REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 227 of 2008

KENNEDY JUMA ABURA…..……..…….. APPLICANT

-VERSUS-

REPUBLIC……..……...RESPONDENT

RULING

The applicant moved the Court by Chamber Summons dated *23rd April, 2008,* and brought under s.123(1),(2) and (3) of the Criminal Procedure Code (Cap.75, Laws of Kenya). The application carries the following prayer:

"That this Honourable Court be pleased to exercise its power under section 123(3) of the Criminal Procedure Code to vary my bail/bond of Kshs.500,000/= and two surety bonds of Kshs.1,000,000/= to a reasonable and affordable amount to suit an ordinary Kenyan citizen of low income."

In the supporting affidavit the applicant depones that he was arrested on 7th July, 2007 and arraigned in Court on 20th July, 2008 on a charge of trafficking in narcotic drugs contrary to s.4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 (Act No. 4 of 1994). He avers that he had pleaded not guilty, and was denied bail/bond. When the applicant renewed his application for bail/bond before the Chief Magistrate's Court, on 30th August, 2007 he was granted a cash bail of Kshs.1,000,000/=. He was unable to meet the terms of bond, and, on 11th March, 2008 he applied for a variation of terms; and the bail/bond amount was then reduced to Kshs.500,000/= – which the applicant is still unable to pay. On 17th March, 2008 he again applied for a variation of bond terms; and the learned Magistrate then granted a bond of Kshs.1,000,000/=, supported with two sureties in like amount; and the applicant has not been able to provide this.

The deponent prays for a variation of bail/bond to "a reasonable and affordable surety bond of Kshs.300,000/=".

The deponent avers that he is "sick and suffering from [Tuberculosis] and severe anaemia"; he says his

health is "deteriorating due to poor conditions in custody."

When learned State counsel ***Mrs. Obuo*** raised the objection that the applicant had only recently brought a similar application before the Court, the Court noted that, where an application is a replica of an earlier one, the right course is not to come before the High Court but to proceed to the Court of Appeal. Orders were then made for the production of the file on the earlier case.

The records show that some two months before the instant application, on *27th February, 2008* the applicant had moved this Court by a Chamber Summons application. The prayers in that application were: "that the Court may be pleased to quash this trial as it is illegal"; and "that the Court may be pleased to issue any further orders which it may deem fit." But those were not the points argued in the earlier application, and on this particular issue this Court noted in the ruling (delivered on *18th June, 2008*):

"**When this matter came up for hearing, on 30th April, 2008 learned counsel *Mr. Ondieki* brought as part of the application an entirely new matter – *variation of bail terms*. As it appeared that the bail-terms question was the sole point the applicant was keen to take up, it became the matter before the Court, at an adjourned hearing."**

In the end, the applicant's prayer for the variation of bond terms was dismissed.

That is the background against which the instant application now comes; and it may be recalled that the applicant is seeking *the very prayer which had been dismissed on 18th June, 2008,* namely, *variation of bond terms.*

Is this Court now being asked to consider a matter which would, in law and in regular judicial practice, have to be placed before *the Court of Appeal?* I would have agreed with learned State Counsel, on the objection. Since ***Mr. Ondieki*** maintained that the earlier application, *High Ct. Misc. Crim. Application No. 124 of 2008* was about *variation* of bond terms, and the instant application was concerned with *reduction* of cash bail and so the respective prayers were at variance, I made an extempore ruling as follows –

"**The preliminary point arising has to do with *reduction* or *variation* of bond terms. Learned respondent's counsel urges that this point had featured in the earlier ruling regarding *variation*. But counsel for the applicant contends that there is a difference between *variation* and *reduction.***

"**These are not terms of art in law – and so reduction can very well mean *variation.***

"**Consequently, in substance I will not draw a strict line between the two.**

"**And therefore, *Mr. Ondieki*, learned counsel for the applicant shall found his application on *constitutional principles*, and not on a differentiation between the two words."**

Mr. Ondieki submitted that the rights of the applicant as an accused person had been violated – because he was held for more than 24 hours in custody, contrary to the terms of s.72(3)(b) of the Constitution, and contrary to the terms of s.36 of the Criminal Procedure Code (Cap.75, Laws of Kenya).

Although the application coming up for hearing had nothing to do with claims in respect of breached *constitutional rights*, learned counsel devoted much time to alleged breaches of the applicant's rights under ss.70, 72 and 77 of the Constitution, and he even cited case authorities on those provisions of the Constitution.

Learned respondent's counsel, ***Mrs. Gakobo*** contested the claims of violation of the applicant's constitutional rights, and urged that the arrest and detention of the applicant in relation to the suspicion of drug-trafficking, had been attended with all due diligence on the part of the Police, who had even filed an

apprehension report in Court. Counsel urged that even though, by s.36 of the Criminal Procedure Code, an arrested suspect could be released on Police bond, the offence in the instant case "was a very serious matter; and the Investigating Officer has explained that she could not risk release, as she feared that the applicant might abscond."

In an application in which the only prayer was for the *variation of bond terms*, it was improper to focus submissions on unrelated issues, a point which learned respondent's counsel raised. Any constitutional questions such as could have properly been raised, had to be founded on principle, and to be so designed as to shed light on the real issue: *variation of bond terms;* and I find that ***Mr. Ondieki*** had let that opportunity go by default.

But more disturbing, is the fact that learned counsel was re-arguing a point already disposed of in an earlier application. The matter, as before this Court, was now *res judicata*.

I will, therefore, ***dismiss*** the applicant's prayers contained in the Chamber Summons of 23rd April, 2008.

Orders accordingly.

DATED and **DELIVERED** at Nairobi this 17th day of September, 2008.

J.B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Huka

For the Applicant: Mr. Ondieki

For the Respondent: Mrs. Gakobo