REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINIAL DIVISION
CRIMINAL APPLICATION NO. 211 OF 2004

MARARET WANGUI GACHARA ……. APPLICANT

VERSUS

REPUBLIC ……. RESPONDENT

R U L I NG

This is an application for the admission to bail of the applicant. The application, dated 15th April 2004, was brought pursuant to the provisions of Section 123 (3) of the Criminal Procedure Code and all other provisions of the Law. In the first instance, the application came before me on 16th April 2004, under a Certificate of Urgency. Having heard the submissions of counsel, I was persuaded, and did certify the application as urgent. I then set it down for hearing on 22nd April 2004. Meanwhile, I directed that the application be served upon the Attorney General on the same day, 16th April 2004.

The application is supported by the Affidavit of Dr. John M. Khaminwa, advocate, sworn on 15th April 2004. It is also supported by a Further Affidavit of Dr. John M. Khaminwa, advocate, dated 20th April 2004. Placing reliance upon the two affidavits the applicant submitted she was deserving of release on bail pending the trial. Learned counsel, Dr. Khaminwa informed the Court that the applicant was currently a patient, admitted at the Kenyatta National Hospital, Nairobi. He also drew the court's attention to the following pertinent facts about the applicant;

(i) She was a qualified medical doctor.

(ii) She was charged with two offences, namely, abuse of office contrary to section 101 of the Penal Code; and obtaining money by false pretences contrary to section 313 of the Penal Code.

(iii) The applicant was originally charged with two other persons, but one of the co-accused had been released. (iv) The applicant had been in custody since 25th February 2004.

(v) The applicant had previously made three applications to the chief Magistrate, and one application to the high Court, for her release on bail. All the said applications had been unsuccessful.

In the light of these facts, the applicant has deemed it necessary to renew her application for bail, hence the current application.

The court was notified that the trial of the criminal case was originally scheduled for 14th and 15th April. However, the trial did not commence because there was no magistrate to hear the case on 14th April 2004, and also because at the said time, the applicant was admitted in hospital. It was contended

that this information was of significance, as this court had previously denied the applicant bail, on the grounds, inter alia, that the criminal case would be heard shortly.

Learned counsel for the applicant did also inform the court that the criminal case was now scheduled for hearing on 5th, 6th and 7th July 2004. But he contended that from his experience, criminal cases do get regularly adjourned for various reasons, such as inavailability of magistrates or witnesses. It was further contended that even if the trial were to start on the assigned dates, it may still be adjourned to later dates. The purport of all these contentions was that there was no way the criminal case would be finalised in the near future. The applicant says that if she was denied bail again, she would continue to languish in custody. In effect, she would already be undergoing punishment. That act would undermine the doctrine of presumption of innocence, as stipulated in the Constitution of Kenya. The applicant also reminded the court that the Constitution was the pillar of both the administration of criminal justice, as well as the general jurisprudence in Kenya.

Counsel said that at all times the state has been opposing the applications for bail. He noted, however, that in all their submissions, the state counsels have been concluding that if the court were inclined to grant bail, it should be on stringent terms. This was construed by the applicant to mean that the state was impliedly conceding that bail could be granted provided that the court imposed stringent terms and conditions. It was emphasized by the applicant that she was willing to abide by any stringent terms as may be imposed by this court. Counsel even went further to suggest some possible stringent terms that the court could impose, namely;

(a) substantial Kenyan sureties

(b) Deposit of applicant's passport in court

(c) Reporting two or even three times to the Criminal Investigation Department (CID), every week.

(d) Restriction against travel outside Nairobi, save with permission of the court or of the Police.

The court was told that the applicant had previously offered to comply with similar terms, but that the Chief Magistrate and Kubo J., both nonetheless still declined to grant bail to her. Counsel for the applicant said that he was not able to understand why the courts have so far been reluctant to grant bail. But in any event, the applicant submitted that the previous decisions are not binding upon this court. It was pointed out that the decision by Kubo J. was that by a court of concurrent jurisdiction, and thus not binding on me.

