

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPLICATION NO.467 OF 2001

THOMAS MARANGA MAOSA APPLICANT

VERSUS

REPUBLIC PROSECUTOR

RULING

THOMAS MARANGA MAOSA (the applicant) is an advocate of this court. On the 22nd June, 2001 he was charged in the Chief Magistrate's Court, Nairobi in Criminal Case No.1309 of 2001 with a criminal offence of Stealing by Agent contrary to Section 283(c) of the Penal Code in that on diverse days between the months of August and September, 1999 in Nairobi, jointly with others, and being an agent of Nancy Sitonik, stole KShs.1,141,000 the property of the said Nancy Sitonik. The particulars of the agency between the applicant and Nancy Sitonik has not been disclosed in these particulars of the offence. The applicant, however, pleaded not guilty and this case was fixed for hearing in Court NO.6 on the 31st July, 2001. His application for bail or bond was rejected by the learned Chief Magistrate. He has now filed this application under Section 123 of the Criminal Procedure Code to be admitted to bail. This Section provides:

“S.123 (1) when a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence, or any drug drug related offence is arrested or detained without warrant by an officer in charge of a Police Station, or appears or is brought before a court, and is prepared at anytime while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail. 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. The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive”.

Mr. Thiongo, assisted by Mr. Onsembe, has submitted on behalf of the applicant that this is a fresh application for bail or bond, and has invoked the original jurisdiction of this court. It is not an appeal against the rejection of the bail application by the learned Chief Magistrate. This being the position, therefore, I will concern myself with the facts placed before me by Mr. Thiongo in support of this application. I will also concern myself with Miss Nyamosi's submission in opposition.

The applicant is an advocate of this court, of sixteen years standing. He is charged with a bailable offence and is prepared to abide by any conditions which this court may impose to ensure his attendance at the trial of this case.

Miss Nyamosi has opposed the release of the applicant on bail or bond on the grounds that he is likely to abscond as he did after he had been released on bond in Criminal case No.3552 of 1996. Miss Nyamosi conceded, however, that she does not have documentary proof or any proof to show that the applicant indeed absconded from the jurisdiction of the court after he was admitted to bail or bond in Criminal Case No.3552 of 1996.

Mr. Thiongo has put it on record that indeed the applicant was charged in Criminal in case No.3552 of 1996 with the offence of stealing by agent contrary to section 283(c) of the Penal Code, particulars of which were that on diverse days between 21st August, 1996 and 15th October, 1996 in Nairobi stole shs.1,141,000 which had been received by him for and on account of Nancy Chepchirchir Sitonik; that the applicant was also charged with stealing by agent Shs.200,000 which he had received from one Helen

Cherotich Sitonik, but that the applicant was acquitted in 1997.

Mr. Thiongo has also put on record that the applicant has never owned a passport, a fact which has not been controverted by the Republic.

The law is clear. Where an accused person is charged with a bailable offence the court has discretion to grant or refuse bail depending on the circumstances of the case. The discretion of the court is not fettered by the opposition of the prosecution to the applicant's release on bail. See ABDULLA BIN MOHAMMED (1914 – 15) EALR 166. The test to be applied in granting or refusing bail is whether such person would appear at his trial if granted bail. In arriving at this conclusion the court is bound to take into account the facts, the charge and all the circumstances of the offence. If the prosecution is objecting to the release on bail of an accused on whatever grounds, the burden lies on it to prove that or those grounds on the required standard applicable in criminal cases.

Indeed in S.107 (1) of the Evidence Act it is provided as follows:-

“107(1). Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist”.

The Republic's opposition to the applicant's release on bail or bond is based on the ground that he is likely to abscond when he was so released. There is absolutely no proof of this and Miss Nyamosi has rightly conceded that there is no such proof. The Republic's objection is for rejection.

For the foregoing matters I grant this application as prayed. I therefore do hereby admit the applicant to bail and direct that he executes executors a court bond of Shs.500,000 with two sureties of Shs.250,000 each. I also direct the applicant to report once a week to the Divisional Criminal Investigation Officer, Kilimani, until the 31st July, 2001. Thereafter the applicant be at liberty to apply for variation of the reporting order.

It is so ordered.

Dated this 9th July, 2001.

A.G.A. ETYANG'

JUDGE