



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**(CORAM: OJWANG, J.)**

**MISC. CRIMINAL APPLICATION NOS. 506 & 507 OF 2007**

**(CONSOLIDATED)**

**MICHAEL NG'ANG'A KANYI.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**-AND-**

**JORAM KAMAU WAINAINA..... APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

In the first application by Chamber Summons dated 12<sup>th</sup> July, 2007, the 2<sup>nd</sup> accused, **Michael Ng'ang'a Kanyi** prayed that he be released on bond on such terms as the Court may direct, pending the hearing and determination of Criminal Case No. 1017 of 2007: **Republic v. Joram Kamau & Michael Ng'ang'a Kanyi**; and in the second application, of even date, the 1<sup>st</sup> accused in the said criminal case made a similar prayer.

Both applications came under certificate of urgency wherein counsel with the conduct of the matters thus states:

- (i) the applicants had been unlawfully detained in Police cells from 16<sup>th</sup> June, 2007 to 25<sup>th</sup> June, 2007 when they were brought before the Courts, on certain charges;
- (ii) upon the recording of pleas of not guilty, the trial Court imposed bail terms, requiring the payment of Kshs.100,000/= in cash, which the applicants were unable to pay;
- (iii) the applicants are Kenya citizens who though gainfully employed, cannot afford to pay the monies required as bail, in cash.

(iv) the Court do grant bond on such terms as may be reasonable.

In support of the first application, **Joyce Wangari**, the wife of the applicant depones that the applicant has at all material times, been an employee of Cousin Service Station at Ring Road, Ngara, the property of one **Mustafa Khimji**. On 16<sup>th</sup> June, 2007 the applicant signalled to the deponent that he had been arrested by Police officers from the Central Police Station; and she went to the said Police station and found the two applicants herein under arrest. It was **nine days** later, that the two applicants were taken before the Court, and charged, on which occasion they were ordered to be released only on a cash bail of Kshs.100,000/= each. The deponent then gave instructions for the instant application to be made, for the release of her husband on bond, on such terms as the Court may determine. The deponent believes to be true the advice of his advocate, that, in imposing the cash-bail terms, the trial Court had not considered the option of a bond-on-terms, as a mode of securing the attendance of her husband in Court as may be required.

The deponent avers that her husband earns the meagre sum of Ksh.12,884/= per month, “and is left with about 1,500/= per month as savings after normal household expenses.” She depones that she is unemployed, and has no place from which to borrow the sum of Kshs.100,000/= which has been imposed as cash bail to secure the release of her husband during the pendency of the criminal case against him.

In the case of the 2<sup>nd</sup> applicant, his father swore a supporting affidavit in which he avers that he is the father of this applicant, who is a colleague of the 1<sup>st</sup> applicant at one place of work. The 2<sup>nd</sup> applicant had been charged alongside the 1<sup>st</sup> applicant, with the offence of obtaining goods by false pretences contrary to s.313 of the Penal Code (Cap.63, Laws of Kenya), on 25<sup>th</sup> June, 2007 after being held by the Police as from 16<sup>th</sup> June, 2007. After both applicants pleaded not guilty, they were subjected to cash-bail terms, in the sum of Kshs.100,000/=, which they could not afford. The deponent believes to be true the advice of his advocate, that his son, the 2<sup>nd</sup> applicant, works as a pump attendant, and earns a salary of Kshs.7,490/= per month, and has no savings from which he can pay the cash bail required. The deponent avers that “almost all the family members of [the 2<sup>nd</sup> applicant] are [peasants] who cannot afford to raise a cash bail of [Kshs.100,000/=].” The deponent states that **he** would be in a position to stand surety for the 2<sup>nd</sup> applicant if the Court were to provide for bond terms incorporating the role of a surety. The deponent states his belief, that the cash-bail terms ordered by the trial Court, to the exclusion of suitable bond terms, “amounts to [a] constructive denial of bail/bond.”

Learned counsel **Mr. Chege** stated in Court that since the two applications were filed, the 1<sup>st</sup> applicant has been released after his family borrowed the sum of Kshs.100,000/= and paid it into Court as cash bail, but the 2<sup>nd</sup> applicant remains in custody. He urged that a variation to the bail/bond terms be made, firstly to enable the 1<sup>st</sup> applicant’s family to retrieve the bail monies already paid; and secondly, to secure the release on bond of the 2<sup>nd</sup> applicant. Learned counsel urged that bond-and-surety terms be granted, to maintain the 1<sup>st</sup> applicant’s liberty during the pendency of trial; he affirmed that in the event such an end was achieved, the 1<sup>st</sup> applicant would not abscond the due course of justice in the criminal case. Counsel made a similar case in relation to the 2<sup>nd</sup> applicant as well.

