



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 176 OF 2004

FRANK GACHARA NJENGA APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

This application was initiated by *ex-parte* chamber summons filed on 31.03.04 and was stated to have been brought under section 123 (3) of the Criminal Procedure Code and all other enabling provisions of the law. The application went before my sister Lesiit, J who certified it as urgent; that it be served on the Attorney-General; and that it be heard *inter-partes* before the duty judge on 06.04.04. It duly came up for hearing before me on 06.04.04.

The application seeks the following orders:-

1. That the applicant be admitted to bail pending trial.
2. That the costs of this application be in the cause.

Learned counsel for the applicant, Dr Khaminwa informed this court through the chamber summons that the application is, *inter alia*, founded on the following principal grounds:-

- i) The applicant is charged with the offences of obtaining money by false pretences contrary to section 313 of the Penal Code and abuse of office contrary to section 101 of the Penal Code respectively which offences are bailable.
- ii) The applicant will abide by the terms of bail/bond set by the Honourable Court.
- iii) The applicant's health continues to deteriorate in remand.
- iv) The applicant has no previous record of criminal activities and she is ready to appear in court for the trial as and when required.
- v) It is in the interests of justice that the applicant be admitted to bail.

At the hearing of the application, applicant's counsel drew attention to a joint medical report dated 25.03.04 by Dr Frank G Njenga and Dr Rachel N Kangethe of F G Njenga and Nguithi Associates,

Medical Consultants, Nairobi. Counsel informed the Court that the medical opinion was sought because certain events occurred before the applicant was taken to court which the prosecution relied on immensely as tending to show that the applicant was not willing to appear in court. The purpose of the report was, therefore, to demonstrate that the applicant was under stress, confused and not in full control of her mental faculties and was incapable of making proper decisions.

Applicant's counsel referred the Court to paragraph 2 under the subheading "suspension" on page 2 of the medical report and made the point that the applicant is a widow, having been widowed early and that she has had to take care of her family on her own. In this regard, counsel laid emphasis on the last sentence of the said paragraph to the effect that she felt lost and confused and felt herself under increasing social and professional pressure as the efficiency-monitoring unit closed in on her. Counsel submitted that the sentence demonstrates her state of mind, ie a shaken and disturbed mind. Counsel also referred to the sub-heading "symptoms" at page 2 of the report to the effect that she developed intermittent loss of sleep and having bad dreams of dead people and becoming withdrawn.

Counsel also referred to the sub-heading "Opinion" at page 3 in the report and drew attention to paragraph 2 which states:

"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."

In applicant's counsel's view, this paragraph explains why the applicant behaved the way she did.

Applicant's counsel also referred to another medical report called for by the state on the applicant. That report was by Dr Margaret Makanyengo, Consultant Psychiatrist at Kenyatta National Hospital, Nairobi. It is dated 30.03.04. In counsel's view, Dr Makanyengo came to the same conclusion as did Dr Njenga and Dr Kangethe, ie that the applicant was suffering from stress, which could lead to irrational behaviour or conduct.

At this juncture applicant's counsel turned to the Nairobi Chief Magistrate's rulings refusing to grant bail to the applicant. Counsel took issue with the affidavit evidence of the arresting officer, Chief Inspector Albert O Ariada to the effect that after making repeated but unsuccessful attempts to find the applicant at her Runda house in Nairobi, he came to the conclusion that she was deliberately avoiding arrest and, therefore, applied for a warrant for her arrest. Applicant's counsel contended that there was no evidence to support the arresting officer's conclusion; that the arresting officer based his conclusion on hearsay and that there was no justification for such conclusion; and that the learned trial magistrate erred in relying on the arresting officer's evidence to deny bail to the applicant.

Applicant's counsel also alluded to media reports on the applicant's case and complained that the said reports appear to have prejudiced the mind of the learned Chief Magistrate who, as a result, rejected the applicant's request for bail.

