



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.433 OF 2019

REPUBLIC.....APPLICANT

VERSUS

PEREZ MAWIRA RIUNGU.....1ST RESPONDENT

JOHNSON MUNENE JOHN.....2ND RESPONDENT

RULING

The Respondents, Perez Mawira Riungu and Johnson Munene John were charged with the offence of stealing by servant contrary to Section 281 of the Penal Code. The particulars of the offence were that on diverse dates between 1st January 2018 and 30th June 2019 at unknown place within the Republic of Kenya, jointly being employees of Option One Distributors (E.A.) Limited stole consignment of cement valued at Kshs.30,043,656.81 the property of Option One Distributors (E.A.) Limited which came in their possession by virtue of their employment. When the Respondents were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. Their application to be released on bail pending trial was opposed by the prosecution on the grounds that the Respondents were familiar with the complainant's employees and was therefore likely to influence, threaten or intimidate the said witnesses. The prosecution further submitted that the amount that was lost was colossal and had not been recovered. The prosecution argued that the Respondents were likely to use the said sum of money to cover their tracks. In that regard, it was their contention that the Respondents were a flight risk. In response, the Respondents denied the prosecution's assertion that they were a flight risk or that they would adversely influence the prosecution witnesses. They told the court that during the entire investigations they co-operated with the police and further, were arrested at their respective houses. They urged the court to take into consideration that the prosecution had not placed before the court compelling reasons to deny them their right to bail as enshrined under Article 49(1)(h) of the Constitution.

After considering the application, the trial court granted the Respondents' application to be released on bail. Each Applicant was released on a bond of Kshs.3,000,000/- with one surety of the same amount or they were each ordered to pay a cash bail of Kshs.400,000/- plus a contact person to be examined by the court. The Respondents deposited the cash bail and were released on bail.

The Applicant was aggrieved by the decision. They have moved this court pursuant to Article 165(6) & (7) of the Constitution and Sections 362, 364(1) & 367 of the Criminal Procedure Code seeking a revision of the said Ruling by the trial magistrate. The Applicant was irked that the trial court had failed to take into consideration the concerns raised by the Applicant in regard to the likelihood of the Respondents interfering with the prosecution witnesses. They faulted the trial magistrate for imposing bond terms that were not commensurate with the seriousness of the charge facing the Respondents. They were aggrieved that the Applicant will likely use the proceeds of crime to cover their tracks and frustrate their prosecution in the case. It was in that regard that the Applicant urges the court to appropriately enhance the bond terms to reflect the seriousness of the charge facing the Respondents. The application is supported by the annexed affidavit of Maureen Akunja, a prosecuting counsel.

The application is opposed. The Respondents' advocate, Albert Makori swore a replying affidavit in opposition to the application. In essence, he stated that the trial court acted properly and considered all issues involved when it ordered the Respondents to be released on bail pending trial. In that regard, he urged the court to dismiss the application.

During the hearing of the application, this court heard oral rival submission made by Ms. Akunja for the State, Ms. Manyaga for the Respondents and Mr. Gitonga for the complainant. Ms. Akunja essentially reiterated the contents of the application and the supporting affidavit in her submission. She submitted that whereas bail is a constitutional right, she reiterated that the prosecution was justifiably aggrieved on the bond terms that were imposed by the trial court. She stated that although the Constitution presumed the Respondents to be innocent, however, the bond terms to be imposed should be commensurate with the seriousness of the charges brought against the accused. She urged the court to take into consideration the Bail and Bond Policy Guidelines and find that the bond terms imposed by the trial court

ought to be appropriately revised. Mr. Gitonga for the complainant essentially reiterated the prosecution's position and urged the court to consider the provisions of Section 123 of the Criminal Procedure Code in regard to what ought to be considered by a court when granting bail to an accused person.

Ms. Manyaga for the Respondents opposed the application. She relied on the replying affidavit and submitted that the prosecution had not place any compelling reasons to satisfy this court to revise the decision of the trial court. She was of the view that if the bond terms were enhanced, it would occasion miscarriage of justice on the Respondents. She reiterated that since the Respondents were arraigned before court, they had attended court on three occasions without fail and had abided by the bond terms that were imposed. She urged the court to take into consideration that the main purpose of imposing bail terms is to secure attendance of the accused before the trial court on the appointed trial dates. In that regard, since the Respondents had established to the satisfaction of the court that they were not a flight risk, there was no justification for this court to enhance the bond terms that were imposed upon them. She further submitted that taking into account the current economic situation, and the fact that the Respondents struggled to raise the cash bail that was imposed on them, it would constitute a pervasion of justice if the bond terms were enhanced. She urged the court to take into account that the Respondents were no longer employed by the complainant and therefore they were unlikely to interfere with the prosecution witnesses. She reiterated that the court should also take into consideration that the Respondents were sole breadwinners of their respective families. She therefore urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. Both the Applicant and the Respondents appreciated that the Respondents are entitled to be released on bail pending trial provided that there were no compelling reasons to prevent their release. Indeed, the court did not hear the Applicant to say that the Respondents should not be released on bail pending trial. The Applicant was aggrieved by the bail terms that were imposed by the trial court. They were of the view that it did not reflect the serious nature of the charge that the Respondents are facing.

Both the Applicant and the Respondents relied on the Bail and Bond Policy Guidelines issued by the National Council of Administration of Justice in support of their respective opposing positions in *Paragraph 4.9*, the Policy recognizes that some of the considerations that ought to be taken into account by the trial court in determining whether or not an accused is released on bail include: the nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty; the strength of the prosecution's case; the character and antecedents of the accused person; the failure of the accused person to observe bail or bond terms; likelihood of interfering with witnesses; the need to protect the victim or victims of crime from the accused person; the relationship between the accused person and potential witnesses; whether the accused is a flight risk; whether accused person is a threat to public order, peace or security and finally, whether it may be necessary to protect the accused person during trial in light of the offence that he committed.

An important consideration in all cases is that the persons accused will attend court without fail during trial. This consideration, in most cases, overrides other considerations. This point was re-emphasized by the court in **Republic –Vs- Danson Mgunya & Another [2010] eKLR** when M.K. Ibrahim J (as he then was) held thus:

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”

In the present application, it was clear to this court that indeed the prosecution has a case when it states that the bond terms imposed on the Respondents were not proportionate and commensurate to the charge that was brought against them. As stated earlier in this Ruling, in considering the bond or bail terms to be imposed, the serious nature of the charge must be taken into account. The bond or bail terms must reflect the nature of the charge brought against the accused. This court is of the view that it would constitute a miscarriage of justice if, for instance, an accused is released on bond or bail terms that are not proportionate to the nature or seriousness of the charges brought against him. In the present application, the Respondents were charged with theft of over Kshs.30,000,000/-. Whereas the law presumes them innocent until proven guilty by a court of law, the trial court erred when it imposed a cash bail of Kshs.400,000/- for the Respondents to be released on bail pending trial. When considering bail applications, the court should not inadvertently send a message to the general public that one can commit a crime and one will literally be released on easy bail terms should such a person be charged irrespective of the nature or seriousness of the crime one is alleged to have committed.

In the premises therefore, the Applicant's application has merit and will be allowed. The bail and bond terms imposed by the trial court are hereby set aside and substituted by appropriate bail and bond terms of this court. The Respondents shall each be released on bond of Kshs.8,000,000/- with one surety of the same amount or each to deposit a cash bail of Kshs.3,000,000/-. Before the Respondents meet the new bond terms, their bail is cancelled. They shall be remanded in custody pending their compliance with the terms imposed by this court. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF OCTOBER 2019

L. KIMARU

JUDGE