



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

MISC. APPLICATION NO. E056 OF 2021

BERNARD MUTUKU MUTISO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(From original order in Machakos Chief Magistrate's Court Criminal Case No. E089 of 2021 (Hon. C. N. Ondieki, PM, PM on 8th March, 20210)

BETWEEN

REPUBLIC.....PROSECUTOR

-VERSUS-

BERNARD MUTUKU MUTISO.....ACCUSED

RULING

1. The applicant herein was charged before Machakos Chief Magistrate's Court Criminal Case No. E089 of 2021 with Robbery with Violence Contrary to Section 296(2) of the *Penal Code*.
2. Upon his arraignment before the trial court, the prosecution opposed his admission to bail on the ground that the Applicant had a murder case before this Court being Criminal Case No. 7 of 2020 and that upon being released, he continues to commit capital offences. It was disclosed that he had another case of Robbery with Violence. According to the prosecution, there was an apprehension that if released, the Applicant might abscond bond.
3. In response the Applicant contended that he had only one murder case and that the alleged robbery case was over this same matter. According to him, the murder case is in fact a traffic case and he has been attending court without fail.
4. I have considered the application, the grounds of opposition and the submissions filed. In Machakos High Court Criminal Case No. 7 of 2020, this Court expressed itself inter alia as follows:

“In this case the opposition to the accused person’s release on bond is based on the ground that the applicant is a repeat offender who faces a charge of Obtaining by False Pretences and during the period he was out on bond in the said case he committed a traffic offence as well as the instant case. While the prosecution has relied on the decision of this Court in R vs. Daniel Muoka Muthusi Machakos High Court Criminal Case No. 18 of 2018, in that case the accused had been convicted in criminal case no. 384 of 2019 342 of 2012 with grievous harm and was sentenced to 7 years which he served at Kamiti Maximum Prison. The Court found that if the accused in that case was sentenced in 2012 for 7 years, then it would seem that he was not free for too long before he was charged with the new offence which he was alleged to have committed on 10th July, 2018. The Court therefore was of the view that while the court must presume that the applicant is innocent, the applicant’s antecedents cannot be ignored and in declining to release the accused on bond at that stage, the Court was of the view that his past record was relevant in determining whether or not there exist compelling reasons to deny him bail. The Court however found that once the vulnerable witnesses’ testimonies had been taken the accused was be at liberty to renew his application. It is therefore clear that the facts of that case are distinguishable from the present one. The only conviction against the accused is that of a traffic offence whose nature has not been disclosed. It might range from obstruction to causing death by

dangerous driving for all we know. Accordingly, that cannot amount to compelling reason for the purposes of refusal to grant bond/bail. As regards the pending criminal case, the accused is yet to be found guilty. This Court cannot therefore state with certainty that he committed the said offence. Less still can this Court make a definite finding that the accused committed the instant offence. In Foundation for Human Rights Initiatives vs. Attorney General [2008] 1 EA 120 it was held by the Constitutional Court of Uganda that:

‘The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening the Constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially...]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person’s appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him.’”

5. It is therefore clear that the Court will not deny an accused person his constitutional right on the basis that while out on bond in a previous case, he is alleged to have committed another offence. Mere allegation of commission of an offence while out on bail ought not to be the basis upon which an accused is denied release on bond. If that were the case, the State would simply charge accused persons consecutively and based thereon seek to have an accused denied release on bond. However, an accused person who is proved to have committed a felony when out on bond may well be denied release on bond in the subsequent case. The burden of proving the same lies on the prosecution. I am saying a felony because where for example a person was convicted of a traffic offence of obstruction and while on bond was charged with assault cannot be denied admission to band based on the previous conviction on a traffic offence as the two offence are clearly unrelated.

6. In this case, it would seem that the only reason the court denied the applicant bail was his earlier conviction and the other cases he is facing. In my view where there is apprehension that the accused may commit offences if released the Court should consider the availability of other options less restrictive than the denial of bail. The Court may, for example, impose, as a condition for the grant of bail, regular report by the Applicant to the Investigative Agencies.

7. Having considered this matter, and particularly as the trial court left room for “further orders” in the matter, I hereby set aside the decision of the Machakos Chief Magistrate’s Criminal Case No. E 089 of 2021 made on 8th March, 2021 and admit the Applicant to bail of Kshs 300,000.00 with one surety of similar amount to be approved by the trial court. I further direct that the Applicant do report to the Police Station nearest to his usual residence on a fortnightly basis until further orders of the trial court. the trial court to determine the said Police Station.

8. It is so ordered.

READ, SIGNED AND DELIVERED AT MACHAKOS THIS 2ND DAY OF DECEMBER, 2021

G.V. ODUNGA

JUDGE

Delivered in the presence of:

The Applicant in person

Mr Ngetich for the Respondent

CA Susan