



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL DIVISION

CRIMINAL REVISION NO. 692 OF 2018

NEWTON KIGERA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application herein is a Chamber Summons dated 3<sup>rd</sup> January, 2019 in which the Applicant prays that the court revises by setting aside an order of the learned trial magistrate Hon. P. Gichohi (Mrs), CM made on 17<sup>th</sup> December, 2018 cancelling his bond.
2. The Applicant is the accused in Kiambu Chief Magistrate's Court Cr. Case No. 412 of 2018 in which he is charged with offence of obtaining by false pretenses contrary to Section 313 of the Penal Code. It is alleged that on diverse dates between 6<sup>th</sup> July, 2016 and 22<sup>nd</sup> day of July, 2016 at Central Business District in Nairobi County within Nairobi County, with intent to defraud obtained from Stephen Wachira Wambugu the Sum of Kshs. 3,400,000/= (Three Million four hundred thousand Shillings) by falsely pretending that he was in a position to import two cars of make Nissan Dualis and Toyota Lexus to the said Stephen Wachira Wambugu, a fact he knew was not true.
3. The application is supported by the affidavit of Oscar Ngime Ragui, his surety in the bond before the trial court on 3<sup>rd</sup> January, 2019. The crux of the application is that the learned trial magistrate incorrectly and irregularly cancelled the Applicant's bond without any factual basis. His counsel Mr. Bosire whilst arguing the application submitted that on the date that the Applicant was absent in court, candid explanations for his absence was given to the court. This was basically that the Applicant was unwell on the respective dates. That in any case, when the court was in doubt that the medical documents presented to the court were not genuine, the court ordered for their verification. The verification was accordingly done through the investigating officer and confirmed genuine but nevertheless the court maintained the cancellation of the bond. It was Mr. Bosire's argument that the court was too harsh to the Applicant because the Applicant ought not to have been punished on account of circumstances that were not within his control.
4. According to the learned counsel, the leaned trial magistrate further cancelled the Applicant's bond on grounds that he kept changing his advocate. This, according to Mr. Bosire, was a total misdirection on the part of the trial court because the Applicant was entitled under the Constitution to the right of representation by an advocate of his choice. He added that the court having confirmed that the Applicant had been genuinely sick and treated in a medical facility, only ought to have warned him and reinstated his bond.
5. The application was opposed by the Respondent through learned State Counsel, Ms. Ndombi. She entirely relied on a replying affidavit sworn by PC. Stanislao Njeru, the investigating officer in the trial sworn on 9<sup>th</sup> January, 2019. The gist of the replying affidavit as submitted by the learned counsel is that the Applicant's antecedents and conduct throughout the trial before and after he took plea was suggestive that he was not willing to proceed with the trial. In summary, counsel argued that even if the Applicant alleged that he was unwell, it was not a coincidence that he only became sick a day or a weekend before the trial. That he had also formed a habit of sending different advocates to inform the court that he was unwell. She argued that this demonstrated that the Applicant intended to cripple justice. She urged the court to rule that there was no incorrectness or illegality or impropriety or irregularity to warrant the setting aside of the order cancelling the Applicant's bond.
6. I have considered the respective rival submissions, the application, the supporting and replying affidavits as well as the record of proceedings of the trial court. The application before this court is brought under both Sections 362 and 364 of the Criminal Procedure Code. Under Section 362 this court has supervisory jurisdiction as conferred on it by Article 165 of the Constitution ***"to 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 basically provides for the orders that the court may issue upon satisfying itself on the threshold of Section 362.
7. In the present application, it is the onus of this court to determine whether the learned trial magistrate was warranted to cancel the Applicant's bond. In her ruling of 17<sup>th</sup> December, 2018 the learned magistrate delivered herself thus:

***“the court record shows that accused keeps changing advocates at will. I consider the objection raised by the prosecution in the matter. The surety who got accused out on bond is no longer a surety in this case as the documents were released. He never appeared in court to explain accused’s absence. The accused never availed the other medical documents to the investigating officer to confirm their authenticity. His bond remains cancelled and remains in custody until his case is heard and determined. Orders accordingly.”***

8. My reading on this ruling drives me to make a conclusion that the Applicant’s bond was mainly cancelled firstly, because he kept changing the advocates and secondly, because he did not avail some medical records to the investigating officer for their verification by the hospital. Needless to state then is that the court cannot make a just determination without having regard to the background of the matter. It must also have regard to the constitutional underpinning for the grant of bail to an accused person.

