REPUBLIC OF KENYA

High Court of Kenya, at Nairobi

Criminal application No. 358 of 2003

Chrispine Kent Otieno Owuor……………………………….APPELLANT

versus

Republic……………………………………………………RESPONDENT

June 13, 2003 Onyancha J delivered the following ruling of the court. This application dated 5.5.2003 is for bail pending the hearing of Kibera Criminal Case No. 2546 of 2003 in which the applicant herein is charged with the offence falling under section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. It is brought before the court under section 72 (5) of the constitution and S. 123(1) and (3) of the Criminal Procedure Code as amended. The applicant who is a 2nd accused in the above mentioned case applied for such bail or bond before the subordinate court but the same was rejected, making this application necessary. The application is supported by an affidavit of one Stanley Kangahi who happens to be the applicants Advocate in this application. Among the facts deponed in the affidavit of Stanley Kangahi are those that might be termed argumentative or based on the opinion of the advocate. The Respondent filed a replying a affidavit through the investigating officer in the case, John Kemboi, sworn on 23.5.2003. Cases where advocates find it necessary to swear affidavits in the cases they are handling should be few. This court would discourage the practice where an advocate without good cause swears an affidavit containing contentious matters.

Mr. Kangahi for the applicant agued that the trial magistrate was, in refusing bail, unfairly and wrongly influenced by the following factsa)

a) That the street value of the drugs the possession of which the applicant was charged with was about Kshs.5.2 million.

b) That the applicant might commit another similar offence if released on bail/bond

c) That several accused persons charged with drug related offences and released on bond or bail, in recent times, absconded.

Mr. Kangahi accordingly argued that the trying Magistrate should not have been influenced by the facts. He further agued that the Magistrate erred in law in not appreciating the fact the granting of bail /bond to an accused is a basic right provided under section 72 (5) of he constitution and that if section 123 of the Criminal Procedure Code, Cap 75 tends to suggest that the trial court has discretion in granting such bail, such suggestion is invalid. He accordingly concluded that bail/bond is to influence and the accused to turn up to court for trial. He cited a legal authority of this court of Misc. Application No. 427 of 1998 which was considered together with Misc. Criminal Application No. 428 of 1998 by my brother, Waweru J.

In response Miss Nyamosi opposed this application and argued that while original S. 123 of Criminal Procedure Code only cited murder, treason, robbery with violence as offences with ressp4ect of which

bail or bond is not available, now the section includes drug- related offences are in fact not available for foe bail or bond. She also argued that Section 72 (5) of the constitution does not provide that the trying court does not have discretion to refuse bail but that it may refuse bail if there are good grounds and that the trial of the offences has not or is not going to be unduly delayed. Furthermore she agued that the applicant if released on bond is likely to interfere with investigations or will most likely abscond.

I have carefully considered the grounds upon which this application is based and which have been ably argued by Mr. Kangahi. I have similarly considered the able response from Miss Nyamosi for the state. I will start by quoting the provisions of section 72 (5) of the constitution. It states thus: -

> ***"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, unless he is charged with an offence punishable by death, be released unconditionally or upon reasonable conditions, including in particular such conditions as are reasonable necessary to ensure that he appears at a later date for trial or for trial or for proceedings preliminary to trial."***

The way I understand the above provision is this: that any person arrested or detained as mentioned in sub-section (3) (b) of section 72 of the constitution who is not tried within a reasonable time should be entitled to be released on bond on bail with or without conditions as long as the offence he is charged with is not punishable by death. What would be a "reasonable time" in my view would depend on the facts and the circumstances of any particular case. The court shall consider all the material placed before it and decide on a reasonable basis whether the person arrested or detained will be tried within a reasonable time. If the court decides that the person so detained will not be tried within a reasonable time within the meaning above mentioned, and having considered the material before it as aforementioned, then in my opinion based in my interpretation of the said section he shall be released either unconditionally or upon reasonable conditions but without losing sight of the fact that any conditions imposed are merely for the purpose of ensuring that the person appears at a later date for trial or other proceedings preliminary to the trial. The constitution thus guarantees and protects the rights to personal liberty subject only to the special exceptions contained in the section. It is my further understanding of the said section 72 (5) aforementioned that subject to the few exceptions singled out therein, the discretion of the courts to grant bail/bond is heavily curtailed. Indeed, much of discretion left in the hands of the courts in the circumstances aforementioned, is only as to whether the accused should be released unconditionally or conditionally.

Miss Nyamosi dew the attention of this court to section 123 of the Criminal Procedure Code and in particular, to the fact that the section has now been amended. Section 123 contains the provisions relating to the granting of bail and it will be instructive to examine them since they were heavily relied on by the respondent. Section 123 (1) & (3) states thus: -

> ***"When a person, other than a person accused of murder, treason, 5robery with violence or any drug related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before court, and is prepared at any time while custody of that officer or at any stage of the proceedings before that court to give bail, that person <u>may be admitted to bail.</u>***
>
> ***Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this part…"***
>
> ***(2)…………..***
>
> ***(3) The High Court may, in any case, whether or not an accused person has been committed for trial direct that the person be or not be admitted to bail or that bail be required by the subordinate court or police officer be reduced ."***

it will be easily noted that this system effectively echoes section 72 (5) of the constitution. But one cannot

miss to see that the discretion left with the court or police officer under the section is considerably unlimited. An application for bail under it may be granted clearly at the court's discretion. That would mean that the right for bail to the accused may not be treated as an imperative right as provided under section 72 (5) of the Constitution where the qualifying word used is "shall" as contrasted to the word "may" used under section 123 of the C.P.C in my understanding of the two sections therefore, there would appear to be a conflict between the two, in that while under the Constitution the right to bail is a declared a basic right which might be granted within the framework defined herein, the same is left to the discretion of the police officer or court in whose custody the accused is found at the time of seeking for the remedy of bail under the Criminal Procedure Code. Being faced with the issue of interpreting the two law provisions above in Criminal Application No. 427 of 1998 which had been consolidated with Criminal Application No. 428 of 1998 where the applicants respectively were Very Odeugu and Okechukwu Juventus, my brother, Waweru J. stated thus at page 4 of his ruling:-

