



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

MISC. CRIMINAL APPLICATION NO. 37 OF 2020

BETWEEN

PAUL KIPKOECH ROTICH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an application to appeal against the cancellation of cash bail in the ruling of the

Chief Magistrate's Court at Gatundu, L.M. Wachira, CM in S.O. No. 2 of 2018

dated 22nd August, 2019

RULING

1. The rights to Liberty and the presumption of innocence are fundamental tenets of our Constitution. **Article 49(1)(h)** of the Constitution provides that unless there are compelling reasons, an arrested person has a right to be released on bond or bail on reasonable conditions pending a charge or trial. **Article 50(2)(a)** of the Constitution recognizes that an accused person has a right to fair trial which includes the right to be presumed innocent until contrary is proved.

2. In this Ruling, this Court is called upon to determine a Notice of Motion application filed on 8th July, 2020. The application is filed by **PAUL KIPKOECH ROTICH, (Paul)**. Paul was charged before Senior Principal Magistrate's Court at Gatundu with an offence of defilement contrary to **Section 8(1)** of the Sexual Offences Act. He pleaded not guilty. On 13th March, 2018 he was released on his bond of Kshs.200,000/= and surety of similar amount or Kshs.100,000/= cash bail.

3. The trial commenced and on 13th June, 2019, Paul was absent from court. The case was on that date due to continue with prosecution's evidence. The trial court on that date issued a warrant of Paul's arrest. Paul again failed to attend court on 16th July and 13th August, 2019. The warrant of his arrest was extend on both those two dates.

4. On 15th August, 2019 when the matter was before the trial court, Paul's learned counsel addressed the court and said:-

“Accused (Paul) appears to have not attended court on a number of occasions the reason for nonappearance was a slight mix up. On the afternoon of 13.6.2019 at 12.30 pm we were to come. I was informed early that day that the court would not be sitting. I agreed with the prosecution that the matter would be fixed for hearing today. I came to learn the accused did not appear in court on the said date.”

5. The trial court delivered a ruling dated 22nd August, 2019 on the basis of the above explanation given by Paul's learned counsel. In that Ruling the trial court noted that Paul had previously failed to honour the terms of his bond by absencing himself from court. The trial court in its considered Ruling, in part stated:-

“Court attendance court(sic) is a duty of an accused person in person (sic). The bail deposited or bond executed is an agreement between the accused person and the court. It is not an agreement between counsel and court. I have looked at the explanation given by counsel, and it appears to explain why counsel did not find any need to appear in court, given the circumstances. There is no explanation given as to why the accused person did not appear in court on 13th June, 2019 either by himself or by counsel. Counsel has only apologised for the failure to appear.”

6. By that ruling, the trial court declined to lift the warrant of arrest and ordered that Paul be remanded in custody for the duration of his trial.
7. It is that order of declining to lift the warrant of arrest that the present application is directed at. Paul by his application, seeks reinstatement of previous bail terms. Paul supported his application for reinstatement of his bail terms before the trial court by an affidavit.
8. By that affidavit, he deponed that throughout his trial, he did not interfere with prosecution's witnesses, that previous failures to attend his trial was due to illness, and that he had during his remand at prison, suffered a fracture and he was not getting proper medical attention in prison. He annexed a report from the Thika prison dispensary and from Thika Level 5 hospital. Both reports confirm he suffered a fracture of the left lower limb in October, 2019. He had plaster of paris put on the limb for eleven weeks. There was good fracture site healing. He however continued to complain of pain which was managed by analgesia, but he reported little improvement. Paul, therefore deponed that he wishes to get better treatment outside of prison.

ANALYSIS

9. An accused person is granted bail or bond on condition that he will attend his trial when required to do so. This was recognized by the court in the case **REPUBLIC V. ROBERT ZIPPOR NZILU (2018) eKLR** thus:-

“The main function of bail is to ensure the presence of the accused at the trial... Accordingly, this criterion is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria. The Working Party on bail procedure in Magistrate’s Courts in the United Kingdom said in paragraph 22 of the Report:-

‘There are a number of other considerations to be taken account in deciding a bail application, but in general they are not in themselves reasons for granting or refusing bail, but indicators of the likelihood or otherwise of the defendant’s appearance.’

As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial...”

Paul contravened that condition of granting bail/bond.

10. I have examined the proceedings of the trial court and I noted that Paul absconded his trial on three different dates. When he attended court with his counsel, his counsel only gave his own reasons why he had failed to attend court. No explanation was given by or on behalf of Paul for failure to attend. It is for that reason that I find, absent of reasonable explaining for failing to attend trial on three different date, that the decision of the trial court to decline to lift the warrant of arrest was not tainted with error. In the circumstances, there is no basis to justify the reinstatement of Paul’s bail terms.

11. Accordingly, the application filed on 8th July, 2020 is dismissed.

RULING DATED and DELIVERED at KIAMBU this 13th day of MAY, 2021.

MARY KASANGO

JUDGE

Coram:

Court Assistant.....Ndege

Applicant:.....Present

Respondent.....Mr. Kasyoka

COURT

Ruling delivered virtually.

MARY KASANGO

JUDGE