Turning to the arresting officer's evidence about a telephone conversation between him and the applicant using the cell phone of one Mwangi who, according to applicant's counsel, appeared to be the applicant's employee, applicant's counsel contended that the arresting officer's use of telephone to communicate with the applicant was dangerous and risky. According to counsel it is easy to misunderstand one another on telephone. He said he was fortified in drawing this conclusion by the fact that during the subject telephone conversation between the arresting officer and the applicant, the applicant said in a subsequent affidavit that the arresting officer allowed her to come to court after ten days while the arresting officer said also by way of affidavit that he did not so allow the applicant as he had no authority to do that since the matter was then in the hands of the Court. In applicant's counsel's view, the trial magistrate erred in accepting the arresting officer's version of what transpired during the subject telephone conversation instead of accepting the applicant's version and as a result he wrongly denied bail to the applicant on the basis of the arresting officer's evidence.

The next subject addressed by applicant's counsel was the constitutional status of bail. He submitted that the offences facing the applicant are bailable offences; that bail is a constitutional right; and that the test to be applied in considering bail is whether the applicant would abscond if granted bail. He cited *Panju vs Republic* [1973] EA 282 as authority for this proposition and submitted that there is no evidence that the applicant will abscond. He criticized the Chief Magistrate for relying on the evidence of the arresting officer's uncorroborated evidence to deny bail to the applicant. He also criticized the magistrate for not exercising his discretion to grant bail to the applicant on such terms as he might deem fit.

Applicant's counsel pointed out that the applicant has deep roots in Kenya, eg she has farming interests, is an employer and family head. She lives with some of the children who are day scholars and has two children studying in the UK; and that she can deposit her passport in court. Counsel described as unfortunate the fact that the Chief Magistrate relied on the fact that the applicant's case is coming up for hearing soon, ie on 14th and 15th April, 2004 to deny her bail. In his view that fact is no good reason for denial of bail. In any case, the counsel argued, there is no guarantee that the case will be concluded in the two days as the courts are very busy and something is bound to crop up to delay completion of the case.

Regarding the search conducted by the arresting officer of the applicant's house, applicant's counsel complained that the arresting officer does not appear to have been accompanied by a female police officer during the search. In counsel's view, since the arresting officer searched the applicant's house, he must have searched her also and that this contravenes section 27 of the Criminal Procedure Code. However, he said he was not stressing this point.

Applicant's counsel said that the nature of the charge is such that the prosecution will be relying on documents and that he as defence counsel can only be properly instructed by the applicant if she is out of custody.

Without this, counsel added, the applicant will not have a fair hearing since she may not access documents hidden, say, in her rural home, etc. Counsel told the Court that the applicant has been in custody since her arrest on 25.02.04.

In conclusion, applicant's counsel said the applicant has her own version of the story about the charges; that the presumption of innocence prevails; and that her application for bail should be granted.

Learned counsel for the respondent, Miss Kamau opposed the applicant's application for bail. She relied on the affidavits of the investigating and arresting officer, Chief Inspector Albert O Ariada of the Kenya Anti-Corruption Commission. There were three affidavits, sworn on 30.01.04, 25.02.04 and 12.03.04, respectively. She handed in copies of the affidavit and explained that the affidavits were relied on in opposing bail in the lower court and she was placing similar reliance on them in opposing the applicant's bail application before this court. She submitted that nothing new has transpired since then and that the affidavits answer some of the issues raised by the applicant's counsel.

Respondent's counsel agreed that the applicant stands charged with bailable offences and that she failed to submit herself to the jurisdiction of the Chief Magistrate's Court. That it was not until an advertisement was put up in the papers and a reward offered for information that would lead to her arrest that the police got her.

With regard to *Panju's* case cited by applicant's counsel as laying down the test for granting bail pending trial, ie whether the applicant will abscond if granted bail or turn up for her trial, the respondent's counsel submitted that if indeed that is the test, then the applicant has already failed it. Respondent's counsel pointed out that abscondment is not confined to going outside the country. As long as the applicant does not turn up for her case, she has failed the non-abscondment test. Counsel submitted that the Court is entitled to look at the surrounding circumstances. That from the time the charges were filed against the applicant, they were highly publicized through the media. That the applicant never turned up in or sent a representative to court to explain her absence and that it took force to break into her house to be able to arrest her.