However, in the applicant's view, the decision by Kubo J was wrong because he had handled the application as if it had been an appeal from the Chief Magistrate to the High Court. The applicant submitted that she had not lodged an appeal. It was further emphasized that section 123 (3) of the Criminal Procedure Code conferred original jurisdiction on the High Court to entertain bail applications. The applicant was invoking the said original jurisdiction. When doing so, the applicant did attach a copy of the previous proceedings and Rulings, as is the practice before our courts.

However, it is clearly understood that by attaching the said previous proceedings and Rulings, the applicant was not inviting the High Court to treat the application as an appeal. In the same vein, counsel for the applicant pointed out that I should not appear to be questioning the decision of Kubo J. Having set out the legal foundation and parameters of the application, counsel then proceeded to prosecute the application. He said that there were two medical reports by Dr. Makanyengo and Drs. Frank Njenga & R. N. Kangethe. The applicant contended that it was common ground as between her and the respondent that the two medical reports did concur.

Effectively, the said reports were said to be proof that at the time to her arrest, the applicant was suffering from a great deal of stress. The said stress could lead to irrational behaviour and impairment of the applicant's decision making mechanism. It was then said that the applicant's decision not to give herself up to the police should be seen in that light. In other words, her said decision was not a deliberate effort to avoid the police.

Counsel the pointed out that an accused person was entitled to bail as a matter of right. The said right was conferred by section 72 (5) of the Constitution of Kenya. That section provides 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"

The applicant conceded that there were circumstances when an accused person may be denied bail by the court. The said circumstances were said to be as follows;

> (i) when the accused was charged with a capital offence, such as murder or treason, or
>
> (ii) if the court was convinced that the accused may abscond, if released on bail, and there was abundance of evidence to that effect.

The most significant factor was that the judge had discretion to refuse or grant bail. In the event that the court did grant bail, the court was entitled to impose stringent terms to ensure that the accused attends court for his trial thereafter. I pause here to observe that the law as set out above, by the applicant, is accurate. When I later analyse this application, I will do so in the light of the said legal considerations.

Counsel submitted that the High Court had been known to release accused persons even when the prosecution had alleged that the accused was a security risk or that his release would be contrary to national interests. However, when I asked counsel to provide me with legal authorities to back this submission, he was unable to do so. Nonetheless, counsel did cite five authorities to back the applicant's case. I will shortly analyse the said authorities. But before I do so, I note that the applicant contends that the offences that she had been charged with are bailable.The court was then asked to consider the personal circumstances of the applicant. It was contended that the applicant's circumstances were exceptional. The said circumstances were said to be her medical condition of stress; the delay in finalisisng the case; the fact that the accused had been in custody since last February; and the "fact" that the prosecution was not opposing the release of the applicant on bail.The court did, at that point, ask the learned state counsel, Miss Kamau, if indeed the application was not opposed. The answer was emphatic; the state was opposing the application.When I asked the applicant's counsel why he had said that the application was not apposed, he expressed the view that the prosecution was giving a hint to the court that bail may be granted, when the prosecution previously submitted that stringent terms ought to be imposed if the applicant was released on bail.

The other exceptional circumstance was said to be the fact that the accused was arrested by a Chief Inspector who then swore an affidavit spelling out the circumstances under which she was arrested. In turn, the applicant swore a Replying Affidavit, but the same was not placed before Kubo J. at the time of the earlier application for bail.It is the applicant's contention that if the Replying Affidavit had been placed before Kubo J., there would have been a strong possibility that the balance would have tilted in favour of the applicant. Counsel submitted that as the deponents of the 2 affidavits were not cross-examined, the applicant ought to have been given the benefit of any doubt. At that point when the court asked the applicant's counsel what standard was applicable at the stage of weighing the affidavits, he conceded that it is not the degree of proof applicable in criminal justice.

