



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Criminal Appeal 38 of 2007

MICHAEL NDAMBIRI NDERI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The appellant filed an appeal against the order of Senior Resident Magistrate Kerugoya in Criminal Case No 611 of 2007 made on 16/5/2007 refusing to admit the appellant to bail. The grounds are set out in the appeal.

1. that the Trial Magistrate did not exercise his discretion judiciously .
2. that the Trial Magistrate contravened Section 57 of Evidence Act which deals with the evidence of bad character in criminal cases.
3. that he relied on extraneous matters/facts
4. that the Trial Magistrate misdirected himself issues he ought to consider before deciding on bail.
5. that he relied on hearsay evidence.
6. that he failed to make any finding on whether the rights of appellant were violated for being held in custody for 8 days.
7. that he failed to take into consideration the counsel submissions and authority submitted.
8. that he failed to appreciate that allegations by DCIO were the basis of the case and were not relevant to the issue of bail
9. that he failed to appreciate that the appellant is by law presumed innocent unless otherwise proved guilty.
10. that the Trial Magistrate erred in exhibiting bias against the Appellant.

The appellant was charged with conspiracy to murder contrary to Section 224 Penal Code. The proceedings show that on 7/5/2007 the applicant through his counsel made an application for bail before the Trial Magistrate saying that the appellant is a resident of the area. He is a businessman. The offence he is facing is bailable. His rights have been violated by police as he was held in custody for 8 days before being brought to court. He will adhere to any conditions the court may give.

The prosecution submitted that the appellant is becoming a persistent threat to the complainant. Accused has been charged in this court on various offences. The DCIO Kirinyaga had given affidavit showing that the appellant has a chain of offences. Mr. Magee cited to the court the case of **Lillian Kahine Musyoki vs Republic Criminal Appeal No. 646/2004** where the court said that a person who is likely to abscond may not be granted bail.

I have read the ruling of the trial Magistrate. It was in his knowledge that the appellant had other cases in that court and had been bonded but never absconded. However his threats to complainant is clear interfering with witnesses. The Trial Magistrate found that to grant the accused bail would be to undermine the cause of Justice.

Upon considering the record I find that an accused person interfering with witness does not deserve to be admitted to bail. The authority of **Gachara vs Republic [2004] 1 KLR** was cited by the applicant where the court held that fundamental rights and freedom of individual protected under constitution of Kenya are subject to the rights and freedom of others. The applicant just alleges his rights were violated but

does not demonstrate how and if the rights were not subject to right of others. In any case there is the correct forum to raise such violations. In that case the court held that bail may be granted unless it is shown by prosecution that there are substantial grounds for believing that the accused will not turn up for trial. In the case of Muraguri vs Republic [1989] KLR 181 the court held that there should be a definite allegation of tampering or attempted tampering with witnesses supported with prove or admitted facts showing reasonable case for the belief. It was also held in that case that where the offence is serious an applicant would be tempted to abscond. There is also the ruling of Etyang J. in the case of Thomas Maraga Maose vs Republic Criminal Application No. 4671 of 2001 where principles on granting bail are set out.

I have considered the application and submissions by counsel. I have also taken into the account of the Affidavit and sworn evidence given by DCIO Senior Officer in the police force in the area where the appellant resides. I believe him when he says that the charge is serious and the accused has threatened to kill the complainant. The affidavit shows that the appellant has been involved in several cases one involving violence (assault) and this shows he is of band character. In the circumstances, I find the refusal of bond/bail by the Trial Magistrate to be justified and based on correct principles of law as to granting bail.

I therefore dismiss this appeal and reject the prayer for bail. I find no grounds to warrant the transfer of the case to another court because all the Trial Magistrates was not to apply the law. In any case it appears there are other cases against the appellant pending before the same court. The prayer is rejected.

Orders accordingly.

Dated this 18th July, 2007.

J. N. KHAMINWA

JUDGE

18/7/2007

Khaminwa – Judge

Njue – Clerk

Mr. Momanyi HB for Magee

Mr. Kimathi for State Counsel

Ruling read in open court.

J. N. KHAMINWA

JUDGE