Respondent's counsel said she appreciated that the applicant is a single mother, a widow and a doctor with other interests. Counsel, however, submitted that while bail is a constitutional right, it is not absolute and is subject to respect for the rights of others and for public interest. She adopted the stand taken by her fellow counsel who appeared for the State at the hearing of the applicant's application on 15.03.04, to wit:

"It is for public interest that accused be available to take trial. We fear she may abscond from her past history. Accused is not capable of turning up on her own. She has to be restrained We oppose the application."

Respondent's counsel also adopted the following passage by the Chief Magistrate appearing at page 18 of the ruling of 17.03.04, namely:

"I consider the request by Dr Khaminwa that I release the accused on humanitarian grounds. She has children schooling abroad, another in day school in Kenya. She lost her husband 8 years ago. Hearing date is April but case may linger on for a longer period. I sympathise with the accused but add that she herself created the circumstances she finds herself in. She has I must say behaved contemptuously to the police and to court. Such a person does not deserve a favourable exercise of the discretion of the Court. I am unable to review the orders I made on 27/7/2004 regarding bond which means the accused will remain in custody until the case is heard and finalised."

Regarding the medical reports referred to by applicant's counsel earlier on, the respondent's counsel submitted that the authors of the two reports came to the same conclusion that the applicant is normal although she had undergone some form of stress.

Respondent's counsel also made reference to principal ground (iii) in the applicant's counsel's *ex-parte* chamber summons filed on 31.03.04 which states:

"(iii) the applicant's health continues to deteriorate in remand."

Respondent's counsel submitted that the health deterioration alluded to has not been substantiated through a medical report to show changed circumstances since the time the applicant was seen by the doctors who prepared the two reports referred to earlier. In essence respondent's counsel was making the point that the applicant's reference to her health continuing to deteriorate while in remand should be ignored.

Finally, respondent's counsel submitted that if the Court is minded to grant bail to the applicant, the Court should impose stringent terms which should include the applicant depositing her passport plus her frequent reporting to the Anti-Corruption Commission.

In reply, applicant's counsel said the applicant has no objection to the terms suggested by respondent's counsel if the Court granted bail. However, he suggested the reporting order, if given, should be to the Director of CID who is detached. Regarding the passage quoted from page 18 of the Chief Magistrate's ruling of 17.03.04, applicant's counsel took issue with the magistrate's allusion to the applicant as having behaved contemptuously to the police and the Court. Counsel contended that there is no proof of such behaviour by the applicant. He reiterated that if bail is refused on grounds that the applicant will abscond, this must be substantiated and that there is no such substantiation. Applicant's counsel also submitted that there is no proof that the applicant failed to submit herself to the jurisdiction of the trial court and that the media publicity and advertisement cannot be relied upon. He reiterated that the applicant's trial be granted on reasonable terms to allow the applicant's release from custody forthwith.

The broad issue for the determination of this court is whether the applicant has made out a case for the grant of bail to her.

Section 123 (3) of the Criminal Procedure Code (Cap 75) under which this application was brought provides as follows:

"123 (3) The High Court may in any case direct that an accused person be admitted to bail or that bail

required by a subordinate court or police officer be reduced.”

Liberty is one of the fundamental rights and freedoms of the individual protected under the Constitution of Kenya, subject to such right not prejudicing the rights and freedoms of others or the public interest. Section 72 (3) of the Constitution, *inter alia*, provides that a person who is arrested or detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence and who is not released shall be brought to court as soon as reasonably practicable. And subsection (5) of the same section is to the effect that if a person arrested or detained as indicated above is not tried within a reasonable time, he must 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. Further, under section 77 (2) (a) of the Constitution, every person who is charged with a criminal offence must be presumed to be innocent until he is proved or has pleaded guilty.

