



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
MISC. CRIMINAL APPLICATION NO. 679 OF 2004

OMBA GANDU MAGLOIRE Alias BONGO.....APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

This is an Application for bail pending trial. It is expressed to have been brought pursuant to the provisions of Section 123(3) of the Criminal Procedure Code, as read together with Sections 72(1), (2), (3), (4) and (5); Section 74(1); and Section 77(1) (2) and (4) of the Constitution of Kenya.

When canvassing the Application, Mr. J. A. B. Orengo, advocate for the Applicant, pointed out that the Application had not been made by way of an Appeal from the decision by the magistrate's court refusing the Applicant bail. He explained that this Application was being made to the High Court in the exercise of the court's original jurisdiction.

Mr. Orengo drew the court's attention to the fact that the Applicant, jointly with his co-accused, had made another Application for bail pending trial; and that Application (which was Criminal Application No. 591 of 2004) was dismissed by me, on 10th November 2004. In view of that fact, the first question is whether or not the Applicant is entitled to bring this Application for bail pending trial.

It must be stated clearly that the decision by either the trial magistrate's court or this court, to reject one Application for bail pending trial is not a bar to a new Application. However, it is necessary that the person making a renewed Application for bail should satisfy the court that there had been material change in his circumstances. **ARCHBOLD ON PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES, 1993** states as follows, at paragraph 3 -18 thereof;

“The general effect of the decisions was that a court was not bound to entertain an Application for bail, after it had been previously refused, unless it was satisfied that there had been a material change of circumstances. A decision to refuse bail presupposed that the court found as a fact that there were substantial grounds for believing that one of the events described in paragraph 2 (a), (b) or (c) of Schedule 1 to the Act would occur. A later court was bound to accept that finding of fact, otherwise, it would be acting as an Appellate Court unless there was a material change of circumstances.”

In this case, the Applicant set out to illustrate to the court that there were changed circumstances. He said that subsequent to my earlier decision, the criminal case had been set down for

hearing on 17th January 2005. However, in his view, it was not likely that the case would be heard on that date. But in any event, the Applicant emphasized that as at the date when this Application was being canvassed i.e. 8th December 2004, he had already been in custody for five months.

The Applicant notified the Court that subsequent to my earlier Ruling, the Complainant in the Criminal Case had negotiated a compromise with four of the Applicant's co-accused. The Applicant annexed to the Affidavit in Support of the Application, uncertified copies of the proceedings before the lower court, to help illustrate the fact that the Complainant had negotiated a settlement with the Applicant's co-accused

. A reading of the said proceedings reveals that the Complainant had withdrawn her complaints against the Applicant's co-accused. She accepted cash payments as well as post dated cheques from the Applicant's co-accused. Following the withdrawal of the Complaints against the Applicant's co-accused, they were all acquitted by the trial court under Section 204 of the Criminal Procedure Code. The acquittals were effected on 16th and 19th November 2004.

Counsel for the Applicant also pointed out that the Complainant was now prosecuting only a civil suit against the persons who are alleged to have obtained money from her either by false pretences or by cheating her. It was thus submitted that the criminal proceedings were only being used for the purposes of coercing the Applicant to pay a civil debt. Therefore, as far as the Applicant was concerned, the criminal proceedings were an abuse of court process.

The other issue raised by the Applicant was that the charges as framed cannot be sustained. He submitted that the trial court was being asked to adjudicate upon a criminal enterprise. In response to this issue, learned state counsel, Mr. Okello submitted that it was not open to this court to determine whether or not the charges, as drawn, were defective. He said that that was the function of the trial court. Otherwise, the only way that the Applicant could get this court to make a finding as to whether or not the charges were defective would be by making an Application for Judicial Review.

Bearing in mind the fact that this is no more than an Application for bail pending trial, I accept as correct, the submissions by the Respondent. For, unless the court was specifically moved to determine the question whether or not the charges as drawn can be sustained, it would be premature for this court to express its views in that regard. It is certainly not one of the factors to be taken into account when deciding whether or not an accused person should be admitted to bail pending trial.

Also it must be borne in mind that the charges can either be amended or substituted during the trial. Although I am not saying that some amendment could cure such defects (if any) which might be found in the charges as framed, it would be improper for the court, at this stage and in this Application to make a decision on the question as to whether or not the charges can be sustained.