9. Under Article 49(1)(h) of the Constitution, ***“an arrested person has the right to be released on bail or bond, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”*** It therefore behooves this court to evaluate whether the fact of changing advocates and failure to present some documents for authentication by the hospital are compelling reasons to warrant a denial of bail to the Applicant. The court must also direct its mind on whether the holding of the learned trial magistrate was based on factual evidence drawn from the proceedings of the trial court.

10. With respect to the first limb of this determination, I emphasize that it is the accused’s constitutional right under Article 50(2)(g) **to choose, to be represented by, an advocate, and to be informed of this right promptly.** In my view then, unless where it is demonstrated that an accused deliberately changes an advocate to cripple the wheels of justice, a court must accord him the opportunity to engage an advocate of his choice. It is also my view that his representation by an advocate accords with the provision of Article 50(2)(c) of the Constitution which calls for grants to **an accused person adequate time and facility to prepare a defence.** One of the tools so paramount for preparation to mount a strong case for an accused person is the facilitation thorough an advocate. Hence, the right cannot be taken away on flimsy grounds.

11. My reading of the record of proceedings of the trial court does not lead to a conclusion that the Applicant changed advocates with an intention to cripple the wheels of justice. It is clear that so far, three advocates have been in record namely; Mr. Masoria, Mr. Omingo and Mr. Bosire. On any of the dates that an advocate on record missed to appear, candid explanations were given to the court for his absence which in my view were reasonable and did not point to any deliberate intention of delaying the trial. On this ground, it is my view that the learned trial magistrate incorrectly ruled that the bond would be cancelled because the Applicant was changing advocates. She more particularly failed to have regard to the constitutional tenet that the right to an advocate was non-derogable under the Constitution.

12. As regards to the second limb of the determination, the record of proceedings shows that the court acceded to the prosecution’s request that medical records be verified by the facility in which he had been treated. The order was made on 26<sup>th</sup> November, 2018. The verified records were presented to court on 3<sup>rd</sup> December, 2018 before Hon. Atambo who was not the trial magistrate. She directed that the documents be presented to the trial magistrate for directions. On subsequent dates, the trial magistrate did not sit until the 17<sup>th</sup> December, 2018 when the subject ruling was made. It is then important that this court briefly gives a brief background of the Applicant’s court attendance since the charge was filed in court.

13. He had been released on police cash bail pending the taking of plea on 13<sup>th</sup> March, 2018. He did not appear in court in the said date and a warrant of arrest was issued. On subsequent mentions on 15<sup>th</sup> and 22<sup>nd</sup> March 2018, the Applicant did not also appear in court and a warrant of arrest was extended respectively. On these dates, his advocate Mr. Masoria informed the court that the Applicant was unwell notwithstanding that there was no medical report was tendered. The Applicant presented himself on 9<sup>th</sup> April, 2018 when he took plea. As at this date, the police cash bail had been forfeited. He was admitted to a bond of Kshs.1.5 million with a surety of a similar amount. There were subsequent court appearances either for formal mention or hearing namely; 23<sup>rd</sup> April, 2018, 23<sup>rd</sup> May, 2018, 16<sup>th</sup> June, 2018, 11<sup>th</sup> July, 2018 and 16<sup>th</sup> August 2018 on which dates the Applicant was present. It is on the latter date that the trial was set for hearing on 14<sup>th</sup> November, 2018 and the date on which the Applicant was absent. Before the hearing date, there was a mention on 17<sup>th</sup> September, 2018 which on account of the Applicant’s illness his attendance in court was dispensed with until the date of the hearing 14<sup>th</sup> November, 2018.