The applicant also said that the nature of the charges facing her were such that she would need to rely on documentary evidence.For that reason, she would need to be out on bail, so as to access her documents and thus be able to instruct her lawyers more effectively. It was contended that the applicant cannot develop her Defence whilst in custody. The result of her inability to develop her defence was said to be a denial of a fair hearing.

In answer to the application, learned state counsel, Miss Kamau, stated that the state was opposing the release of the applicant on bail. She adopted the submissions of Miss Ondieki, state counsel, before the Learned Chief Magistrate, Mr. Muchelule. Miss Kamau also adopted her previous submissions before Kubo J.The main reason for adopting the said submissions wholesale was that nothing new had transpired to change the position previously prevailing. It was conceded that the applicant was currently admitted at Kenyatta National Hospital. But as the applicant's counsel emphasized severally, the fact of the said hospitalization was not the basis of the current application.

Even though the offences facing the applicant were bailable, the state was oposoing the application because the peculiar facts surrounding this case showed that the applicant was not likely to turn up for her trial. The said peculiar facts were the applicant's behaviour of failing to turn up to take her plea, even when she knew that the police were searching for her.The learned state counsel pointed out the applicant well knew that the police were looking for her, as she stated in paragraph 25 of her Replying Affidavit. I think it would be useful to set out herein the wording of the said paragraph 25. It reads as follows;

> "THAT it is true that when the press reported that police were seeking information of my whereabouts I panicked and I could not leave my residence in Runda and I may not have received wise counsel at that time but I was never a fugitive from justice. The police were not diligent enough for I never shifted residence at any time".

There can be no doubt that the applicant knew that the police were looking for her. She says that she

learnt that the plocie were looking for her from the press. It is for that reason that she panicked. Her advocate attributes her said reaction, of not giving herself up, to her mental stress. In all this, one fact remains true. The fact that the applicant did not give herself up to law enforcement officers when she knew that they were looking for her. Her advocate says that her said behaviour is excusable due to the stress she was undergoing at the material time. On the other hand, the earned state counsel says that the conduct is clear proof that the applicant had failed the test for bail, when she did not respond to the warrants, about which she had read in the press.

To my mind, the most significant factor in the medical reports is the statement by Dr. Njenga and Dr Kangethe, when they state as follows;

> "It is our opinion that she, as anyone else would, suffered a great deal of stress during this time and it is possible that the experience of such stress could lead to irrational behaviour though not amounting to a formal mental illness. Whether this is the explanation for the alleged behaviour or not could not be established with certainty in her particular case. It does however remain a possibility".

The two doctors expressly state that they did not established if the stress suffered by the applicant was the explanation or her alleged behaviour. Therefore that medical report cannot be construed as an explanation for the applicant's behaviour. It does not support the applicant's assertion that her failure to respond to the warrants was explained medically.

It is also noted that whereas the applicant states in her affidavit (para 25) that she did learn from the press that the police were looking or her, when she was examined by Dr Frank G. Njenga and Dr. Rachel N. Kangether, the applicant said that she was not reading newspapers. Clearly, these two positions taken by the applicant are wholly inconsistent. It would not have been possible for her to have learnt from press reports that the police were seeking information on her whereabouts, if she was not reading newspapers. Furthermore, I note that when the applicant consulted Dr. Margaret Makanyengo, the doctor noted that,

> "she reports that as a consequence of the negative reports she felt depressed, lonely betrayed and fearful of people in general".

Most probably, the "negative reports" were through the press. But in any event, even if they were not from the press, it is clear that the applicant was aware that she was being sought by the police. She responded by hiding away from the police. I do accept the respondent's contention that it matters little whether the applicant was in hiding outside the country or within our borders.

But I ask myself if the applicnt was actually keeping house at her Runda residence. She says that at no time did she shift from her said residence. She blames the police for notbeing diligent in their search for her. Yet at the same time, I note that the applicant states the following at paragraph 29 of her Replying Affidavit.

