REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL APPLICATION NO. 603 OF 2004

ERNEST MURIUKI GICHUKI……..…….APPLICANT

VERSUS

REPUBLIC….……RESPONDENT

RULING

This is an application for Bail pending trial. The applicant, Ernest Muriuki Gichuki, was charged with ATTEMPTED MURDER, contrary to section 220(a) of the Penal Code. The offence is said to have been committed on 28th January 2004, at the Kiambu Police Lines. According to the information on the face of the charge sheet the applicant was arrested on 26th July 2004. That date is confirmed as accurate, by the Advocate for the applicant, Mr. A. Burugu. Two days after arrest, the applicant was arraigned in court, charged with attempted murder. He then promptly applied for bail, but his application was opposed.

Later, in a reserved ruling, the learned trial Magistrate dismissed the application stating *inter alia* that;

> **"The court notes that the accused has persistently issued death threats to the complainant. That he made good the threats when he attacked the complainant herein. He has given several reasons why he insists he should kill the complainant. Under those circumstances for the complainant's safety the court declines to release him on bond. The accused shall be remanded in custody until the case is heard and determined."**

The foregoing ruling, by the Senior Resident Magistrate, was made on 19th August 2004. It prompted the applicant to file an application for the transfer of the case to another court of competent jurisdiction, for hearing and determination. However, that application was withdrawn by the applicant, on 3rd November 2004.

Meanwhile, the applicant had also applied to this court for bail pending trial. That application was filed on 6th October 2004, and came up for hearing on 3rd November 2004. But as the respondent had not been served with the application it was adjourned to 16th November 2004.

The applicant and the respondent are both in agreement, that the offence which the applicant has been charged is bailable.

When canvassing the application, Mr. A Burugu Advocate for the applicant submitted that the denial of bail by the lower court was a miscarriage of justice. He elaborated by saying that the applicant had presented himself to the District Criminal Investigation Officer (DCIO), voluntarily. He says that is then that he was arrested, at the police station, and then charged.

As far as the applicant was concerned, there are no circumstances that would warrant him being denied bail. In the meantime, as the applicant has been in custody for over 3 months, he says that he has suffered in the gravest manner. He therefore says that it would be in the interests of justice to grant him bail.

Mr. Olengo, Learned State Counsel, opposed the application. He urged me to give due consideration to the reasons why the lower court had denied the applicant bail. In his view, Mr. Olengo said that the lower court was right to have denied the applicant bail as the applicant was likely to commit other offences. According to Mr. Olengo, the applicant was constantly threatening the complainant. Mr. Olengo then said that the applicant had written to the DCIO giving reasons for wanting to kill the complainant. When I asked the State Counsel wherefrom he obtained the information about the alleged letter to the DCIO, he conceded that he was making a statement from the bar. He asked me to accept the said statements as did the lower court, for the reason that the applicant had not challenged the statements. He invited this court to presume that the allegations against the applicant were correct. He then concluded his submissions by asking me to dismiss the application, as otherwise the applicant was likely to infringe on the complainant's rights.

Section 72(5) of the Constitution of Kenya stipulates as follows;

> **"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 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."**

In my understanding, it is the foregoing statutory provisions which is the cardinal law governing the issue of bail pending trial.

Section 123(1) of the Criminal Procedure Code then provides that accused persons, other than those charged with murder, treason, robbery with violence or any drug related offence, may be admitted to bail, at any stage of the proceedings. Thus, in principal, a person charged with attempted murder may be admitted to bail. However, much as bail is a right of accused persons, it is neither an automatic nor an absolute right. By virtue of S. 72(5) of the Constitution, emphasis is placed on the importance of according an accused person a trial within a reasonable period of time. Therefore, if the trial of an accused person cannot be held within a reasonable period of time, the court ought to consider granting him bail. For a better understanding of S. 72(5) of the Constitution, it is imperative that it be placed within perspective. By that I mean that when trying to appreciate its full tenor, meaning and purport, one should always bear in mind the wording of section 72(1), which reads as follows;

> **"No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases."**

In effect, the first rule is that every person is entitled to enjoy his/her liberty. That right can however, be taken away by law. One of the reasons for which liberty may be taken away is by arrest or detention, upon reasonable suspicion of having committed or being about to commit, a criminal offence.

