



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 514 of 2006**

MARIAM MUMINA MOHAMED..... ..APPLICANT

VERSUS

REPUBLIC..... ..RESPONDENT

R U L I N G

On 27th September 2006, this court heard the Notice of Motion application dated 26th September 2006 and filed on the same day on behalf of the Applicant **MARIAM MUMINA MOHAMED**. In the Notice of Motion application the Applicant sought two orders in pertinent.

- (a) That this application be certified as extremely urgent and be heard exparte in the first place.
- (b) That this Honourable Court be pleased to review the Senior Principal Magistrate’s Makadara Orders and release the applicant on the original bond signed by Army Department (DOD) or on the alternative the Honourable Court be pleased vacate the order commanding the applicant to deposit her passport with court as the precedent to her case bail being accepted.
- (c) That this Honourable Court be pleased to stay the said order till hearing and determination of this application.
- (d) That meanwhile this Honourable Court be pleased to re-instate and release the applicant on the original bond.

Prayer (a) was granted exparte and prayer (b) was granted in terms after hearing both parties interpartes. The reason for granting the prayer is what I will now give on this ruling. I will first set down the order made by this court on 27th September 2006 hereunder.

“Prayer (d) of the amended notice of motion dated 26th September 2006 granted. The Applicant’s original bond terms reinstated and she is hereby released on free bond unconditionally.”

I called for and perused the record of the proceedings of Makadara Chief Magistrate’s **Criminal Case No. 23898 of 2004**. I formed the view that even without hearing any arguments from the Applicant and the State this is a matter that could be dealt with as a revision under **Section 362** of the **Criminal Procedure Code**.

I considered the submissions by **Mr. Mugo** for the Applicant and **Mr. Okello** for the State. **Mr. Okello** opposed the application and he gave his reasons which I did not agree with.

The crux of the matter in this case is that the Applicant’s free bond was cancelled due to one, non-

attendance of a co-accused and two, the failure by Department of Defence (DOD) to keep their undertaking concerning the 2nd accused in the trial that the Department would ensure that the said 2nd accused would not leave the jurisdiction of the court. Apparently the Department of Defence breached their undertaking and actually sent the 2nd accused on a foreign mission abroad during the pendency of the case. I will not comment on the court's decision to cancel the bond by the 2nd accused, since that matter is still pending before that court.

In regard to the Applicant, after canceling the free bond, the trial court gave new bond terms with certain conditions. The Applicant was able to give the cash bail ordered but was unable to furnish her passport on reasons it was being held by the Complainant in the case who was her former husband and the father of her children. The court seems not to have believed her and in addition the Complainant filed an affidavit in the trial case file indicating he did not have the passport. The filing of the affidavit by the Complainant was irregular as in the issue of bond terms, the Complainant was taking up the role of a busy body as he had given evidence in the case and his part in the case was really over. That affidavit should not have influenced the court in determining whether or not to vary the bond terms requiring the Applicant to surrender her passport. All it meant is that the condition was oppressive and amounted to a denial to grant bail to the Applicant. The best the court could have done was to call evidence on oath to determine the issue of who may have the passport. On the Applicant's part, she did not breach any of the bond terms and failure by the DOD to keep its undertaking in regard to the 2nd accused in the case ought not to have affected the Applicant's bond at all. The exercise of the trial court's discretion to cancel bond and vary bond terms to the detriment of the Applicant was misconceived as the grounds the court used to do so were not compelling reasons and in any event had nothing to do with the Applicant.

The Applicant's bond was therefore reinstated for these reasons.

Dated at Nairobi this 18th day of October 2006.

LESIIT, J.

JUDGE

Read signed and delivered in the presence of;

Applicant present

Mr. Mugo for Applicant

Mr. Okello for State

Tabitha - CC

LESIIT, J.

JUDGE