



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Coram: D. K. Kemei - J

**MISCELLANEOUS CRIMINAL APPL. NO. E037 OF 2020**

**IN A MATTER OF CRIMINAL CASE NO. 779 OF 2015 AT THE CHIEF MAGISTRATE'S COURT AT MAVOKO**

**ALFRED GICHANA OGWANKWA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant, **Alfred Gichana Ogwankwa** is facing several counts before the trial court of obtaining money by false pretences contrary to section 313 of the Penal Code. The charges relate to alleged sale of certain parcels of land at Athi-River Sub-County within Machakos County in two different situations. When the Applicant was initially arraigned before the trial court, he was released on bail pending trial. However, the Applicant failed to attend court on the various dates that the court had appointed for trial of the case. The bond granted to the Applicant was later cancelled. The Applicant was aggrieved by the decision and has applied to this court vide a Notice of Motion application filed on 11<sup>th</sup> November, 2020 to have the decision revised by this Court.

2. The Applicant seeks four (4) orders namely:

*i. Spent.*

*ii. THAT this Honourable Court be pleased to order for the reinstatement of the Applicant's bond and bail terms.*

*iii. THAT the Honourable Court also be pleased to grant the Applicant a bond of at least Kshs. 100,000/- and a cash bail option of at least 20,000/- since his economic situation is currently down.*

*iv. THAT the Applicant is willing to abide by any other conditions that might be ordered including availing two contact persons if need be.*

3. In the case of the Applicant, he reiterates that after the learned Magistrate recorded the agreement on an out of court settlement, through ADR, but did not issue another date either for a mention or a hearing and that the matter stood as technically withdrawn since neither the complainant nor himself was ever informed of a next date. He added that the matter was never mention from July 2017 to 24<sup>th</sup> January, 2018 as per the record of proceedings. During the said period, he visited the Court's Registry in the Month of September 2017 and December 2017, respectively. He further averred that, in December 2017 during his follow up on the discharge of the surety which was his ancestral land title deed, he was informed by one clerk that, his matter had been dispensed with and his file was already in the Court's Archives therefore he should not bother coming as they were to discharge the surety and contact the owner (his father) to come for it in person.

4. The application was canvassed by way of written submissions. The Applicant reiterated the contents of the supporting affidavit. He submitted that he is currently being held at Kitengela Prison where he is unable to access medication. He pleaded with the court to take into consideration his current health conditions and reinstate the bond terms that were earlier granted but were cancelled.

5. The Respondent submitted that the Applicant failed to adhere to the provision of his bond terms, by failing to appear in Court when required to do so. It was also submitted that there is no agreement in the lower court proceedings that indicates that parties have entered into a settlement. It was finally submitted that the Applicant abused his privilege on the issue of his bond and therefore he should proceed with his matter while in custody. The court was urged to dismiss the application in its entirety.

6. The right to bail is provided under **Article 49(1) (h) of the Constitution**. Indeed, the Applicant was released on bail pending trial before he absconded court which led to his bond being cancelled by the trial court. The Applicant has pleaded with this court to reinstate the bond

that was initially granted to him.

7. It is in appreciation of this constitutional right that the trial court released the Applicant on bond pending trial. The essence of granting an accused bond/bail, is to enable him/her prepare for trial and enjoy his freedom of movement but an accused person must also comply with the conditions pertaining to that bond/bail. One of the foremost requirements is that an accused person will attend court whenever required to do so.

8. This court has carefully considered the facts of this application. In the case of **Albanus Nyayo Kimeu v. Republic, Machakos HC Cr. Case No. 10 of 2015, (2015) eKLR, (per Nyamweya, J.)** that an accused person is, consistently with the presumption of innocence, entitled to be released on bail pending trial, unless there are compelling reasons not to do so, and that the Prosecution must show such compelling reasons.

9. I have considered the application and the submissions presented. I have also perused the lower court record and note that the applicant was released on bond sometimes on 22.06.2016 and on 3.07.2017 he failed to turn up in court which necessitated the issuance of a warrant of arrest against him. The warrant remained in force until 5.03.2018 when it was lifted subject to the Applicant availing medical documents. The Applicant upon being released absconded court from 22.05.2018 until 24.04.2020. It would appear to me that the Applicant had violated the terms of bond namely to ensure that he attends court without fail. The record shows that the applicant did not attend court for most of the dates. The applicant's claim that the case had been withdrawn seems to be incorrect since there is no such application made on behalf of the complainant. Again, the applicant has not indicated whether his surety has turned up in court to explain about his long absence from court and whether he/she is still willing to continue standing for him as surety for the remainder of the trial. The Applicant's claim that the matter stood technically withdrawn as neither himself nor the complainant were informed of the next date appears rather queer as it was his duty to attend court until the matter was finalized. It was thus out of character for him to stay away until a warrant was issued against him. The Applicant has also not indicated whether he has sought for review of his bond before the trial court and was turned down. The applicant ought to know that he has every right to approach the trial court every time regarding review of bond and that it is after a refusal by the trial court that he can then approach the High Court for intervention. This is meant to ensure that the trial courts have the requisite parameters to tackle its matters especially where exercise of discretion is involved. The trial court had approved the surety and is in a position to summon him over the issue of the applicant's long period of absence from court and also to call for a report from the probation department over a request for review of bond by the applicant at any stage of the proceedings. The applicant who has given a lengthy narration of what had transpired leading to his absence from the court should therefore approach the trial court for reinstatement of his bond. I am therefore not satisfied that the Applicant has exhausted all the available remedies before approaching this court.

10. In the result, it is my finding that the Applicant's application filed on 11.11.2020 lacks merit. The same is dismissed.

It is so ordered.

**Dated and delivered at Machakos this 12<sup>th</sup> day of March, 2021.**

**D. K Kemei**

**Judge**