

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Crim Appli 759 of 2007

FEISAL SHARIFF MOHAMMED.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

R U L I N G

Before me is an application by way of Chamber Summons dated 24th October, 2007 filed by Ms. ONGEGUA Associates advocates on behalf of the applicant. The application is purported to have been filed under section 123(1), and (3) of the Criminal Procedure Code (cap. 75 Laws of Kenya). The substantive prayer sought in the application is that the court be pleased to allow the applicant to deposit insurance bond of Kenya Shillings Two Hundred Thousand (Kshs.200,000/=) as bail with or without conditions as the court may please. The application has grounds on the face of the Chamber Summons and is supported by the affidavit of the applicant **FEISAL SHARIFF MOHAMED**.

From the grounds of the application as well as the supporting affidavit, it is clear that the applicant has been charged in Nairobi Chief Magistrate's Criminal Case No.1097 of 2007 with several counts relating to issuing of cheques. He was granted cash bail of Kshs.200,000/=. However, he wanted the cash bail to be substituted with bond of similar amount from Corporate Insurance Company Ltd. That application was declined by the subordinate court. That refusal gave rise to the present application.

At the hearing of the application, Mr. Monda, learned counsel for the applicant submitted that the applicant faced bailable offences before the subordinate court and was put on cash bail of Kshs.200,000/=. He applied for substitution of the cash bail with insurance bond, which was denied. Counsel contended that the denial of insurance bond was a misdirection by the learned magistrate as the insurance company in question was a reputable insurance company and bound itself to forfeit the amount of bond. Counsel argued that the principal reason for bonds was to ensure the attendance of accused persons in court for the case. Counsel submitted that courts had released suspects on land title deeds, on motor vehicles log books, fixed deposit slips, share certificates and civil servants pay slips. Counsel submitted that though insurance bonds had not been used in our criminal law system they had been used in the civil jurisdiction such as in the case of JAMES NJOROGE –VS- KENYA CEMENT MARKETING LTD. where an insurance bond for Kshs.40,000,000/= was accepted for performance of a contract. Counsel also submitted that Lord Denning in the case of REGINA –VS- SOUTHAMPTON JUSTICE 1QBD 15 summed up a cognizance as a bond in which failure to fulfill it gives rise to a civil debt. It could also be enforced by committing a defaulter to prison. Counsel submitted that though he did not produce statements of accounts confirming the repute of the insurance company, the company was sound financially.

Mrs. Obuo, Learned State Counsel, submitted that the insurance bond sought was a new concept. If the court accepted it, it would bind the Insurance company, the accused and the court. Counsel felt that the court should order directors of the company to personally appear in court and verify the authenticity of the bond by oath. The said directors should be held responsible if the company collapses. Otherwise the State Counsel left the matter for the decision of the court.

In a short reply, counsel for the applicant submitted that only an authorized employee or representative like himself should come to court, not directors.

I have no doubt that under section 123 of the Criminal Procedure Code, this court has powers to review the terms of bond granted by a subordinate court. Having considered the application and submissions of both counsel for the parties. I cannot grant the prayers sought.

Firstly, insurance companies operate on the basis of insurance arrangements with their insureds. It has not been disclosed to this court, what type of relationship the insurance company in question has with the accused/applicant for this court to satisfy itself that indeed there is a legally enforceable arrangement that can be executed. We also have not been shown the kind of bond envisaged.

Secondly, in my view, securities for bond in criminal cases are personal and not corporate. The provisions of section 131 of the Criminal Procedure Code (cap.75) clearly envisages a personal liability, therefore when counsel for the applicant objects to the commitment of directors of the insurance company – that argument flies in then it flies the face of the provisions of section 131. The suggestion by counsel of the applicant that authorized employees or himself appear in court is neither acceptable nor does it have any legal basis. The suggestion smacks of an attempt to trivialize the seriousness of the bond or bail as known in criminal cases. Counsel has not even been able to vouch for the stability or financial soundness of the insurance company.

In those circumstances, I find no merits in the application and dismiss the same.

Dated and delivered at Nairobi this 25th day of February 2008.

George Dulu

Judge

In the presence of ?

Mr. Monda for applicant

Mrs. Obuo for State absent

Mr. Mwangi – court clerk