But if the person is so arrested or detained, he should be brought to court as soon as practicable. Thereafter, the person arrested or detained should be tried within a reasonable time, otherwise he ought to be released. However, when he is being released, the court is required to ensure that it does what is necessary to ensure that the person appears at a later date for his trial. In my considered opinion, if the court holds the view that the person arrested or detained is not likely to appear at a later date, for his trial, the court should not grant him bail. But if the court finds that the person will probably appear in court at a later date, for his trial, the court may even release him even unconditionally, if it is deemed appropriate in the circumstances prevailing. If on the other hand, the court finds it necessary to impose conditions for the person's release, the court is empowered to impose such conditions. That then is the guide for the grant or denial of bail pending trial. Earlier, in this Ruling, I set out the reasons given by the lower court for denying the applicant bail. And as I indicated, the respondent invited me to be swayed by the said

reasons. I decline that invitation, as there was no material placed before me which I could then evaluate before making up my own mind as to whether or not the issues raised by the prosecution were credible.

I believe that when anybody, be it the prosecution or the accused is making serious allegations, such as those made by the prosecutor herein, it should be in the form of an affidavit. In this application, the applicant was aware of the statement earlier made by the prosecution. I believe that he should have anticipated that the respondent would try to put forward the same reasons in the present application. But if he did so anticipate, the applicant chose to say nothing about the allegations. On the other hand, the Respondent has not placed any affidavit before me. Instead, he asks me to presume that the allegations made by the prosecutor were true, as the same were not challenged when they were made before the lower court.

It must be understood that the present application is not by way of an appeal. It is an original application to the High Court. It ought to be founded on its own substance. Similarly, if the application is opposed, the respondent must state why it is opposing the application. In my considered view, it is not open to the respondent to merely ask this court to accept what had been stated previously. That is even more so in applications for bail because those can be renewed, at any stage of the proceedings, as stipulated in S. 123 of the Criminal Procedure Code. Indeed circumstances of an accused person may continue to change, thus giving him the right to make new applications for bail, even before the same court. In the circumstances, it is my considered view that each new application must be responded to in its own right.

The second, and main reason why I have declined the respondent's invitation to go along with the view expressed by the learned trial Magistrate is that I find it to amount to an apparent condemnation of the applicant, before the court has received evidence on the case. It was indeed premature for the court to conclude that:

> **"the accused has persistently issued death threats to the complainant. That he made good the threats when he attacked the complainant herein. He has given several reasons why he insists he should killed the complainant."**

With all respect due to the learned trial Magistrate, if he has already been convinced about the foregoing matters, he would have pre-judged the very matter that is scheduled to be canvassed before him. I therefore believe that it would be in the interests of justice for Mr. Wachira Senior Principal Magistrate to have the applicant's case heard by another Magistrate.

In the meantime, it has not been disputed that the applicant presented himself to the police, on 26th July 2004, and that he was then arrested at the police station. But I also note that he did so some six months after the offence is alleged to have been committed. Where was he for the six months, and why did he not present himself to the police earlier? I do not know, for the applicant has not offered any explanation.

The only fact which is clear is that since the applicant's arrest, on 26th July 2004, his trial had not yet commenced. By the time I was hearing this application on 6th December 2004, the applicant had been in custody for over 4 months. In my view, the applicant's trial has not commenced within a reasonable time, unless in the meantime, the case has actually started.

At present, I do not have sufficient material from either the applicant or the respondent to enable me make a substantive ruling on the matter. In the circumstances, I find that the only reasonable step to take, and which I hereby do, is to strike out the application dated 6th October 2004.

For the avoidance of doubt, the applicant is at liberty to make a new application, (providing all relevant information) if he is so minded. By all means, the respondent will have a right to file an appropriate affidavit, if he wishes to oppose such application, (assuming that one is made). But in the meantime, I trust that the learned trial Magistrate will move swiftly to have the case transferred to another court. I also trust that the trial court will strive to ensure compliance with S. 72(5) of the Constitution.

Dated at Nairobi this 21st day of January 2005

FRED A. OCHIENG

AG. JUDGE