



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAINDI

MISCELLANEOUS CRIMINAL APPLICATION NO. 140 OF 2019

DORRIS MAKENA.....1ST ACCUSED/APPLICANT

HABEL NYAMBO WABONGO.....2ND ACCUSED/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mr. Mwadilo for Dr. Khaminwa for the applicant

Mr Nyoro for State

RULING

The applicants approached this court by way of a notice of motion dated 29th December, 2019 under Section 123(3) of the Criminal Procedure Code and Article 49(1)(a) of the Constitution seeking the following orders:

- 1. That the bail/bond terms issued in Chief Magistrate Court Malindi Criminal Case Number 1146 of 2019 requiring each to furnish a bail of Kshs.2,000,000 in the alternative a bond of Kshs.3,000,000 and two sureties varied or reduced. The motion is supported with grounds on the face of it and an affidavit by Habel Nyambo Wabongo.**
- 2. The 2nd applicant disposes that he is a businessman while the 1st applicant is a teacher by profession and in addition is engaged as Equity Bank Agent. That the police arrested them on suspicion of transactions being handled by the 1st applicant in her normal business and an allegation arose that she had stolen Kshs.18,845,204 from Equity Bank Ltd. That on being arraigned in court and taking plea each was released on cash bail of Kshs.200,000 and in alternative a 3 million surety bond. Further the 1st applicant supported the application with her affidavit filed in court on 4th December, 2019. She reiterated the contents of the disposition of the 2nd applicant affidavit. Her main complaint was that the bail terms granted by the learned trial magistrate was punitive and harsh. She further deponed that on 24th June, 2019 she underwent surgery and still recuperating, therefore further incarceration poses a great risk to her health. That by virtue of the freezing of her accounts she is unable to satisfy the order on bond terms issued by the learned trial magistrate.**

On Revision Dr. Khaminwa Senior Counsel for the applicants vehemently submitted that the court by virtue of Article 49(1)(h) of the Constitution reviews the bond terms and release the applicants from custody. In support of the submissions Senior counsel cited the following authorities **R v Kimunya 2011 EA, R v Mgunya and another (2001) EA.**

The principles behind the authorities referred to by Senior counsel are that the primary considerations when faced with an application to release an accused person on bail is whether he shall attend court and be available as scheduled until the full determination of the case.

Background

The application before me was triggered by the decision of the Chief Magistrate Malindi Hon. Oseko (CM) who is seized of the criminal proceedings against the applicants. From the record the applicants are facing two counts namely:

- 1. Conspiracy to commit a felony contrary to Section 393 of the Penal Code. That on diverse dates between 10th January,**

2019 and 2nd November, 2019 Kwa Chocha area in Malindi within Kilifi County, jointly they conspired with others not before court to steal Kshs.20,238,694 the property of Equity Bank.

2. Alternative count stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. The brief particulars that on diverse dates between 10th January, 2019 and 1st November, 2019 Kwa Chocha area in Malindi within Kilifi County stole Kshs.18,845,204 through Equity Bank prepaid card Number 5314940159906400 issued to one Dorris Makena by the said Bank.

3. Stealing contrary to Section 268(1) as read with Section 275 of the Penal Code. The particulars of the charge are that on diverse dates between 10th January, 2019 and 2nd November, 2019 at Kwa Chocha, Malindi County the accused Habel Nyambu Wabongo stole Kshs.897,640 through Equity prepaid card Number 5314940159912655 issued to him by Equity bank Ltd.

I have perused the primary record, the ruling by the learned trial magistrate and the current application seeking variation or reduction of the bond terms issued before the trial court.

Analysis and Resolution

The Supreme Law of the land, the Constitution 2010 under Article 49(1)(h) provides that an accused person is entitled to be released on bond or bail or reasonable conditions pending a charge or trial unless there are compelling reasons not to be granted bail. The right to bail is not absolute it is dependent upon many factors. Some of which are dealt with in Section 123(A) of the Criminal Procedure Code which states:

1. Subject to article 49(1)(h) of the Constitution and notwithstanding Section 123 in making a decision on bail and bond the court shall have regard to all relevant circumstances and in particular:

(a) The nature or seriousness of the offence

(b) The character, antecedents, associations and community ties of the accused persons

(c). The defendants record in respect of the fulfilment of obligation under the previous grants of bail. The strength of the evidence of his having committed the offence.

It is not in dispute that applicants have already been granted bail in consonant with Article 49(1)(h) of the Constitution and Section 123 of the Criminal Procedure Code.

The vexing question to be resolved on appeal is whether the learned trial magistrate in exercise of discretion to determine the bails terms at Kshs.2,000,000 and an alternative surety bond of Kshs.3,000,000 she misdirected herself or applied wrong principles or took into account irrelevant factors rendering the decision subject matter of this court.