14. On this date, the Applicant was absent and Mr. Omingo appearing for him informed the court that he had been taken ill the previous evening. A mention was set for 26<sup>th</sup> November, 2018 and again the Applicant was absent. Mr. Bosire was on record for the Applicant. On this date that the court ordered the verification of the medical documents which were presented in court showing that the accused was unwell on 17<sup>th</sup> September, 2018 and 14<sup>th</sup> November, 2018. Bond was suspended on the latter date.

15. On 3<sup>rd</sup> December, 2018 the matter was mentioned before Hon. Atambo, SPM and the investigating officer one PC Maatwa presented the medical documents to the court upon verification. He informed the court as follows:

***“the documents in question are confirmed that accused was at the facility on 14<sup>th</sup> November, 2018. They didn’t confirm about 17<sup>th</sup> November 2018. On this date, the accused didn’t attend the facility. I have a report dated 27<sup>th</sup> November, 2018 from Nairobi Women’s Hospital.”***

16. Moving to the proceedings of 17<sup>th</sup> September, 2018 learned counsel, Mr. Kihoro who was holding brief for Mr. Omingo informed the court that the Applicant was absent because he had fallen sick over the weekend and had sought medication. He did inform the court that they would avail documents in that respect. He also requested that the Applicant’s presence be dispensed with for the day. It is on this date that the court conceded to that request as there was also no objection by the prosecution.

17. When the court made an order for verification of the medial documents on 26<sup>th</sup> November, 2018 it did not specify that verification involved documents for both 17<sup>th</sup> September and 14<sup>th</sup> November, 2018. Further, according to PC Maatwa, on 3<sup>rd</sup> December, 2018 he did not

state that the Applicant did not present to him medical documents of 17<sup>th</sup> September, 2018 as alluded by the learned trial magistrate. What he told the court was that the Nairobi Women's Hospital could not confirm the document of 17<sup>th</sup> September, 2018 because the Applicant had not been treated in the facility on that date. In fact, his statements implies that that he had the documents save that Nairobi Women's Hospital could not authenticate them because they did not belong to it. It was thus up to PC Maatwa to take the documents to the proper facility for authentication.

18. Therefore, it was not based on any record of factual basis that the learned trial magistrate ruled that the Applicant failed to present medical documents for 17<sup>th</sup> September, 2018. Accordingly, that holding was incorrect as it was not supported by the facts on record.

19. It is clear from my analysis of the chronology of events that after the Applicant took plea, he diligently attended the court until the 17<sup>th</sup> of September, 2018 when it was said that he was unwell. Even if no medical documents were availed, the court ought to have taken cognizance of the fact that matters of sickness should be given a benefit of doubt.

20. I nevertheless underscore the fact that the Applicant's non-attendance to take plea and failure to present medical report of 17<sup>th</sup> September, 2018 raised an eye brow and cast aspersions of his untruthfulness of his reasons not to attend court. Nevertheless, the Nairobi Women's Hospital having confirmed that it treated him on the 14<sup>th</sup> November, 2018 ought to have been a good ground for the court to visit his explanation with leniency. That said, it is clear that the finding of the learned magistrate that it is the Applicant who failed to present medical reports of 17<sup>th</sup> September, 2018 to the investigating officer was not factually correct. And therefore the cancellation of bond based on that finding was incorrect and irregular.

21. It is in view therefore that I find that there was no compelling reason for the denial of bail through its cancellation. This application accordingly must succeed. In the upshot, I set aside the order of the learned trial magistrate Hon. P. Gichohi, CM of 17<sup>th</sup> December, 2018 cancelling the Applicant's bond. I substitute it with an order that the Applicant be and is hereby admitted to a bond of Kshs. 1.5 million with a surety of a similar amount to be assessed by the trial court.

22. The submission by Mr. Bosire that the surety is still willing to continue to secure the bond for the Applicant is rebutted by the proceedings showing that the security documents were released to him. Nevertheless, the same surety is at liberty to present documentation for fresh assessment by the trial court. It is so ordered.

**DATED and DELIVERED this 10<sup>th</sup> day of January, 2019**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

**1. Mr. Bosire for the Applicant.**

**2. Ms. Ndombi for the Respondent.**