



**REPUBLIC OF KENYA**

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

**(CORAM: R. MWONGO, J)**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 10 OF 2020**

**PETER KINYANJUI WAINAINA.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

1. On 19<sup>th</sup> October, 2010, the appellant was charged in the lower court in Naivasha with attempted murder in that on 17<sup>th</sup> October 2019 at 9.30pm at Maili Saba Village, Bahati, he attempted unlawfully to cause the death of one Rufus Mutuma by strangling him. This was in case is CMCC No. 1531 of 2019. The offence carries a life sentence.
2. On the other hand, in the High Court in HCCRC No. 17 of 2019, the applicant is charged with the murder of Edith Muthoni Njoki on 17<sup>th</sup> October, 2019 at Kiungururia Village Gilgil at 8.30pm. The offence carries a death sentence.
3. In the lower court the accused was granted a bond of Kshs 500,000/= on 30<sup>th</sup> November 2011. In the High Court, following a contested application, the court in a ruling on 30<sup>th</sup> April, 2020 granted bail of Kshs 600,000/= among several other conditions.
4. In the application herein, the applicant, seeks to consolidate the bond terms imposed on him in the two different cases and two different courts.
5. The applicant in his supporting affidavit and further affidavit argues that: the bond terms in the High Court and in the lower court can be consolidated into a single bond; that as the two courts are in the same compound no inconvenience will be caused; that this is in the interest of justice and augurs well for decongestion of prisons as accused cannot afford both bonds as he is from a very poor background; that the two cases are related in that the circumstances that occasioned the crimes happened on the same day and in the same location; and that supervision of the bond terms in the two matters will not be affected as storage of security will be at the High Court which can stand for both matters.
6. The DPP argues that the bond terms and conditions in each of the courts are different and must be supervised by the court that handled the matter; that releasing the applicant on a consolidated bond will jeopardize supervision of the terms and conditions set out for bond in each case/trial; that one case is under the High Court's jurisdiction whilst the other is under the subordinate court's jurisdiction.
7. In **Stephen Gitau Karanja v Republic [2018] eKLR** the High Court (Kiambu) determined that it was not provident to consolidate bond in respect of four separate criminal cases despite the fact that all four charges were in the Chief Magistrate's Court Kiambu, and the cases had themselves been consolidated.
8. In **Maurice Amugumbi Jumba v Republic [2019] eKLR** an application to consolidate bond terms in two criminal cases in Limuru SPM's Court, was under review. The High Court declined to consolidate on the ground that administration of the bail would be further complicated. The court insisted on two separate sureties in each case as both cases involved serious offences and attracted the maximum penalty.
9. In **Edwin Mwiti Gacunku v Republic [2019] eKLR** the High Court in Nairobi allowed consolidation of bail in two cases in the Nairobi Chief Magistrate's Court. The applicant had been in custody for one year and was unable to meet the bond terms. The court was, however, convinced from available information that the applicant would not be a flight risk as he had dutifully attended court in the earlier case. The court consolidated the bond terms. **Kimaru J** stated:

**"The overriding principle that guides the court in applications such as the present one is whether the Applicant, if released on bail pending trial, will attend court on the dates that the cases are scheduled for trial. Of course, there are principles which this**

*court ought to consider such as the serious nature of the offence the Applicant faces and whether the Applicant was likely to abscond from the jurisdiction of the court and also taking into consideration his antecedent conduct. Further, this court is required to take into consideration whether, if the Applicant is released on bail pending trial, he will commit another offence or will interfere with witnesses. In the present application, the trial courts released the Applicant on bail pending trial. The courts were satisfied that the Applicant fulfilled the requirements to enable the said courts release him on bail pending trial. In the considered opinion of this court, the said courts formed the view that the Applicant was not a flight risk.”*

(Emphasis supplied)

10. In **Republic v John Kahindi Karisa & 2 Others [2010] eKLR, Ibrahim J** (as he then was) observed:

*“Whatever the court will decide, the fear and anxiety exerting on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing a capital offence is real and cannot be wished away. It is therefore true that the seriousness of an offence and the sentence for which is possible upon conviction is a matter which can bear on the accused and can affect his decision to attend trial or not.”*

11. The court must therefore ensure to balance between the presumption of innocence and the seriousness of the offence through a careful consideration of the peculiar facts of the case. The court in the **Maurice Amugumbi** case (supra) observed that:

*“The ultimate purpose of bail is to ensure that the accused person will attend trial. Obviously, the more severe the likely punishment for the offence charged, the more likely that an accused person may be tempted to abscond to avoid the eventuality of punishment. Therefore,*

*in as much as the court must pay attention to the charges facing an accused person, it must be careful to give effect to the right to bail while determining what conditions to impose. If that does not happen, the terms imposed may well turn out to be effectively a denial of the right to bail.”*

12. The question of presumption of innocence was canvassed by Porter J in **Watoro v Republic [1991] KLR 220** at 283 as follows:

*“The seriousness of the offence in the terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. It would be wrong to leap to the conclusion that the accused was guilty merely because he had been charged and to decide the bail application on that basis.”*

13. In the present case the offences carry the heaviest penalties - life and death sentences. Whilst the bond in the lower court has no conditions, the bond terms in the High Court are quite detailed and include: the accused to report to Bahati Police Station every Friday and to make a record thereof; such record be maintained in a book to be availed to court, and that the accused shall not interfere with investigations. The attempted murder was alleged by one of the witnesses in the High Court - the complainant in the lower court - to be intended to snuff out evidence of the murder for which the accused was charged in the High Court.

14. Taking all these matters into account, I would be hesitant to interfere with the bond terms in the High Court, the administration of which requires specific follow-through. I would have no difficulty however, in reducing the bond terms in the lower court from Kshs 500,000/= to Kshs 200,000/= which I hereby do.

#### **Administrative directions**

15. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

16. A printout of the parties’ written consent to the delivery of this judgment shall be retained as part of the record of the Court.

17. Orders accordingly.

**DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 2ND DAY OF MARCH, 2021.**

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**R. MWONGO**

**JUDGE**

Attendance list at video/teleconference:

1. Ms Njoroge holding brief for Mbiu for the Applicant
2. Ms Maingi for the Respondent

### 3. Court Assistant - Quinter Ogutu