The applicant is facing in count 2 a charge of obtaining Kshs 3,162,058/= by false pretences. In count 3 she is charged with obtaining Kshs 24,699,122/= also by false pretences. Count 4 charges her with abuse of office while in count 5 she faces a charge of giving false information. Each of the offences under counts 2, 3 and 5 is a misdemeanour attracting 3 years imprisonment while the offence under count 4 is a felony also attracting 3 years imprisonment. All these offences are bailable. But everyone charged with a bailable offence does not automatically get bail. Circumstances of each case have to be taken into account.

Affidavit evidence deposed by the arresting officer, Chief Inspector Ariada is to the effect that he looked for the applicant at her house in order to get her to answer the aforesaid charges but that the applicant successfully evaded him so he eventually obtained a warrant for her arrest and had to break into the house to effect her arrest. The applicant has denied having evaded the arresting officer and explains that she was confused following problems she had at her place of employment which caused her to be stressed and to withdraw from human contact. Her counsel informed this court that he sought a medical report on her to demonstrate that she was at the material time confused, not in full control of her mental faculties and incapable of making proper decisions. He told the Court that the report by Dr Njenga and Dr Kangethe provides the desired demonstration. Some portions of the report were quoted earlier on. I add the following quotations:

“At no time did she (applicant) have clinically significant depressive features, at no point did she have psychotic symptoms and at no point did she have any suicidal thoughts. Her blood pressure was normal at 110/68

During this examination, it became evident that Dr Gachara does not suffer from a mental disorder. She did not suffer from a mental illness at any point during her contact with the law enforcement authorities, specifically, including the period just before her arrest. 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.”

Applicant’s counsel also drew the Court’s attention to a second medical report on the applicant called for by the State. This report was compiled by Dr Makanyango. In applicant’s counsel’s view, this report also shows the applicant not to have been in full control of her mental faculties. Respondent’s counsel held the opposite view.

Dr Makanyango recorded from the applicant, complaints about sleep disturbance, fearfulness and anxiety after she was discharged from her duties as director, National Aids Control Council under circumstances which had generated marked media interest. The doctor adds that the applicant reported to him that following the negative reports she felt depressed, lonely, betrayed and fearful of people in general and that she restricted her movements and did not venture outside her house. After noting that the applicant’s general physical findings were normal, this doctor concluded her report as under:

“Opinion

In my view she is suffering from mild to moderate sleep disturbance and anxiety as a result of a mild depression. Secondly to factors already mentioned in the report and currently she is in prison custody facing charges in a court of law which have not yet been concluded.

Recommendation

Supportive counseling will help her cope with the situation she is in. Mild anxiolytic drugs will be beneficial for a few days to help her sleep. Meanwhile hastening of the case will also help in minimizing the suspense she is experiencing while in prison custody.”

I have considered the purport of the two medical reports. In my respectful view they do not establish that the applicant was suffering from mental illness at the material time, or that she was not in full control of her mental faculties as her counsel put it. The two reports should not, therefore, be elevated beyond what they say, ie she underwent some form of mild stress or depression arising from problems emanating from her employment situation. The doctors were not able to link with certainty the applicant’s stress or depression to the behaviour she displayed towards the police and ultimately to the trial court. Such link remained merely in the realm of possibility.

It would appear from Chief Inspector Ariada’s replying affidavit of 12.03.04 that the applicant had filed an affidavit to which the said Chief Inspector was replying. The applicant’s affidavit was not availed by the applicant or his counsel to this court. Be that as it may, it appears to have been considered by the Chief Magistrate alongside the affidavits of Chief Inspectors Ariada. The learned Chief Magistrate accepted the Chief Inspector’s affidavit evidence regarding the applicant’s behaviour. This is a finding of fact which the magistrate was entitled to make. Chief Inspector Ariada’s evidence is to the effect he made repeated visits to the applicant’s house but she avoided him so he eventually obtained a warrant and broke into her house to arrest her. And that he was able to get her in the house only after the police announced a reward of Kshs100,000/= for information that would lead to her arrest. Only then did an informer give the Chief Inspector a tip-off leading to the applicant’s arrest in her house. The learned Chief Magistrate accepted Chief Inspector Ariada’s evidence as credible and rejected that of the applicant. These are findings of fact and no credible material has been placed before me to warrant my making a contrary finding.