> ''THAT at no time did Chief Inspector show any search warrant despite the fact that he searched my house on several occasions".

If the applicant was always at her residence, which was searched on several occasions, I am unable to understand how the chief Inspector of Police could not find her therein. For that reason, I am more inclined to believe the version given by Chief Inspector Ariada than the version given by the applicant. I do not therefore find any justification in the applicant's criticism of Kubo J. In fact, I believe that had the Replying Affidavit been placed before him, the judge would most probably have arrived at the very same conclusion as he did.

I also note that the learned Chief Magistrate had the benefit of giving consideration to both the Affidavit of Chief Inspector Ariada, as well as the Affidavit by the applicant herein. He too found the former affidavit more plausible. I see absolutely no reason to differ from his finding. By saying this, I must not be deemed to be sitting on appeal or otherwise to be ascertaining whether or not I can review the Rulings

by either the Learned Chief magistrate or the Honourable Judge. I recognize that this court has original unlimited jurisdiction to look at the application afresh. I have done so, and heave given my reasons, in relation to the facts as I perceive them. I now have to look at the applicable law.

In Ngui V Republic [1985] KLR 268, the Court of Appeal dealt with the application of a woman aged 54. The court made the following observation, at page 272;

> "we have considered the age and health of the applicant. She suffers from ulcers and high blood pressure. For these complaints she can be treated in prison or if necessary transferred to hospital under the usual safeguards".

In this case, the applicant is already hospitalized at Kenyatta National Hospital. Therefore, if her state of health was the only ground upon which she was seeking to be released on bail, I would probably have rejected the said application. But counsel did emphasize that he was not relying on the applicant's state of health as a ground for the grant of the orders sought in this application. Indeed, he said that that is the reason why there had not been filed another more current medical report regarding the applicant.

Nganga V Republic [1985] KLR 451, at 455, sets out the principles of consideration by the High Court when hearing an application for bail pending trial. Chesoni J. (as he then was) expressed himself thus;

> "The primary purpose of bail is to secure the accused person's attendance to court to answer the charge at the specifiied time. I would, therefore, agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:
>
> (a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty: Where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.
>
> (b) The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justifiable to remand him in custody.
>
> (c) The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour those may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.
>
> (d) Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.
>
> (e) Interferring with prosecution witnesses. Where there is a likelihood of the accused interfering with prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference".

To those considerations must be added the provisions of section 72(5) of the Constitution. In other words, if the person is not tried within a reasonable time, and the court is satisfied that they will attend trial, if released on bail, the court will grant bail.

The applicant here complains that she has already been in custody since February 2004. Her trial was earlier scheduled for 14th and 15th April 2004. However, due to nonavailability of the trial magistrate, and due to the hospitalization of the applicant, the trial did not commence. The new trial dates are now 5th, 6th and 7th July 2004. By the time the trial commences, if it does so on 5th July 2004, the applicant will already have been in custody or almost five months. Looked at in isolation, the said period would appear to be long. And when it is borne in mind that the applicant is a widow, who is in her 40's, who is a qualified medical doctor, who has been used to a reasonably good life, one can almost feel that to her the period would appear even longer. For those reasons, I concur with both the Learned Magistrate and the Honourable B.P. Kubo J., that the applicant is deserving of sympathy. However, sympathy alone is not enough. In fact

sympathy is not a ground for the grant of bail.

The applicant is said to have suffered a lot of stress when she learnt that the police were looking for her. She therefore hid from the police. In my considered view if the fear of arrest was capable of causing the applicant to go into hiding, as she felt depressed, lonely, betrayed and fearful; she would probably feel even more so when faced with the prospects of conviction and custodial sentence. I believe that it would be unsafe to expect her to readily present herself to court for her trial. For those reasons, the application dated 15th Aril 2004, is dismissed.

I make no order as to costs.

Dated at Nairobi this 26th day of April 2004.

FRED A. OCHIENG

Ag. JUDGE