Learned State Counsel **Ms. Gakobo**, however, contested both applications. She urged that the bail terms imposed by the trial Court were “reasonable, and not excessive”: because in the charge, the two applicants are alleged to have obtained the sum of Kshs.498,000/= from the complainant. Counsel urged that the trial Court did have a discretion to give cash-bail, or surety/bond terms, and that the nature of the charges laid, had been taken into account by that Court. Counsel urged that it had not been “shown that the learned Magistrate did not exercise his discretion in a judicious manner in granting bail.” **Ms. Gakobo** urged that the bail terms as granted be not interfered with, as they had been determined to be sufficient to ensure the applicants presented themselves for trial.

In his response, **Mr. Chege** submitted that this Court has a wide discretion to make appropriate orders to secure attendance of accused persons, during trial. Before the trial Court, learned counsel had already

sought a variation of the bail/bond terms (on 3<sup>rd</sup> July, 2007) – but unsuccessfully; and so it had become necessary to bring the matter to the High Court. Counsel said his clients were only praying for alternative security arrangements, for the appearance in the trial Court of the applicants – especially in the light of the evidence of their earnings as this stood. Counsel apprehended in particular that, without a variation to the bail/bond terms, the 2<sup>nd</sup> applicant might remain in custody for long periods of time.

The applicants have placed before this Court evidence that their earnings are limited, and they (in particular the 2<sup>nd</sup> applicant) have difficulties in benefiting from the bail terms granted, to secure their liberty during the pendency of trial. The applicants have also alluded to a question, that they were held in Police custody for some nine days before being charged in Court, but this is not the immediate question before this Court.

Whenever a charge is brought against an accused person, I would note, there are *two vital causes* running in parallel: firstly, it is a dictate of criminal justice that the matter be dutifully prosecuted, until guilt or no-guilt is determined; and secondly it is a *right* of the accused to partake of bail/bond terms and to secure his or her liberty pending trial, unless the offence charged is by law unbailable. Striking a balance between those two objects is a function of *discretion* entrusted to the Court. This is *judicial discretion*, and so it cannot be arbitrarily exercised; it must be founded on a judicious assessment of the pertinent facts.

What are the facts, in this regard? (i) The prosecution allege that the applicants have obtained goods by false pretences – goods bearing the value of Kshs.488,450/=. (ii) The applicants deny that allegation, and they plead not guilty. (iii) The applicants are being tried for the said offence – as should indeed be the case. (iv) Attendance of the applicants in Court during trial *must* be secured. (v) The applicants are both employees at a fuel station, where their status is that of attendants, with only rather limited earnings. (vi) Is there a risk of the applicants absconding the trial process? They say they won't do that. But if they were released on bail/bond and they then absconded, how could this be redressed, in the *public interest*?

In considering those questions, the terms of upholding the rights of the accused persons should incorporate a range of alternatives: cash bail; bond/surety.

I am in agreement with learned State Counsel, **Ms. Gakobo** that a cash bail of Kshs.100,000/= as imposed by the trial Court, cannot be said to be unreasonable, in the circumstances of this case. I do not, indeed, apprehend learned counsel **Mr. Chege** to be disputing that fact. I think the real issue in the applications is, whether it is meet to provide an *alternative security*, apart from the cash bail.

To rule out an alternative security for the applicants' attendance in Court, I think, is not right, as it would have immediate negative impacts on the trial-rights of the accused persons. There can be no doubt that, from a management-standpoint, it is always a great convenience to the prosecution if accused persons are delivered before the trial Court from a secured custody; but the price of such an arrangement must be to rein-in and to somewhat regiment the way of life of individuals; the effect would be, I believe, to derogate from the enjoyment of personal liberties as provided for in Chapter V of the Constitution, on the fundamental rights of the individual. This Court, in my opinion, ought not to assume a policy-orientation which prefers such a constriction in the enjoyment of individual liberty.

On the foregoing principles, I will agree with learned Counsel **Mr. Chege**, that an alternative to the cash-bail term imposed by the trial Court in the instant matter, must be given.

Consequently I will make orders as follows:

- 1. In both applications, Misc. Crim. Application No. 506 of 2007 and Misc. Crim. Application No. 507 of 2007 the current bail terms shall remain in place.**
- 2. As an alternative to the bail terms in force, I hereby grant a *personal bond* for the 2<sup>nd</sup> applicant, to be duly executed, and to be secured by a surety or sureties by way of *property***

***title deed and/or motor vehicle ownership document* bearing a value of Kenya Shillings Five Hundred Thousand Only (Kshs.500,000/=).**

**3. Before any such property-ownership titles are accepted as security, a search shall be conducted in the pertinent registration office, to confirm validity and authenticity.**

***Orders accordingly.***

**DATED and DELIVERED** at Nairobi this 30<sup>th</sup> day of July, 2007.

**J.B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court Clerk: Tabitha Wanjiku**

**For the Applicant: Mr. Chege**

**For the Respondent: Ms. Gakobo**