



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CHUKA

CRIMINAL MISC APPLICATION NO. E018 OF 2020

ABDALLA MUTEMBEI GISAGA.....APPELLANT

VERSUS

PROSECUTION.....RESPONDENT

(Being a revision against a ruling by Hon. N.Kahara (SRM) sitting at Chuka Law Court

in Criminal Case No. 760 of 2020 and delivered on the 24th.02.2021)

R U L I N G

INTRODUCTION

1. The applicant herein was charged with the offence of assault causing actual bodily harm contrary to **Section 251 of the Penal Code**. It was alleged that on the 27th.07.2020 at Ndagani sub location, Karingani location, Meru South Sub -County within Tharaka Nithi County, he assaulted one Ogeto Andrew thereby occasioning him actual bodily harm.
2. The applicant upon being arraigned in court was granted orders for bond of Kshs. 30,000.00 with one surety or a cash bail of Kshs. 20,000.00 . He deposited the cashbail and he was released. On the 6th.01.2021, the applicant failed to attend court and as a result, the court issued a warrant of arrest against him.
3. On the 8th.01.2021, the applicant was before the court although the record is not clear as to whether he appeared on his own volition, or under a warrant of arrest. The prosecution made an application for the bond/bail to be cancelled. The applicant in defence produced treatment notes which upon further scrutiny, was determined to be unauthentic as he had claimed that he was treated at Chuka District Hospital an allegation that turned out to be false.
4. On the 24th.02. 2021, the court proceeded to make a decision to cancel the bond/bail and the applicant was ordered to be remanded at the Chuka G.K. Prison until the case is heard and determined. On the 13th.01.2021, the applicant was further brought before court for making a document without authority contrary to **section 357(a) of the Penal Code** in court file No.E010/2021. The court directed that he be remanded in custody to await the ruling in this matter
5. The applicant moved this court vide a notice of motion dated the 24th.2.2021 and filed under certificate of urgency. The court certified the application as urgent since it touched on the liberty of the applicant. The court directed that the application be served for interpartes hearing on the 4th.03.2021.
6. Mr. Kijaru appearing for the applicant moved this court to exercise its supervisory authority over the lower court in relation to the ruling denying the applicant bond/bail. The application was however opposed by the prosecution.

APPLICANT'S CASE

7. By a notice of motion dated 24th.02.2021 and filed under certificate of urgency, the applicant moved this court and relied on the following grounds:-

- i. THAT he has been in custody since 07th.01.2021.

ii. THAT the lower court has unjustifiably refused to grant him bond and or reinstate his bail terms.

iii. THAT his constitutional right to liberty stand to be prejudiced by further incarceration.

iv. He prayed that this application be granted.

8. He also attached a supporting affidavit dated 24th.02.2021 citing among other things that he has been attending court without fail until 7th.01.2021 when he was arrested. He argues that his failure to appear before court on the material date was not a deliberate act of disobedience but as a result of a mistake.

9. That on the same material date, he was within the court precincts applying to be supplied with court documents in Criminal E201 of 2020 and if at all he had wanted to abscond, he could not have come to the court precincts. He claims that the trial court has unjustifiably denied him bail and further cancelled his bail/bond terms.

10. That he is tossed from one court to another and so he prays for this court's intervention; since the trial court keeps on informing him that it awaits this court's ruling. He instead blames his woes unto one Alexious Stephene Njue who allegedly vowed to fight him since the complainant in CR 760/2020 is his employee.

11. He further claims that the alleged offence facing him is a bailable offence and so prays that this court exercises it's revisionary authority to safe guard his rights.

RESPONDENT'S CASE

12. By a replying affidavit dated 8th.03.2021 sworn by one Cpl. James Kinoti Mwebia, the court is urged to deny the applicant bail until the case is finalized.

13. That he is the investigating officer and currently handling an assault case of causing actual bodily harm (involving the applicant) contrary to section 250 as read with section 251 of the penal code. He further submitted that the applicant is a flight risk and so he should not be released. That the applicant is involved in another criminal matter namely CR 481/249/2017 (assault causing actual bodily harm) of court number 907/2017.

14. He argues that the applicant absconded court on the 6th.01.2021 in CR 760/2020 and as a result, a warrant of arrest was issued against him. That on the 7th.01.2021, he managed to arrest the applicant herein. That upon being produced before the trial court, the applicant produced treatment notes alleging that he had attended Chuka District Hospital on the 6th.01.2021.

15. That the treatment notes tendered in court vide patient number 111725 as the applicant had not attended the facility on the 6th.01.2021. He lauds the decision by the trial to withdraw the bond /bail terms of the applicant as correct, legal and proper and that the applicant has not shown any impropriety to warrant this court to intervene by way of revision.

16. He further argues that the applicant herein is under investigations over allegations of planning to kill one Alexus Stephene Njue.

17. He prays that this court dismisses this application with costs.

ANALYSIS AND DETERMINATION

18. The issue for determination is whether this court can exercise its supervisory jurisdiction on the decision of the trial magistrate cancelling bail for the applicant.

