



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Criminal Application 402 of 2012

THOMAS MUTUNE.....APPLICANT
VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 438 of 2012 in the Chief Magistrate's Court at Kibera – E. Ominde (CM) on 01/2/2012)

RULING

1. What is pending before this court is an application dated 30th July 2012 brought by way of Notice of Motion, under **Section 123(3) of the Criminal Procedure Code, Cap 75 Laws of Kenya**. In the application, the applicant **Thomas Mutune** prays for variation of bail terms granted to him in **Kibera Criminal Case No. 438 of 2012.**
2. Mr. Thiong'o, learned counsel for the applicant, submitted that the learned trial magistrate admitted the applicant to a cash bail of Kshs. 2,000,000/= on the 1st February 2012. Since then the applicant has made futile attempts to meet those bond terms. The learned counsel submitted that the applicant is a Kenyan from Kabati village in Kitui, and is married with two children. That he currently resides at house No. 16 Harambee Estate in Nairobi, and he is a sole bread winner of his family which is suffering due to his incarceration. He is therefore unlikely to abscond.
3. The learned counsel referred me to **Cr. App No. 322 and 377 of 2000 Thomas Kada Dalu vs Rep.** in which the accuseds were charged with trafficking in Narcotic Drugs. The lower court granted each applicant bond of Kshs.10 million with two sureties of like amount.
4. On appeal the High court reduced the bond terms to half a million with a surety of similar amount pending trial. The learned counsel urged the court in the instance case to reduce the bond to Kshs.300,000/= with a surety of similar amount.
5. Mr. Mulati learned state counsel opposed the application stating that the applicant is asking for affordable terms to the extent of proposing his own figure of Kshs.300,000/-. In the learned state counsel's opinion, Bond has nothing to do with affordability, and everything to do with reasonableness. It is intended to compel the applicant to attend court. The learned state counsel submitted that the nature of the offence was serious and the value of narcotic drugs was more than Kshs.4.7 million, and that the bond terms were therefore reasonable in those circumstances.
6. In **Republic v Danson Mgunya & Ano. HCCR NO. 26 OF 2008**, Hon. Ibrahim J, as he then was, comprehensively considered the issues to be taken into account in determining "**compelling**

reasons” not to release an accused person on bail. I have considered some of the criteria set out in Danson Mgunya as herein under, in respect of this case:

7. The nature of the charges, and the gravity of the punishment in the event of conviction: Ordinarily, where the charges against the accused person are serious, and punishment prescribed is heavy, there is more probability and incentive to abscond, whereas there may be no such incentive in cases of minor offences. The nature of the charges herein is grave and the punishment in the event of conviction which is life imprisonment, or three times the market value of the subject matter of the charge, is severe indeed.

8. The strength of the evidence which supports the charge, and the likelihood of the accused interfering with witnesses or suppressing evidence that may incriminate him: The courts are usually, not willing to remand an accused person in custody where the evidence against him/her is tenuous, even if the charges are serious. On the other hand, where the evidence against the accused person is strong the court may consider it justifiable to remand him/her in custody.

9. In Republic vs Muneer Harron Ismail & 4 others, H.C. Criminal Revision No. 51 of 2009, Warsame J. stated as follows:

“In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him.

the court must be allowed to fulfil its traditional function of balancing the interests of the State and those of individual.

10. At this point the presumption of innocence enshrined in **Article 50(2)** of the **Constitution** operates in favour of the respondents, and such evidence as the prosecution may have is yet to be tendered and tested at the trial.

Having considered the submission of the applicant/accused, the reply from the respondent, the gravity of the charge, and the severity of the sentence in the event of conviction, I am pleased to exercise my discretion in favour of the applicant and reduce the bond terms from Kshs. 2,000,000/= with one surety of like amount to Kshs.1,000,000/= and one surety of like amount.

It is so ordered.

SIGNED DATED and DELIVERED in open court this **15th** day of **November 2012**.

L. A. ACHODE
JUDGE