The unique texture of the courts governance in administration of justice is anchored in what is commonly referred to as “**exercise of discretion.**” **Blacks Law Dictionary 6th Edition 1990** defines discretion as follows:

“A power or right conferred upon them by law of acting in certain circumstances, according to the dictates of their own judgement and conscience, uncontrolled by the judgement or conscience of others. It connotes action taken in light or reason as applied to all facts and with view to rights of all parties to action while having regard to what is right and equitable under all circumstances and law.”

The application before this court will be considered in light of the above principles whether the exercise of discretion by the learned trial magistrate was proper, regular and correct. Whereas this is the question to be answered by this court. It is significant to state that by typically the rationale of the right under Article 49(1)(h) of the Constitution as whether in determining to grant an accused bail he is likely to flee from the jurisdiction of the court.

It was held in the persuasive case of **R. Hawken 1944 2DLR 116/119** that:

“The question of bail is sometimes misunderstood, when a man is accused he is nevertheless still presumed innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the judge is satisfied that the bail will ensure the accused appearing for his trial.”

To balance the right to bail and liberty are considered in connection to other relevant factors some as envisaged in Section 123A of the Criminal Procedure and Bail and Bond Policy guidelines of the judiciary.

In the interlocutory stage of the proceedings on the right to bail under Article 49(1)(h) of the Constitution full disclosure by an accused person is considered necessary where he has been charged with an offence. It is clear that the law places a duty on the state to demonstrate compelling reasons why an accused person or arrested person should not be released on bail. However it must be appreciated that some of the critical material for purposes of grant of bail under Article 49(1)(h) of the Constitution are within the knowledge of an accused person. I must add that an accused person should be allowed through her or his own affidavit to make a disclosure that is reasonably necessary to

secure or protect the legal right to bail. I therefore think, first and foremost the issues before court involve the accused person, the victims of crime and the larger society called Kenya.

In short the issues before court would crystallize and determined subject to the balancing Act of the competing rights between these stakeholders in the administration of criminal justice system. Hence, the reason the maxim **'Equality of arms'**. The evidence on whether the accused has a fixed abode within the jurisdiction of the court or is a permanent resident of the county or elsewhere in the Republic of Kenya is a factor in issue to the pending application on bail. The question of access to and proximity to the court with jurisdiction to hear the case is relevant. Whether the accused person has in his or her possession suitable security and a surety within or outside the county to covenant with the court as a guarantor that accused would honour the obligations to attend court if released on bail is of paramount importance. The existence or nonexistence of it would be a factor to grant or deny bail to the accused person.

As a matter of good measure in the administration of criminal justice discretion on the other hand can be exercised to release an accused person on bail over the evidence tendered that exceptional circumstances exist in a particular case to have an accused person released on bail.

As stated in Article 49(1)(h) of the Constitution, the general principle of law is well founded within the scope and spirit of the fundamental rights and provisions in chapter 4 of the bill of rights. The import to secure that right to bail is subject to limitations designed to ensure the enjoyment of those right doesn't prejudice the victim's rights or public interest both of which make sense of the purposes and objects of the Constitution.

In the present case whether the learned magistrate financial condition and amount of bail fixed is punitive or excessive is a question of fact dependent upon the circumstances of the case.

It is contended by Senior Counsel that given the facts of the case the learned trial magistrate bail terms were excessive and unconscionable.

In all the circumstances of the case going by the principles in the cases of **R. v Ahmed Mohamed Omar CR Case No. 14 of 2010, R v Ahmed Mohamed & another CR Revision No. 373 of 2012** and **Philip Kamau v R High Court CR Case No. 46 of 2012** I see no reason to apply any different criterion as regards grant of bail to the applicants. There are no exceptional circumstances or any good reason for interfering with the decision of the trial court. The essence of the matter in this application is that the learned magistrate in exercise of discretion has not been shown to have acted in excess of jurisdiction, or taken into account irrelevant factor or applied wrong principles and in the process misdirected herself to arrive at an erroneous decision. In this regard I echo the fundamental principles in civil law which can apply *mutatis mutandis* to the present **Mugunga General Stores v PCP CO Distributors Ltd 1982 – 88 2 KAR 89** where the court stated:

“The judge had as he said, a discretion whether or not to enter summary judgement. A laid down in Mbogo v Shah 1968 EA 93 –

The duty of this court in an appeal against the exercise of that discretion is not to interfere unless the judge has exercised his discretion wrongly in principle as perversely on the facts of the case.”

Looking at the matter as a whole, it is manifestly clear that no evidence has been placed by way of affidavit to show discovery of a new matter of evidence, error on the face of the record, illegality of the order for this court to set it aside or vary the bond terms. The application is therefore dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 3RD DAY OF DECEMBER, 2019.

R. NYAKUNDI

JUDGE