> ***"I am a ware, of course, that section 123 of the Criminal Procedure Code gives the courts, both subordinate and the High Court, discretion to grant or deny bail. This is my humble view, is inconsistent with section 72 (5) of the constitution as outlined above and ought to be declared null and void to the extent of the inconsistency……unless it can be shown that the accused will be tried within a reasonable time, if faces an otherwise bailable offence he is entitled to bail and the court has no discretion to refuse or grant bail in such a case."***

I am conscious that the said ruling is only of a persuasive nature. I am however of opinion that it is a correct interpretation of the provisions of the law aforementioned and I would, subject to the facts of this case, adopt the same. It is not easy to understand the reason underlying the constitution of section 123 of the Penal Code in its present wording .It may not be easily argued that he Legislature intended to deviate from the strong and express position finding in section 72 (5) of the Constitution in view of the accepted legal principal that the provisions of the Constitution are superior to any ordinary legislation and take precedence over he same. Perhaps it is because our Criminal Procedure Code, with some amendments in older and has been in place much longer than the Constitution so that when the latter was introduced on our dependence, section 123 was inadvertently not amended sufficiently to bring it in line with section 72 (5) of the Constitution. Be that as it may, and believing that Waweru J.'s and my interpretation of both a above legal provision is correct, I would observe, with a great respect that the legislature may need to revisit section 123 of the Criminal Procedure Code for amendment to bring it in accord with section 72(5) of the Constitution.

While at it this court wishes to consider the issue raised by Miss Nyamosi for the Attorney General. She argued that section 123 aforesaid has legal notice No. 14 of 1991 been amended to include in the non-bailable offences, any drug-related offence. The list of such offences would now include murder, treason, robbery with violence, attempted robbery with violence and any drug-related offence. By the time we are writing this ruling the only non-bailable offences are provided by the said section 72 (5) of the constitution are those that a attract a death sentence on conviction. These do not include the drug-related offences. This, in my understanding, means that drug-related offences have been made non-bailable under section 13 of the Criminal Procedure Code while the same are still bailable under the Constitution. The anomaly most probably was not intended but in my opinion, it does exist and may at the pleasure of the legislature need adequate attention. This situation in my opinion takes us back in my earlier view, that the relevant wording of section 123 of the Criminal Procedure Code probably needs a serious reconsideration to bring it in line with those of section 72 (5) of the Constitution . but as it stands presently, the amendment of section 123 of C.P.C to extend the list of non bailable offences to include drug related offences appears to me to be inconsistent with the provision of section 72 (5) of the Constitution and I would rule it null and void to the3 extent of the inconsistency.

Turning to the case before me, I take into account the facts that the lower court, having considered the various risks of the applicant absconding if granted bail, and having noted the large value of the seized drugs and also the likely serious punishment if convicted, rejected the applicant's application for bail. she did so even after accepting in the court record that bail is accused's right. She failed to consider and appreciate the legal situation created by section 72(5) of the Constitution which is that as long as the intended trial may not be forthcoming without delay, and the offence charged before her is not one of the

non bailable ones, then she had little discretion to exercise either way. The correct position was that she had to grant the bail but let herself be influenced by the circumstances she took into account (in refusing bail) in deciding the kind of bail and what terms, she would grant it. Put differently, the trial court had no discretion in granting bail in this case. It was her legal obligation to grant it as long as the trial was not coming within a reasonable time and the offence (as was in this case) was bailable as defined in section 72 (5) of the Constitution.

Unfortunately, it is not clear whether or not she directed her mind to the issue of the time within which the trial would come. In my view it is not enough that she had actually fixed the hearing date and she may be taken to have had it in mind. It must be clear form the record that she was actually conscious of it and was influenced by it. It is upon this court therefore to consider the fact in order to decide the greater immediate issue as to whether or not the applicant was to be granted bail.

Miss Nyamosi put into the record the fact that the criminal case in question is set down for a hearing on 27.6.2003 and on 1.7.2003. this was confirmed by MR. Kangahi for the applicant. The case was originally fixed on 13th and 14th May 2003. it must have failed to take off then and was reaffixed for 27.6.2003. clearly therefore the hearing date was from the start, fixed on dates which were reasonably close as considered from the point of view of this court in this application. More so if we consider this application as afresh application and taking into account the current hearing date of 27.6.2003 in determining the phrase “within a reasonable time” envisaged in section 75(5) of the Constitution. It is the conclusion of this court accordingly, that since the trial date is within a reasonable time, from the date hereof and taking in to account the fact that the offences the applicants are charged with are serious and would attract heavy sentences; that the applicant’s abode is not known presently, and he has no known family; that he is likely to interfere with potential witnesses as stated by the State and that he is likely to easily abscond due to the above reasons, this court is of the view that granting of bail will not wise at this stage. This application would therefore be refused for the time being, with leave of this court to the applicant to renew the application if there is a delay of the trial in which case the court will then grant bail upon conditions to be decided then.

It is so ordered.

Dated and delivered at Nairobi this 13th day of June 2003.

June 13, 2003

Onyancha J.