



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Misc Crim Appli 535 OF 2007**

**LEONARD ARCHIBALA MUYONGA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

Before me is an application brought by way of Chamber Summons dated 25<sup>th</sup> July 2007 filed by the applicant in person. The substantive order sought in the application is that the court be pleased to order granting of bond/bail variation in criminal case No. 1003 of 2007 now pending in the Chief Magistrate's Court at Nairobi. The application is supported by an affidavit sworn by the applicant. It is deponed in the supporting affidavit that the applicant was charged in criminal case No. 2356 of 2004 and was granted bond of Kshs. 300,000/=. It is also deponed that case was subsequently withdrawn under section 87(a) of the Criminal Procedure Code, after many adjournments. Thereafter the applicant was rearrested and charged with the same offence in criminal case number 1003 of 2007. In the later case, the applicant also pleaded not guilty and, this time, he was granted cash bail of Kshs.100,000/=.

At the hearing of the application on 8/10/2007, the applicant made submissions in support of his application. He contended that he was attending court faithfully and did not see the reason why his previous free bond terms were changed to a cash bail of Kshs.100,000/=. He submitted that he had not been able to raise the cash bail imposed and had therefore remained in custody where he contracted typhoid.

Ms. Gateru, the learned State Counsel conceded to the application. It was counsel's contention that the previous free bond terms should not have been changed by the magistrate.

I have perused both the subordinate court files. I have also considered the submissions on both sides. Indeed, the applicant was charged together with two others, with three counts in Nairobi Chief magistrates Criminal Case No. 2356 of 2004. The first count was for making a document without authority contrary to section 357(a) of the Penal Code. The second count was for forgery contrary to section 349 of the Penal Code. The third count was for obtaining goods by false pretences contrary to section 313 of the Penal code. The applicant was released on free bond of Kshs. 300,000/=. The case was later withdrawn under section 87 (a) of the Penal Code, on 19/6/2007, after three witnesses had testified. The applicant the rearrested and charged afresh in criminal case No. 1003/07 with the same previous three offences on the same particulars of charges as in the case No. 2356 of 2004. He was charged in the later case, together with the same two other co-accused. In the later case, the magistrate

ordered all the accused (including the appellant) to be released on cash bail of Kshs. 100,000/=, instead the previous free bond of Kshs.300,000/= with one surety.

Bail or bond is a conditional Constitutional right as clearly set out under 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 such 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”.**

Clearly, whether to grant bail unconditionally or on reasonable conditions is a discretion of the court that considers the grant of that bail. That discretion, should however, be exercised judicially and not capriciously or on sympathy or arbitrarily. The charges preferred in the current case before the subordinate court, that is, criminal case No. 1003 of 2007, are same charges as in criminal case No. 2356 of 2004, which was withdrawn by the prosecution under section 87(a) of the Criminal Procedure Code (Cap. 75). In imposing cash bail terms in the subsequent case, the learned magistrate did not give any reasons for so doing. In my view, that was an arbitrary way of exercising discretion. The learned magistrate should have at least given the reasons for varying the previous free bond terms, especially in view of the fact that the charges and particulars in both cases are the same. The change from free bond to cash bail terms . It was an improper exercise of judicial discretion, which this court is entitled to interfere with. Learned State Counsel has conceded to the application and, in my view, rightly so.

Consequently, I allow the application order as follows –

1. I set aside the cash bail of Kshs.100,000/= imposed by the magistrate on the applicant in criminal case No. 1003 of 2007.
2. I order that the applicant be released on his executing a free bond of Kshs. 300,000/= with one surety of similar amount in criminal case No. 1003 of 2007.

It is so ordered.

Dated and delivered at Nairobi this 15<sup>th</sup> day of October 2007.

**George Dulu**

**Judge**

**In the presence of –**

Applicant in person

Ms. Gateru for State - absent

Eric - court clerk.