19. The right to bail or bond is a fundamental right enshrined in the Bill of Rights. **Article 49 (1) (h) of the Constitution** provides that an arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

20. Article 49 of the constitution stipulates that: "An arrested person has the right:

a)

h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

21. It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation.

22. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release.

23. Be that as it may, this court is called upon to weigh the applicant's rights to bail under Article 49(h) against the compelling reasons given by the prosecution (in this case, the investigations officer) for denial of bail.

24. In **Michael Juma Oyamo & another v Republic [2019] eKLR**, the Court of Appeal pronounced itself as follows in respect to compelling reasons that can justify denial of bail/bond:

“Article 49(1) (h) of the Constitution states that an arrested person has the right “to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons”. It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person. We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in *R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009* as follows:

“... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution.”

25. Having considered all the information placed before this court. The High court's power of Revision is set out under **Section 362 and 364 of the Criminal Procedure Code.**

Section 362: provides

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.

Section 364(1)

In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High court may:

a) In the case of a conviction, exercise any of the powers conferred on it as a court of appeal by Section 354, 357 and 358, and may enhance the sentence.

b) In the case of any other order other than an order of acquittal, alter or reverse the order.

26. When considering whether to issue orders on revision on a trial court's decision on bail, the High Court, must be satisfied that the decision of the trial court is plainly wrong or, has misdirected itself in failing to take into account a material factor or taking into account an immaterial factor and it has resulted in a miscarriage of justice, as expressed by the Court of Appeal for East Africa in the context of ***Mbogo v. Shah (1968) EA 93*** as follows:

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice”.

27. There is no right of appeal from the decision of the trial magistrate denying the accused person bail since the applicant has not been acquitted or convicted nor are there other circumstances as provided under **Section 348 A of the Criminal Procedure Code** in this regard, the applicant was in order when he approached this court by way of revision.

28. The ruling of the trial magistrate is basically an order denying the applicant bail for which this court has jurisdiction to call for the record and examine its correctness. The contention by the respondent that the applicant has not indicated any impropriety to warrant this court's intervention by way of revision is thus not correct.

29. Upon perusal of the proceedings before the trial magistrate, the court reasoned that; -

“The explanation of the accused person for absconding court is therefore unacceptable. For the foregoing reasons, I am inclined to allow the prosecution's application to cancel the accused bond terms.”

30. It is important to point out that the grant of bail and bond is an exercise of discretion by a trial court. The Bail and Bond Policy guidelines of the Judiciary has proposed that the court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision.

31. The Guidelines further recommend that officers of the probation and aftercare service should prepare reports as soon as practicable but not later than two weeks from request. The argument has been that there is need to balance the grant of bail with the needs of the victims; this is further buttressed by the very reason that the court also takes judicial notice of and the directions from the Judiciary during the existence of the ravaging effects of Covid -19 that accused persons should be allowed to seek for revision and or appeals to reduce unnecessary overcrowding within the remands and jails.

32. In this regard, this court had due regard to the affidavit on record that raised apprehension of the prosecution towards the grant of bail to the applicant. For an applicant who had dutifully attended court, the prosecution was supposed to lay before the court compelling reasons and not mere allegations.

33. Having found that this court has jurisdiction to entertain the application for revision the question is whether the court should set aside the order of the learned trial magistrate and reinstate bond/bail terms. Where the court is called upon to exercise discretion, the court is expected act independently and be influenced only by the best interest of justice in the case. In my view, one of the considerations which the trial magistrate ought to have made is that the grant or denial of bail is an issue of right to fair trial which under the Article 25 of the Constitution is one of the rights which cannot be limited. It also touches on the right to be presumed innocent until the contrary is proved, see **Article 50(2) (a) of the Constitution**. This court is supposed to consider the question of legality of the action taken by the trial court.

In this case bail for the applicant was cancelled mainly on the basis that the treatment notes were not authentic. This was plainly wrong as the applicant was not given an opportunity to be heard on the document and since the applicant was charged over the same document due process ought to be followed before a determination as to whether the documents were authentic or not. I note that the document was presented to explain his failure to attend court. He had been attending court while out on bond and the prosecution had not presented any compelling reason to deny him bail.

Considering the circumstance of this case a warning or enhancement of the bail terms would have serviced.

In Conclusion:

It is my view that it was plainly wrong for the trial magistrate to hold that the document was not genuine without giving the applicant an opportunity to be heard and in effect determining the charge in court file. No. 010/2021 where the applicant has pleaded not guilty before it is heard. Based on these facts, I have reason to interfere with the ruling of the trial magistrate.

I order that:-

- 1) The ruling dated 24/2/2021 is set aside.
- 2) Bail for the applicant is reinstated on the same terms.
- 3) The matter be mention before the trial court on 16/6/2021 for fixing a hearing date before the trial magistrate.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 3RD DAY OF JUNE 2021.

L.W. GITARI

JUDGE

3/6/2021

The ruling has been read out in open court.

L.W. GITARI

JUDGE

3/6/2021