



REPUBLIC OF KENYA

HIGH COURT OF AT NAIROBI (MILIMANI LAW COURTS)

Misc Crim Appli 374 of 2007

PATRICK ODUOR..... APPLICANT

-VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant came before this Court by Notice of Motion, dated 28th May, 2007, brought by virtue of ss.362 and 364(1)(b) of the Criminal Procedure Code (Cap.75). He was asking that this Court do call for the proceedings at the Makadara Law Courts, in Criminal Case No. 7201 of 2005. His complaint was aimed at the order issued on 19th April, 2007 which cancelled the applicant's bond; he was asking that the same be reviewed.

He stated as grounds, the manner in which the learned Magistrate had construed his asthmatic health status, without herself being a medical expert, and then such construction leading to the cancellation of the personal bond which he had been granted earlier.

The relevant portion of the learned Senior Resident Magistrate's ruling reads as follows:

"I note that on 28th March, 2007 the accused was absent and Mr. Ongao, counsel for the accused attended Court and [so] informed the Court. A warrant of arrest was issued as there were no treatment chits produced by counsel, and a mention was fixed for 17th April, 2007, when the accused duly attended Court with a treatment chit dated 26th March, 2007 which very clearly shows [that] the accused has an asthmatic [condition] and was seen and put on chemotherapy and off-duty for three days.

"I do not concede. I am not a medical practitioner; however, to the best of my knowledge chemotherapy is treatment administered to cancer patients and not asthmatic patients. This clearly shows [that] the alleged treatment chit which is on the Court file cannot possible have been issued by a medical practitioner. The import of this is [that] the accused has decided to make a mockery of the Court by failing to attend and by presenting an [incredible] treatment chit.

"The Court will not under any circumstances condone such unbecoming [and] disrespectful conduct. The impunity with which such a document [has been] presented to the Court is extremely worrying and must be deterred. For the foregoing reasons...I cancel the accused's bond pending the hearing and determination of the case."

This is now the reasoned ruling which explains the context of the **orders** which I granted on 13th June, 2007. The orders were given after I had recorded consensus in the submissions of learned counsel **Mr. Makura** for the State, and learned counsel **Mr. Mung'ao** for the applicant. It was acknowledged that by virtue of ss.362 and 364(1)(b) of the Criminal Procedure Code, the Court has powers to call up any record of the Subordinate Courts, for the purpose of satisfying itself as to the propriety of any proceedings or orders of such Courts. It was entirely for this Court, in such circumstances, to decide whether to give audience to any parties. Both counsel noted that when the learned Magistrate cancelled the bond – which is the reason for the instant application – counsel had appeared before her and had explained the medical reason which prevented the applicant from appearing personally. At that stage, the trial Court's objection appeared to be that the advocate had brought no medical document as proof of the claim which he was making.

But when, subsequently, the accused himself now appeared in Court with the said medical document, the learned Magistrate appeared to attach hardly any significance to the fact that such a cardinal evidentiary document was now before the Court; she did not take the said document as a possible justification for the accused's failure on the relevant date, to turn up in Court. Instead, the learned Magistrate came up with an entirely new query, to the said medical document itself. She virtually went out on a limb to declare her own understanding of *medical* questions: chemotherapy could not be presented before her as a treatment for asthma, for, to the best of her knowledge, that was only a treatment accorded cancer patients. She did not inquire, for instance, whether it might be that the applicant could have had a history of cancer; she did not consider, as another instance, if chemotherapy could have been prescribed as a remedial course for asthma in combination with some other ailment. On the basis of her psychological disposition at the time, the learned Magistrate laid blame, for disrespect, at the doors of the applicant, cancelled his bond, and had him committed to prison custody.

Learned State Counsel **Mr. Makura** conceded to the application herein, noting that the learned Magistrate would have improperly given herself to speculation, and so her decision lacked justification.

There is no need to restate the facts attending the cancellation of the applicant's bond. Whenever an accused person pleads medical grounds in answer to a charge that he has failed to appear in Court as ordered, the Court has a judicial duty to consider the matter with care and understanding, as no person, *judicial notice* would be taken, calls on illness to descend upon him or her. In this case, the learned Magistrate appears to have taken leave of the requisite temperance to hear a weighty plea placed before her, in the process failing to exercise her discretion judicially. She went further even, and took the stand of the qualified medical doctor who alone should be able to pass judgement on correct prescriptions and therapies for a particular illness.

I will, therefore, restate the orders which I had made on 13th June, 2007, as follows:

- 1. That, the cancellation of the applicant's bond in Makadara Law Courts Criminal Case No. 7201 of 2005, is hereby set aside, and the bond restored.**
- 2. That, the applicant herein shall undergo trial while enjoying the bond terms originally granted.**
- 3. That the applicant shall forthwith be released from custody.**

Orders accordingly.

DATED and DELIVERED at Nairobi this 9th day of July, 2007.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Ndung'u

For the Applicant: Mr. Mung'ao

For the Respondent: Mr. Makura