The Applicant then drew the court's attention to the fact that whilst the maximum penalty for the offences with which the Applicant had been charged was imprisonment for 3 years, the Applicant had already been in custody for 5 months. It was then submitted that the maximum sentence to be imposed was a factor to be taken into account when the court was assessing the issue as to whether or not the accused person had been put on trial within a reasonable period of time. In that regard, I find no room at all for argument. I say so because if an accused person was facing charges for an offence where the maximum penalty was imprisonment for six months, it would be a mockery of Section 72(5) of the Constitution to deny the person bail even though his trial had not commenced four months after the accused person was arrested and held in custody.

In response, Mr. Okello, learned state counsel, submitted that the Applicant was wrong to assume that the trial would not proceed on 17th January 2005. I agree with the Respondent. However, at the same time I take cognizance of the fact that the original date allocated for the trial herein was in March 2005. The date 17th January 2005 was only then fixed by the trial court after the Applicant drew the court's attention to my earlier order, to the effect that the case be accorded priority. In my understanding therefore, the date which the trial court found most convenient in its diary was in March

2005. Therefore, it would not be a question of one making a blind assumption by saying that the trial of the case was not likely to be tried on 17th January 2005.

In the considered opinion of Mr. Okello the high risk of the Applicant absconding was still very much alive. Therefore, as that formed the basis for the earlier decisions by both the trial court and this court, for denying the Applicant bail, the Respondent believes that this Application has no merit, and should be dismissed. When denying bail to the Applicant (and his co-accused), the learned trial magistrate said, *inter alia*: -

“ The prosecution is now telling the court that they are ready to proceed with their case on 27.10.04 and that they fear if the 5 are released on bail they will abscond. Like I said earlier in my ruling the courts are made of magistrates and judges who are all human beings. This court can’t fail to appreciate how the Complainant would feel if the 5 are now granted bail and they absconded.”

Bearing in mind the citation from **ARCHBOLD**, at the start of this Ruling, I now ask myself if the circumstances have changed. The Applicant says that the circumstances have changed, whilst the Respondent thinks not.

In my view, the circumstances have definitely changed. The Complainant has actually negotiated with four out of the five accused persons. The Complainant has also received both cash payments and some cheques towards the payment of the money which was allegedly obtained from her by the accused persons.

When the Complainant was asked by the learned trial magistrate if she was willing to take the risk of withdrawing her complaint, even before she had received the full payment, the Complainant answered in the affirmative. Effectively, therefore, the Complainant is already recovering her money from the persons who had earlier been charged with the Applicant. Meanwhile, the Applicant remains in custody because he has not been able to negotiate with the Complainant. I do not think that that is right.

The Complainant is already received some payment from the Applicant’s former coaccused. She negotiated that arrangement, and was happy to withdraw the complaints against the Applicant’s four co-accused. To my mind, the only hurdle in the withdrawal of the complaint against the Applicant is his failure or inability to negotiate with the Complainant. In other words, it appears that, at present, the Applicant is being punished for that fact alone.

Since the Complainant is already receiving payment from other persons, in respect of the money which Applicant is said to have received jointly with the said others, I find that the risk of the Applicant absconding is very little now. Why would he be tempted to abscond when the money which is the subject matter of the charges against him is already being repaid by other persons?

In the circumstances, I allow this Application. The Applicant shall be admitted to bail pending his trial, if he meets the following conditions: -

- (a) He executes a personal bond of Kshs.1,000,000/-.
- (b) He secures a Kenyan surety for Kshs.1,000,000/-. The said surety is subject to approval by the Deputy Registrar of this Court, in the normal manner.
- (c) The Applicant is to deposit his passport with this Court until the Criminal Case is determined.
- (d) The Applicant is to report to the Officer-in-Charge at the Criminal Investigation Department, Provincial Headquarters, Nairobi, on every other Tuesday, until the criminal case is determined. The Officer-in-Charge may delegate this function to a specific officer, as he may deem appropriate.

Dated at Nairobi this 26th day of January 2005.

F. A. OCHIENG'

JUDGE

Read, signed and delivered in the presence of;

F. A. OCHIENG'

JUDGE