



Republic Of Kenya
In The High Court Of Kenya At Nairobi
Criminal Division
Criminal Application No. 646 Of 2004

Lilian Kalunde Musyoki.....Applicant

Versus

Republic.....Respondent

RULING

This is an application for bail pending trial. It has been brought pursuant to the provisions of S. 123 (3) of the Criminal Procedure Code, and Sections 72 and 77 of the Constitution of Kenya.

It is the applicant's case that she is the accused person in Criminal Case No. 971 of 2004, which is currently pending before the Chief Magistrate's court. She says that she was arrested on 9th April 2004, and charged on 14th April 2004. The offence with which the applicant has been charged is "**Trafficking in Narcotic Drugs, contrary to section 4(a) of the Narcotic Drugs and Psychotropic substances (control) Act. No 4 of 1994**"

Since her arrest, the applicant has remained in custody. She believes that her stay in custody has been for far too long, as the offence for which she has been charged is bailable. It is her considered view that her continued stay in custody, prior to her trial, is a violation of her Constitutional right.

The record shows that the applicant did make an application to the trial court, for bail pending her trial. The said application was made on 16th September 2004. At the time, the applicant was pregnant, and her baby was almost due. It is on the basis of the applicant's health that the application was canvassed before the learned trial Magistrate.

In response to the previous application, the prosecutor merely left the matter to the court. Thereafter, in a reserved Ruling, the court noted that that was the 2nd application for bail. The learned trial Magistrate observed that the applicant was expecting her 2nd child and that she was sickly. In view of her delicate medical status, the learned trial Magistrate directed that the applicant be accorded access to her personal doctor, if it became necessary. However, bail was denied.

The main ground upon which bail was denied was the fact that the penalty for the offence included a fine of Kshs 1,000,000/= or 3 times the market value of the drugs, whichever is greater. The statute provides that the fine is to be imposed over and above the sentence of imprisonment. In the circumstances, the court expressed the considered view that the penalty was so high as to be an incentive to the applicant to abscond.

When this application was canvassed before me, Mr. Osoro advocate pointed out that the applicant had been in custody for the last 3 months. He reminded the court that the offence with which his client was charged was bailable.

He also pointed out that the applicant had delivered a baby on 19th October 2004. The applicant's health is said to have deteriorated, and an extract from the applicant's medical records was adduced in evidence to prove that fact.

The applicant's Counsel also said that the applicant's baby had contracted asthma. He therefore sought the applicant's release, on humanitarian grounds, so as to safeguard the life of the infant. However, there were no medical records made available to this court, to support the assertions regarding the health of the applicants infant.

In answer to the application, learned State Counsel, Ms Mary Mwenje, pointed out that although the right to bail was enshrined in the Constitution, it was neither absolute nor automatic. By so saying, Ms Mwenje was purporting to controvert the authority cited by the appellant, which is **Criminal Applications Nos. 427 and 428 of 1998, very Odeoung and another V Republic**

In that case, H.P.G. Waweru J. expressed himself as follows, at page 3 of his Ruling;

“Unless it can be shown that an accused person will be tried within a reasonable time, if he is facing any offence not punishable by death, then he is entitled to bail as a matter of law (the law here being Section 72(5) of the constitution), and the courts (subordinate or the High court) have no discretion in the matter. The only discretion given to the court under the said provision of the Constitution is as to whether the accused should be released unconditionally or conditionally.”

If the law was as straight forward as my brother has made out above, every accused person, not facing a capital offence, and who had not been tried within a reasonable period of time, would not be asking the courts for bail pending trial. They would, instead, demand that the court determine solely whether or not bail would be unconditional or conditional; and if conditional, to impose the appropriate terms and conditions.

To my mind, the courts continue to retain the discretion as to whether or not to grant bail pending trial., I say so because section 72(5) recognises the need for the court to ensure that the accused person appears at a later date, for his trial or for proceedings preliminary to trial. Therefore, if the court was to form the considered view that an accused person was more likely than not to abscond, if granted bail, I believe that it would then be wrong for the court to nonetheless release the person on bail.

In this case, the applicant has applied for bail on two occasions previously. She was denied bail. If she was so convinced that bail was constitutional right, in respect of which neither the Magistrate's Court nor the High court had a discretion, I believe that that she would have appealed against the earlier decisions, so as to prove the same to be wrong. The procedure adopted by the applicant in this matter, is, to my mind, an indication that regardless of her submissions on the perceived absolute right to bail, she is aware that bail was discretionary.

From the applicant's records, it is clear that she is diabetic and Hypertensive. The record (dated 19th October 2004) also shows that the applicant had a wound which had been infected after surgery. When she appeared before me, the applicant had a very young baby, whom she said had been delivered through caesarian section. The infected wound was attributed to the incision made by the doctor who helped the applicant deliver the baby.

In the light of the foregoing circumstances, I would be inclined to grant bail to the applicant. But then again, I cannot help but bear in mind the fact that the applicant was said to have been in possession of 2 kilograms of heroin. A perusal of the charge sheet reveals that the value of the said heroin is placed at kshs 2,700,000/=. Therefore, by virtue of the provisions of S. 4(a) of the Narcotic Drugs and Psychotropic substances (Control) Act, the applicant, if convicted, would be liable to a fine of upto Kshs 8,100,000/=. The said fine would be over and above imprisonment, which could be for a period of upto the applicant's lifetime.

Clearly, given the very hefty penalty that the applicant could face if found guilty, there appears to me a real possibility that she may feel inclined to abscond.

Yet again, I have to weigh that possibility against the legal presumption of innocence.

Doing the best I can, I do hereby order that the applicant be admitted to bail pending trial. But so as to try and ensure that she attends court, at her trial, I am obliged to impose the following terms and conditions;

(a) The applicant shall execute a personal Bond of kshs 2,000,000/= (two million shillings only)

(b) The applicant shall procure two Kenyan sureties for Kshs 2,000,000/= (Two million shillings), each.

The said sureties shall be subject to approval by the Deputy Registrar, in the normal manner.

(c) The applicant's passport shall be deposited with the Registrar of the High Court of Kenya.

(d) Each surety shall deposit his / her passport, (if they hold passports, and this to be verified with the Immigration Department), with the Registrar to the High Court.

(e) The applicant is to report, every Tuesday morning, to the Director of Criminal Investigations, (or such other officer as may be nominated by him), until the hearing and determination of her trial in Criminal Case No. 971/04.

It is so ordered.

FRED A. OCHEING

AG. JUDGE

Delivered in the presence of

For the State

Mr. Osoro for the Applicant

Mr. Odera – Court clerk