



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CRIMINAL APPLICATION NO.567 OF 2003**

**FELIX MACHARIA MAGAWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant herein has applied to this Court for:-

1. Consolidation of Criminal Case No.1030 of 2003, Criminal Case No.1386 of 2003 and Criminal Case No.1387 of 2003, all preferred against him in Nairobi Chief Magistrate's Court on different dates between 25th April and 6th June, 2003.
2. Variation of bond terms after consolidation of the three cases to an affordable and realistic total amount of Kshs.200,000/= and one surety of the same amount to enable him to enjoy his constitutional rights and pleasure to undergo trial from outside remand custody.

Learned counsel for the applicant, Mr. Rakoro, who held brief for Mr. Odenyo for the applicant, informed this Court that the applicant pleaded not guilty to the charges in all the three cases. Initially counsel stated that all the three cases were part-heard but he subsequently said only two were in fact part-heard, i.e. Criminal Case No.1030/03 and Criminal Case No.1386/03. He stated that the three cases are similar; that they were investigated by the Banking Fraud Investigations Department (BFID); and that they were preferred against the applicant on different dates between 25th April and 6th June, 2003, i.e. within 1 ½ months. That Criminal Case No.1030/03 and Criminal Case No.1386/03 had earlier been set down for hearing on 09.07.03 and 15.07.03 but were later re-scheduled to 28.07.03 and 30.07.03, respectively. That under Criminal Case No.1030/03 the applicant is facing charges for the offences of stealing with an alternative count of handling stolen goods; forgery; uttering false documents; making a false document; and that the sum total of the money allegedly involved under these counts is Shs.100,000/= while the bond terms came to Shs.200,000/=. That under Criminal Case No.1386/03 he is facing a charge of stealing Shs.380,000/= and the bond terms amount to Shs.150,000/=. That under Criminal Case No.1387/03 he is facing forgery charges and the aggregate amount allegedly involved is Shs.100,000/= while the bond terms amount to Shs.200,000/=. That the sum total of the money involved under the three cases is Shs.580,000/= while the sum total of the bond terms thereunder amounts to Shs.550,000/=. That the applicant suffers a recurrent kidney problem, has been in remand custody for over 100 days and it is difficult to get regular access to a qualified doctor while in remand. That he is the sole breadwinner for his family and his 3 children, one of whom is in form 4, who are suffering due to lack of school fees following his being away in remand custody. That he cannot raise the bond terms and that they are oppressive. That consolidation of the cases will facilitate speedy trial thereby reducing the backlog of

cases. That if the bond terms are reduced to half the current amount that should be enough and that the applicant will abide by conditions this Court may impose if his application for consolidation of the three cases is granted and his bond terms scaled down. Counsel urged that the applicant's application be allowed.

Learned counsel for the respondent, Miss Okumu opposed the application for consolidation. In her view, since the cases, or at least two of them, are part-heard, they cannot be consolidated. She noted that Criminal Case No.1387/03 has a total of 8 counts; Criminal Case No.1386/03 had 1 count; while Criminal Case No.1030/03 has 7 counts. This makes the aggregate number of counts 16. She drew attention to **Ochieng vs Republic** [1985] KLR 252 in which the appellant faced multiple charges, i.e. 44 counts, alleging forgery, fraudulent false accounting, uttering and stealing by a person employed in the public service. The Kenya Court of Appeal held in Ochieng's case that it is undesirable to charge an accused person with so many counts in one charge sheet as this may occasion prejudice and that usually, no more than 12 counts should be laid in one charge sheet. Counsel noted that the complainants are different and submitted that this is not a fit case for consolidation. Regarding the applicant's second prayer for reduction of bond terms, respondent's counsel submitted that they are reasonable as they stand and not excessive as contended by the applicant. On the question of kidney ailment the applicant said he is suffering from, counsel noted that the medical report he alluded to is dated 19.02.02, i.e. over 1 ½ years old. She (counsel) submitted that if the applicant wishes to rely on this ground in support of his application, he needs to produce, for consideration, a current report duly authenticated by a doctor at Kenyatta National Hospital showing that he (applicant) still suffers from the ailment complained of. Counsel urged that the applicant's application be dismissed.

I have given due consideration to the submissions of both counsel on behalf of their clients. The applicant is facing various charges under the Penal Code (Cap.63).

The issues for the determination of this Court are:

1. Whether the applicant should or should not have the criminal cases facing him consolidated and
2. Whether his bond terms should or should not be reduced or scaled down.

Regarding the application for consolidation, I note that the three cases sought to be consolidated are different cases in different Courts and are at different stages of the trial process. The complainants are different, ranging from banking institutions, i.e. National Bank of Kenya and Barclays Bank of Kenya, plus various individuals. The offence subject matter of Criminal Case No.1386/03 is said to have been committed against the National Bank of Kenya in September, 2000. The offences charged under Criminal Case No.1030/03 and Criminal Case No.1387/03 are stated to have been committed on different dates in April, 2003 against the Barclays Bank of Kenya and various individuals.

If they were consolidated, they would have to go before one magistrate. Would that have to be one of the magistrates trying one of the cases or a totally new magistrate? Should whichever magistrate assigned the consolidated cases hear each of the cases de novo or should he/she continue those which are part-heard from where the initial trial magistrate left in terms of section 200 of the Criminal Procedure Code (Cap.75)? If the cases were to start afresh, witnesses would have to begin giving evidence all over again while the trial magistrate would have to appraise himself/herself of the new matters before him/her. The applicant is right in saying there is a back log of cases. How does starting to hear part-heard cases afresh advance the cause of speedy trials? If the cases are to continue before a new magistrate from where each case had reached, the succeeding prosecutor and magistrate have to acquaint themselves with the new matters falling into their hands. What assurance is there that early hearing dates will be available to advance the cause of speedy trials? And what is the justification for bringing about all these complications?

If consolidation is granted, the applicant will end up facing a total of 16 counts of stealing or handling stolen goods, attempted stealing, forgery, altering false documents, making documents without authority

and personation. Has he considered the full implications of the complicated scenario his application is bound to create for the overall interests of justice? In any case, the Court of Appeal came out clearly in Ochieng's case (supra) that it is undesirable for an accused to be subjected to more than twelve charges at one trial. This is a binding authority

I find no merit in the applicant's application for consolidation of the three cases and the said application is hereby dismissed.

The applicant also applied for scaling down of his bond terms since he has been unable to meet them as they presently stand and in the result he has remained in remand custody. The offences are bailable. The applicant raises a valid point in urging that his circumstances should be given due consideration so as to facilitate his release while awaiting trial. He is, of course, presumed to be innocent until he is proved or pleads guilty. He has denied the charges. That is his constitutional right. Section 72 (5) of the Constitution provides in effect that an accused charged with a bailable offence, as is the case with the applicant:

“... 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 has undertaken to attend Court when required and to abide by any conditions the Court deems fit to impose. He urges that if the bond terms imposed in each of the three cases are reduced by half, he may be able to meet them and gain release from custody pending his trial.

The applicant's application for scaling down of his bond terms is hereby granted. His bond terms in each of the subject three cases are reduced by half plus one surety for the like amount in each case.

Orders accordingly.

**Delivered at Nairobi this 15th day of September, 2003.**

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**B.P. KUBO**

**JUDGE**