



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appli 422 of 2007

SAMUEL MUREITHI WATATUA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From the ruling of the Chief Magistrate's Court at Nairobi of Criminal Case 319 of 2007)

RULING

Before me is a Chamber Summons dated 13th June 2007 brought under section 123 (2) and (3) of the Criminal Procedure Code (Cap. 75). It seeks for the following orders, that –

1. This Honourable court be pleased to make orders for bond variation.
2. This Honourable court be pleased to admit the applicant on bond terms that include surety.
3. This Honourable court do make further order as it may deem fit and just.

The application is supported by an affidavit sworn by the applicant SAMUEL MUREITHI WATATUA on 13/6/2007. It is deponed in the affidavit that the applicant was charged in Chief Magistrate's Criminal Case No. 319 of 2007 and granted bail of Kshs.1 million without the option of a surety bond. It is also deponed that the applicant applied for surety bond in court No.2, but the same was declined and instead the cash bail was reduced to Kshs.700,000/=. It is further deponed that the applicant is unable to raise the cash bail, and that his mother was ready to stand surety for him. It is also deponed that the sixth accused was granted surety bond.

When the application came up for hearing before me, the applicant was represented by Mr. Kangahi, while Mr. Makura appeared for the State. Mr. Kangahi for the applicant submitted that the applicant was charged jointly with two others with the offence of obtaining by false pretences. Though the cash bail terms were reviewed from Kshs.1 million to Kshs. 700,000/= the applicant had not been able to raise the amount of money of cash bail and was therefore in custody. Counsel also submitted that the trial before the subordinate court was yet to commence. Therefore, the applicant was asking for reviewed bail terms or an alternative of free bond with surety.

Learned State Counsel, Mr. Makura, opposed the application. Counsel contended that the amount involved in the charge was Kshs.6,000,000/=: therefore the cash bail of Kshs.700,000/- was not excessive. The State Counsel contended that an application for variation of the bond terms was rejected by the subordinate court because there were incidents of presentation to court of false documents. In

counsel's view, since the circumstances in the applicant's case had not changed, there was no justification for variation of the bail terms.

I have considered the application and the submissions of both counsel for the parties. I must say, first of all, that there is no sixth accused in this case before the subordinate court, who was granted bond with surety as deponed to by the applicant in his affidavit. Be that as it may, I find from the record that there were three accused persons charged before the subordinate court, including the applicant herein. On 26/2/2007 they were each granted cash bail of Kshs.1 million. On 5/3/2007, on application by counsel for the three accused persons that the bond terms be reviewed and that bond with surety be considered, the subordinate court reduced the cash bail of Kshs. 1 million to Kshs.700,000/=. The court decided that, due to the nature of the charges preferred, bond with surety was not merited.

Bond or bail is a conditional Constitutional right conferred by section 72(5) of the Constitution, which provides –

“72(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any other proceedings that may be brought against him, he shall, unless he is charged with an offence punishable by death, be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial”

From the above provisions of the law, it is evident that the primary purpose of granting bail or bond either conditionally or unconditionally is to ensure the attendance of an accused in court for the trial or proceedings. Cash bail has already been granted in this case by the subordinate court, but the applicant asks this Court to vary those terms.

In accordance with the provisions of section 123(3) of the Criminal Procedure Code (Cap.73), this court has jurisdiction, on a fresh application such as the one before me, to vary the terms of bond granted by a subordinate court, or to grant bond where it has been declined by the subordinate court. The Section provides –

“123(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced”

Indeed, as submitted by the learned State Counsel, the amount involved, as alleged in the charge sheet, is Kshs.6,000,000/=. The charge has however, yet to be proved. The offence charge is a misdemeanour with a maximum sentence of three years. The prosecution, in the subordinate court, did not object to the grant of bond, nor did they propose any particular terms of bail or bond. The contention by learned State Counsel, that there are cases of submission of fake documents is not borne by the record. In any case, that will go to the approval of the documents for security tendered in each case, rather than a blanket denial of bail or bond. It is not a ground for denying someone bond with surety. Additionally, in my view, the fact that one person tenders in court doubtful bond security documents cannot be used to punish another. Each case must be considered on its own merits. Even at the hearing of this application, the State Counsel did not state that the accused is not likely to turn up in court for the trial, if he is granted bond with surety, especially in this case where the prosecution in the subordinate did not object to the same. I appreciate the concern of the subordinate court, but I consider that the applicant should also have been given an option of bond with surety. Imposing only a cash bail requirement can simply mean that an accused person is condemned to remain in custody. This is especially so, where the cash bail required is of a large amount, and Kshs. 700,000/= is certainly not a small amount of cash money. On the above considerations, I am persuaded to vary the bail terms granted by the subordinate court.

Consequently, I allow the application, and order as follows –

1. The applicant may be released on cash bail of Kshs.500,000/=.
2. Alternatively, the applicant may be released on signing his personal bond of Kshs.700,000/= with one surety of same amount.

It is so ordered.

Dated and delivered at Nairobi this 26th day of September 2007.

George Dulu

Judge

In the presence of –

Mr. Kangahi for the applicant

Mr. Makura for State

Eric - court clerk