



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
MILIMANI LAW COURTS
Misc Crim Appli 361 OF 2007

JITEN V. MANDALIAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Before me is a chamber Summons dated 22nd May 2007 filed by M/S T.K. RUTTO & COMPANY advocates for the applicant. The application is purported to be brought pursuant to section 123(1), (2) and (3) of the Criminal Procedure code (cap. 75). The application was filed under certificate of urgency and seeks for orders that the applicant be admitted to bail with or without conditions as the court may please. The application has grounds on the face of the Chamber Summons and is supported by the affidavit of THOMAS K. RUTTO advocate sworn on 22nd May 2007. The grounds of the application are that –

1. The applicant is an accused in Criminal Case Number 2518 of 2005 and Criminal Case Number 600 of 2007.
2. In both criminal cases he has been charged with bailable offences.
3. None of the Criminal Cases has been heard and determined and the accused is still presumed innocent until proven otherwise.
4. The accused was admitted to bail in criminal case No. 2518 of 2005 but denied bail in criminal case No. 600 of 2007.
5. In denying the accused bail in criminal case number 600 of 2007, the court considered extraneous matters.
6. Pursuant to the foregoing (grounds) the court misdirected itself and/or acted on the wrong principle of when it denied the applicant bail.
7. It is only just and fair that the application be allowed.

At the hearing of the application, learned counsel for the

applicant, Mr. Rutto, submitted that the offences in which the applicant was denied bail were bailable offences. Bail was a Constitutional right and the learned magistrate considered extraneous matters in denying the applicant bail in criminal case No. 600 of 2007, as the appellant was presumed innocent until

proved guilty. Counsel sought to rely on the grounds of the application and the supporting affidavit. Counsel also sought to rely on the case of MWAURA –vs- REPUBLIC [1986] KLR 600 and the case of HEZEKIA NDURA WARUINGE –vs- REPUBLIC – Nairobi High Court Miscellaneous Criminal application No. 106 of 2007.

Learned State Counsel, Ms. Gateru, opposed the application Counsel contended that, though bail was a Constitutional right, it was discretionary and depended on the circumstances of each case. It was counsel's contention that the applicant committed offences which resulted in his being charged in criminal case No. 600 of 2007 while the applicant was on bail in criminal case No. 2518 of 2005. According to counsel the applicant did not honour the conditions of the bail that had been granted to him because he committed similar offences which justified the denial to grant him bail in criminal case No. 600 of 2007. In alternative, the State Counsel submitted, if the court was minded to grant to grant bail, then it should be subject to stringent terms to ensure that he attended court.

I have considered the application and the submissions of both learned counsel. There is no doubt that bail is a Constitutional right. However, it is a conditional right. This is the purport of 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 further 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 Constitution therefore, bail is not available to persons who are charged with an offence punishable by death. Where somebody is charged with a capital offences, the issue for consideration in that case, is not that somebody is presumed innocent until proved guilty, but whether somebody has been charged with an offence punishable by death. In that event, bail or bond not be available to him. For all other offences, bail is available. The above position of the Constitutional rights of an individual with regard to entitlement to bail, are amplified under section 123 and 124 of the Criminal Procedure Code (Cap. 75 Laws of Kenya).

In our present case the offences for which the applicant was charged in the two cases before the subordinate court are bailable offences. The offences range from forgery to uttering false documents, to theft by servant, to making a false document, to stealing. All of which are bailable offences. The applicant was initially granted bail in criminal case No.2518/2005, but when he was again charged in Criminal Case No. 600 of 2007 the magistrate declined to grant the applicant bail.

The considerations to be taken by a court in deciding whether or not to grant bail were discussed in the case of MWAURA –vs- REPUBLIC [1986] KLR 600 in which Bosire J. (as he then was) held –

- 1. Bail is a Constitutional right however the decision whether or not to grant bail to an accused person is in the discretion of the court to which the application is made; and subject to the discretion being exercised judicially each case has to be considered on its own peculiar facts.**
- 2. The principles applicable in considering granting or refusing bail are: the nature of the offence, the strength the evidence, the character or behaviour of the accused and the seriousness of the punishment which may be awarded if the accused is found guilty.**
- 3. The primary and underlying consideration in considering whether to grant bail is the accused will turn up at the appointed place and time for his trial.**

- 4.
- 5.

I fully agree with the above position. It is clear that the grant

of bail is a discretion of the court to which an application for bail is made. The discretion of the court has however to be exercised judiciary not on whim, caprice or sympathy. The major consideration as envisaged under section 72(5) of the Constitution is whether the accused will attend trial at the appointed place and time.

The applicant herein was denied bail in criminal case NO. 600 of 2007 because he had already been said to have committed similar offences to those in criminal case No. 2518/2005 in which he was granted bail of Kshs.800,000/=, while he was on bond. In the words of the learned magistrate –

“There appears to be a real likelihood that similar offences may be committed by him again. The accused was out on bond, as late as March 2007. These circumstances suggest that he does not respect the terms of his bond in Cr. 2518/05.

Although the primary consideration on granting bail is whether or not an accused will turn up for trial, the likelihood of commission of similar offences is also relevant. The more charges are leveled against an accused the more the temptations to abscond especially in light of the serious nature of the offences and possible punishment.”

Counsel for the applicant has submitted that the court took into account extraneous matters in refusing to grant bail. I do not agree. The learned magistrate had the discretion to take into account the facts and circumstances of the case in which the court was considering the application for bail. The only thing that I do not share with the learned magistrate is that I do not see the connection between the commission of similar offences with the likelihood of the accused failing to attend court. The major consideration for granting bail being to ensure that the accused appears at a later date for trial or for proceedings preliminary to trial as enshrined in the Constitution, in my view, the factors enumerated by the subordinate court could only call for stiffer conditions for grant of bail, not a denial of bail. In my view therefore, the magistrate erred in declining to grant the applicant/accused bail. For that reason I will allow this application.

Consequently, I allow the application and order as follows –

1. With regard to Nairobi Chief Magistrates Court Criminal case No. 600 of 2007 the applicant/accused will be released on cash bail of Kshs. 800,000/=.
2. In the alternative to 1 above, he will be released on executing free bond of Kshs.1,000,000/= with one Kenyan surety of similar amount.

It is so ordered.

Dated and delivered at Nairobi this 15th day of October 2007.

George Dulu

Judge

In the presence of –

Mr. Rutto for applicant

Ms. Gateru for respondent - absent

Eric - court clerk