



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

(Coram: Ojwang, J.)

MISC. CRIMINAL APPLICATION No. 807 of 2007

BETWEEN

MARTHA WAIRIMU WAITHAKA.....APPLICANT

-AND-

REPUBLIC.....RESPONDENT

RULING

The applicant comes before this Court by Chamber Summons dated 19th November, 2007 and brought under s.357 of the Criminal Procedure Code (Cap.75, Laws of Kenya); s.72(5) of the Constitution of Kenya; and “all other enabling legal provisions.”

The one element that rendered this application a much-contested one, was the nature of the application: “THAT the Applicant herein *Mrs. Wairimu Waithaka* be admitted to bail pending the delivery of judgement in Criminal Appeal No. 48 of 2007”; and “THAT the Honourable Court do issue such further orders and directions [as] it deems fit ...in the circumstances of this case.”

In the general grounds upon which the application rests it is stated that judgement, which had been scheduled to be given on 19th November, 2007 has now been re-scheduled to be delivered on 3rd March, 2008; that in view of this development it will be in the best interests of justice for the applicant to be released on bail, pending the outcome of Criminal appeal No. 48 of 2007; that the appeal has overwhelming chances of success; that the appeal raises substantial points of law the effect of which is to render the entire trial a nullity; that the applicant is ailing, and the Court should exercise its discretion regarding the pending judgement.

The evidentiary basis of the application is set out in the affidavit of learned counsel *Mr. Ondieki*, but the facts deponed therein are basic and are already clear from the face of the application itself.

Learned State Counsel, *Mr. Makura* raised a preliminary objection to this application: that it fell not within a category known to law, and that the only known categories are bail pending *trial*, and bail pending *appeal*. The notion of bail pending judgment, counsel urged, was an abuse of the process of the Court.

Learned counsel *Mr. Ondieki* was of a different view, and said he was making a *sui generis* proposition

which, however, would well coincide with the terms of s.72(5) of the Constitution, and the broad discretionary competence of the High Court.

On this preliminary point I directed as follows:

“The instant application raises important questions of law not canvassed. A correct decision cannot be reached without argument. Therefore I adjourn this hearing to 6th February, 2008 when counsel will come and argue the point before the matter is determined”.

At the adjourned hearing, **Mr. Ondieki** urged that the application was informed by S. 72(5) of the Constitution, and that this section gives a wide discretion to the Court, in the interests of justice. Counsel further drew from s.65(2) of the Constitution which provides:

“The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate Court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those Courts”.

This supervisory competence of the High Court, learned counsel urged, provided a backcloth against which there lay a general discretion to provide relief such as was being sought in the application.

To this argument, **Mr. Makura** had an objection: the applicant had cited s.357 of the Criminal Procedure Code as a basis for the application, yet that provision related expressly to bail *pending appeal* and nothing else. In the circumstances, learned State Counsel urged, the applicant ought to have sought leave to amend the application.

Mr. Ondieki submitted that s.65(2) of the Constitution bore a wide meaning and that, by virtue of it, the High Court may issue any writs to serve the interests of justice.

Learned counsel then argued, on the basis of s.77(9) of the Constitution, that the High Court should be minded, on the facts of the instant matter, to grant bail *pending judgment*, because it is provided in the said paragraph that ?

“...where proceedings for [the determination of the existence or extent of a civil right or obligation] are instituted, the case shall be given a fair hearing within a reasonable time”.

The point here being made, clearly, was that since delivery of judgment had been postponed from 19th November, 2007 to 3rd March, 2008 a delay had resulted not in keeping with the requirement of s.77(9) of the Constitution and, therefore, conditions called for an exercise of judicial discretion in an *extraordinary manner*, so as, in effect, to recognise a *new category of bail*.

Mr. Ondieki met the challenge that he was relying on bodies of law not cited in his application-rubric, with the riposte that the same rubric made specific reference to “all other enabling legal provisions”.

Learned counsel went further and invoked some of the arguments he had *already made at the hearing of the appeal*, and supposed that some of the points he had raised, would predispose the outcome in a particular manner, and the Court, being aware of outcome-probabilities, should take them into account and grant bail to his client.

Learned counsel **Mr. Makura** submitted, by contrast, that the instant application was misplaced, misconceived, incompetent, and all for striking out. It was urged that “bail pending judgment” fell in no known legal category; for the outcome of a judgment could not be predetermined. He submitted that it would defeat the legal process if an applicant in custody could be released pending judgment. **Mr. Makura** urged it to be improper that the instant application should invoke the High Court’s *revision powers* in relation to Subordinate Courts: there was nothing now pending, to be revised, as the matter had long left the hands of the Magistrate’s Court and come before the High Court for hearing and disposal. In

learned State Counsel's submission, the instant application cannot but be mischievous.

There is no doubt that learned counsel **Mr. Ondieki** has endeavoured industriously to purvey a reconstruction of the law of criminal procedure. He drew generously from the Constitution, as a source of principle to activate the exercise of the Court's discretion, in recognising a new category described as bail pending judgment.

The difficulty with such a proposition is that it would pre-empt the eventual outcome of the case. All pertinent issues of fact and law may properly be canvassed while the appeal is being heard; but from the moment judgment date is assigned, the judicial bearing covers the question with *privilege*; prospective judgement is not to be bared; it is not to be discussed; it is the exclusive pre-occupation of the Judge; it is to be solemnly declared on the notified date. It follows, that any application predicated on a supposition of the eventual outcome, bears elements of a passive contempt, which, necessarily, renders it *incompetent*; and for that very reason, no competent application carrying prayers such as are contained in the instant one, can be founded on the very arguments which had been raised at the hearing of the appeal.

Learned counsel has generously drawn from the Constitution, as a foundation for rights such as those claimed in the application, and as the basis of a broad judicial discretion to administer justice. Whenever, however, attempts are made to resort to the Constitution in such a *general manner*, it is often found that there are, in place, *competing constitutional values*; and the most significant one in this case is the need to protect the *independence and impartiality of the Judiciary*; the need to recognise the *confidentiality of judgement*, and of its process of construction; the object of not pre-empting the outcome of a judicial decision. These are wider public-interest objects which, in my opinion, ought not to be subordinated to the special claims of a party.

These principles lead me to refuse the applicant's prayers made by way of the Chamber Summons of 19th November, 2007.

It is so ordered.

DATED and DELIVERED at Nairobi this 20th day of February, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Huka

For the applicant: Mr. Ondieki

For the respondent: Mr. Makura