



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC CRIMINAL APPLICATION NO. E084 OF 2021

KELVIN KAMAU MACHARIA.....APPLICANT

VERSUS

REPULIC..... RESPONDENT

RULING

1. The applicant has moved the court vide a notice of motion application dated, 15th March 2021, brought under the provisions of; section 123, 362 and 364 of the criminal procedure code and article 165 of the Constitution of Kenya, and all other enabling provisions of the law.

2. He is seeking for orders as here below reproduced; -

a) The matter be certified urgent and be heard ex-parte and on a priority in the first instance.

b) The Honorable court do call for and examine record of proceedings in criminal case CMCC No. 4693 of 2020 R V Kelvin Makau Macharia, for purposes of satisfying itself on the correctness and legality of Chief Magistrates Court ruling on 11th December 2020 denying the applicant bond/bail pending trial;

c) That, the Honorable court reverse the orders of 11th December 2020; denying the applicant bail and bond and to order that the respondent be granted bail/ bond pending trial.

d) The costs of the application.

3. The application is supported by the grounds thereto and a supporting affidavit of even date sworn by the applicant. He avers, in a nutshell that, he is charged with over 54 counts of allegations of; stealing, forgery and uttering a false document. That he took a plea of guilty and denied all the charges.

4. The Investigating Officer then swore an affidavit that he denied bond and/or bail, on the grounds that, he would interfere with witnesses and/or abscond, as he had previously absconded bond at the Chief Magistrate's Court at Makadara.

5. That indeed he was granted bond but due to oversight he failed to go to court. However, upon realization thereof; he presented himself at Embakasi Police Station to find out the position and was arrested due to the warrant of arrest issued against him.

6. He argued that, he has already been charged, therefore, the allegations of interfering with witnesses and absconding court if granted bail/bond are unfounded. He further avers, he has businesses in Nairobi and a fixed place of; abode and cannot abscond court.

7. However, he application is opposed by the Respondent grounds of opposition dated 30th April 2021. It is argued that; the right to bail is not absolute. That the trial court denying the applicant bail is neither improper, incorrect nor illegal as there are compelling reasons.

8. Further the applicant is guilty of material non-disclosure that the impugned order was subject to review after a month. As such the application is premature, lacks merit and is an abuse of the court process.

The application was disposed of vide oral address to the court by the parties on 15th March 2021, who literally replayed the averment's in the affidavit and the grounds and/or the reasons given in the impugned ruling. However, the learned counsel Mr Ogessa for the applicant submitted three witnesses have already testified and there is no fear of interfering with them.

9. However, the learned State Counsel, Ms Kibathi submitted that, four witnesses have already testified and four remaining and on that basis the matter should go back to trial court and the hearing be expedited. That, if the Honorable Court is inclined to grant bail, it should consider character of applicant, the subject matter and grant stringent terms.

10. I have considered the arguments advanced and I find that, the only issues to determine herein is whether the court has the jurisdiction to grant the orders sought and/or whether the trial court decisions meets the threshold for review.

11. The power of the court to revise orders of the subordinate court are stipulated under article 165 (6) of the Constitution which states as follows:

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

12. Pursuant thereto the provisions that govern the revision are stipulated under section 362 to 364 of Criminal Procedure Code.

The provisions of; section 362 states as follows:

“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.”

13. In the same vein, the provisions of; section 364 of the Criminal Procedure Code states that: -

“(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 sections 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.

(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

14. It therefore follows from the above that for the court to revise the orders impugned the applicant must prove the elements of; **correctness, legality or propriety therein. In deed the entire matter herein rests on the applicants’ right to bond and/or bail.**

15. **In that regard**, Article 49 (1)(h), of the Constitution of Kenya 2010, provides that, an accused 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.”

16. Similarly, section 123 (1) and (2) of the Criminal Procedure Code, empowers the trial court to admit an accused person to bail or release him or her upon executing a bond with sureties for his or her appearance and states that in fixing the amount, the court shall take into account the circumstances of the case and it shall not be excessive.

17. The constitutional right to bail is based on the provisions of; Article 50(2) of the Constitution of Kenya, 2010, that every accused person is presumed innocent until proved guilty. Indeed, the purpose of bail and bond terms is to ensure therefore that the accused attends the trial.

18. Further, bail determination must balance the rights of the accused persons and the interest of justice. Consequently, bail or bond will only be denied where the prosecution presents convincing evidence to justify such denial and demonstrate, with convincing evidence that, his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions.

19. In the instant case, the accused has been denied bail because he had once been granted bail and he failed to adhere to the conditions set and/or absconded attending court and hence he was classified as a flight risk. He admits that, he failed to appear in court. He terms the reason is mere oversight.

20. It is however, noteworthy that, he was released on cash bail by the court. He failed to show up and neither did his counsel, but when he showed up he went to the police station, and not court where a warrant of arrest was issued, why not the court? The trial court clearly indicated that, the right to bail is not absolute. That the action of absconding indicates that the applicant cannot be trusted, and that he is a flight risk in that once released he can abscond.

21. However, the trial Magistrate conceded that, the applicant presented himself to the police and that should mitigate his conduct and/or character. In conclusion the trial court gave the applicant leave to renew the bail application after one month.

22. I note that the period of one months is long gone. It will not be in the interest of justice, to intervene in the matter without according the trial court the opportunity to review its own order. If the court is apprehensive that, the applicant cannot be trusted on cash bail terms, bond terms with a surety and any other conditions that will ensure his attendance to trial may be considered. However, that is within the discretion of the trial court,

23. In my considered opinion, if for any lawful reason, the applicant is not admitted to bonds and/or bail the trial court may consider, expeditious trial to ameliorate of any prejudice he may suffer in continued custody especially during this Covid-19 Pandemic.

24. The upshot of the aforesaid is that, I decline to grant the orders sought on the ground that, the elements for revision under section 362 of the criminal procedure code are not proved. However, the

other directions given by the court abide. In that case, the trial court file should be released to that court forthwith for the necessary action.

25. It is so ordered

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 7TH DAY OF JUNE, 2021

GRACE L. NZIOKA

JUDGE

In the presence of: -

Mr Ongessa for the applicant

Ms Kibathi for the Respondent

Edwin Ombuna: Court Assistant