security. However, because of the nexus between the applicant, the surety and the security offered by that surety, it would be improper to disregard those facts.

This court has taken note of the fact that the applicant's son has been punished for having offered a questionable security. He was held in custody for 7 days.

Hopefully, that action has sent a clear message to him and also to the applicant.

I also believe that any other potential surety will have taken note of how seriously the court takes the issue of securities and sureties.

Thirdly, I believe that regardless of how convincing an accused person and his sureties sound, the trial court should always go through the procedures for the verification of securities before the same is approved.

In this instance, the applicant did attend court whenever he was required to do so. However, when a security is questionable, there is a real possibility that the accused person who has secured his freedom on the basis of such security, will not present himself to court.

Because the applicant did attend court when required, that goes to his credit.

However, I note that even when Mr. Olando, RM, approved the securities, he noted that the Bond value remained KShs.5,000,000/-. He therefore stressed that although the value of the securities deposited was KShs.2,890,000/-;

"(1) The surety is approved but the Bond value is of KShs.5,000,000/-, and in the event that the accused defaults to appear the bond payable is Kshs.5,000,000/-."

The surety being approved therein was ABDI HUSSEIN GUNE, the 3rd surety.

Meanwhile, the 1st surety, AHMED DAHIR SALAT, had told the court as follows;

"I know my responsibility is to make sure that the accused comes to court, and I know that if he fails to come to court then the motor vehicle will be sold and I will be arrested for the same. I know that I will be arrested to satisfy the Bond of KShs.5,000,000/- given to him."

On his part, the 2nd surety, KORIO ABDULLAH OMAR, deposited a logbook of a vehicle valued at KShs.1,740,000/-. The value of that vehicle, when added to the value of the vehicles deposited by the 1st and 3rd sureties, totaled KShs.2,890,000/-.

Therefore, the securities did not reach KShs.5,000,000/- for each of the 2 sureties, as had been ordered by the court which granted the Bond terms.

There is no court order varying the Bond terms from KShs.5,000,000/- with 2 sureties of a similar sum each. If anything, both the 1st and the 3rd sureties remained under an obligation to each satisfy the Bond sum of KShs.5,000,000/-.

In the circumstances, when Mrs. Wachira PM emphasized that the Bond of KShs.5,000,000/- would be backed with 2 sureties of the same amount, the learned magistrate was not enhancing the terms. She was only emphasizing that the terms which had been set by Hon. T. Matheka SPM be complied with.

Accordingly, there is no merit in the applicant's contention that Hon. Wachira PM issued;

"New stringent bond terms of KShs.5 Million and 2 sureties of the same amount."

It strikes me that the applicant did set out to try and meet the terms set by Hon. Matheka SPM. However, his proposed sureties fell short of the terms.

The said sureties appear to have persuaded the learned magistrate who was approving the securities to accept securities whose value did not meet the requirements. The said learned magistrate ought not to have done so.

If the applicant wished to have the terms varied, he should have made a formal application to the court which had imposed the Bond terms. As he has not yet approached that court, I cannot tell what the said court would do if it were to be asked to very the bond terms.

The applicant has not demonstrated why he needed to come straight to the High Court whereas the trial court has the requisite jurisdiction to entertain an application for revision of the terms which it had imposed. I therefore decline the applicant's invitation to review bond terms which were first issued by Hon. T. Matheka on 31st August 2012; and which Hon. Wachira (Mrs) reiterated on 27th September 2012.

Finally, although I have rejected the applicant's application, I nonetheless urge the trial court to bear in mind the provisions of **Article 49 (1) (h) of the Constitution of Kenya,** when the said court is called upon to review the terms for the release of the applicant on Bond or Bail, pending his trial. I have no doubt that the learned trial magistrate has the capacity and intellect to balance between terms which will ensure that the applicant feels obliged to attend court until his trial is concluded, with the need to ensure that the terms do not become an obstacle to the applicant's realization of his right to bail pending trial.

Dated, Signed and Delivered at Nairobi, this 28th day of November, 2012.

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FRED A. OCHIENG
JUDGE