Applicant’s counsel correctly contended that in considering whether or not to grant bail to the applicant, the Court should consider whether she will turn up for trial or abscond if granted bail. In counsel’s view, if abscondment is put forward as a reason for refusing bail, there should be substantiation of the reality of abscondment. That is a correct test.

In *Mazrui vs Republic* [1985] KLR 279 the High Court (Abdullah, J, as he then was) held that in principle, generally and because of the presumption of innocence, an accused person should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing, *inter alia*, that the accused will fail to turn up at his trial or to surrender to custody. I, respectfully, share the same view.

Is the applicant a suitable candidate for bail? The learned Chief Magistrate did not think so and he gave his reasons for so holding. The grounds put forward before this court by the applicant as a basis for her bail application were advanced before the Chief Magistrate and rejected as aforesaid. As indicated earlier, I find no credible material before me to warrant my coming to a contrary finding. There is, of course, the submission that the applicant’s health continues deteriorate in remand. There is no medical evidence to support this.

Applicant’s counsel submitted that it is in the interests of justice that the applicant be admitted to bail. The same justice also enjoins the Court to ensure that those accused of crime are made available to answer for their alleged criminal activities. It is a tight rope we walk and we must carefully balance the competing claims of justice.

It was said by applicant's counsel that the arresting officer (Chief Inspector Ariada) erroneously concluded that the applicant was deliberately avoiding arrest because the people who repeatedly told him during his initial visits to the applicant's house that the applicant was away have not come forward to give corroborative evidence. It is not the law in this country that every issue must be testified to by more than one witnesses. The Chief Magistrate did not doubt the arresting officer's evidence that he repeatedly visited the applicant's home and that whoever he found there said the applicant was away while she herself eventually told Dr Njenga and Dr Kangethe that she never left the house! And the arresting officer deponed that when he eventually caught up with her by breaking into the house, he found her holded up in her daughter's bathroom. In my view, the arresting officer was justified in concluding that the applicant was deliberately avoiding arrest and further that the Chief Magistrate was also justified in accepting the arresting officer's evidence.

Applicant's counsel submitted that the arresting officer erred in using Mwangi's mobile phone to communicate with the applicant as it is easy for people communicating on phone to misunderstand each other. What other option did the arresting officer have after missing to make physical contact with the applicant repeatedly? The arresting officer said he never gave the applicant permission to come to court after ten days as he had no authority to do so in a matter in the hands of the Court. This makes a lot of sense. Applicant's counsel submitted that the magistrate should have accepted the applicant's version of what transpired during the cell-phone conversation. The magistrate was entitled to believe or disbelieve the applicant. He disbelieved her and I find no fault in that.

Applicant's counsel faulted the magistrate in relying on the fact that the applicant's trial is due to start soon as a ground for denying bail. Firstly, it is a proper ground to take into account. Secondly, it was not the only ground relied on.

Applicant's counsel submitted that the nature of the case is such that the prosecution will have to rely on documents which the applicant may not be able to access for purposes of giving her counsel appropriate instructions for proper preparation of the defence case. I am sure arrangements can be made for the applicant to access the documents alluded to, if any.

Finally, the applicant's counsel submitted that there is no evidence that the applicant will abscond. Evidence does not have to be direct. It can be circumstantial. The applicant's behaviour necessitating her house to be broken into in order to effect her arrest tilts the scales against her plea for bail.

I find that in the present case the respondent has demonstrated credible grounds for believing that there is real risk and danger of the applicant not turning up for trial if granted bail. Accordingly, I do not consider this to be a proper case for me to direct that the applicant be admitted to bail.

Like the learned Chief Magistrate, I too sympathise with the applicant but I also think she is the author of her own misfortune and that the law should take its course. I note that her trial is scheduled for 14th and 15th April, 2004 which is less than a week away.

The applicant's application for bail pending trial is hereby dismissed.

The trial court should make every practical endeavour to see to it that the applicant's trial is expedited.

I make no order as to costs.

Dated and Delivered at Nairobi this 7th day of April 2004.

B.P.KUBO

JUDGE