



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL REVISION NO. 386 OF 2018

GODFREY SHIKUKU WANGAYA.....APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. Before me is a Notice of Motion filed on 31st July, 2018 expressed to be brought under Article 49(1)(h) of the Constitution and Section 362 and 364 of the Criminal Procedure Code. The Applicant seeks an order that the bail terms in Criminal Cases Nos. **610 of 2018, 611 of 2018, 612 of 2018, 613 of 2018 and 614 of 2018** in Chief Magistrate's Court at Kiambu be consolidated, and/or and variation of the said bail terms.

2. The application is premised on the ground that bail ought to be consolidated or reviewed to enable the Applicant comply and to be released. He asserts that his family is suffering as they depended on him before his incarceration.

3. In his supporting affidavit, the Applicant deposed that upon entering a plea of not guilty, in the respective cases, he was granted bail in the sum of Kshs. 1 Million and a like surety in each of the five cases facing him, and with no alternative cash bail. He states that he is unable to raise the required sureties. He urged the court to consolidate and review his bond terms to Kshs. 1 Million and /or Kshs. 500,000/= cash bail which his father was allegedly ready to deposit. He deposed that he does not intend to abscond trials and will undertake to attend all the hearings.

4. The DPP opposed the application through a replying affidavit sworn by **PC DAVID MAILU**. He deposed that he is one of the investigating officers in the cases before the lower court and asserted that that the Applicant is facing serious offences all arising from different transactions and periods, making the cases unsuited for consolidation of bond terms. He contended that the cases relate to different complainants, dates of offence and involve different investigating officers and that consolidation of bail terms may prejudice the right to a fair trial under Article 50 of the Constitution.

5. The Application was canvassed by way of oral submissions. The Applicant submitted that he seeks consolidation of his cases for purposes of bail. He relied on his supporting affidavit. He asked the court to review his bail terms.

6. Mr. Ongira, for the Director of Public Prosecutions, opposed the Application. He relied on the replying affidavit. He submitted that there are no exceptional circumstances to warrant consolidation of bail terms. He stated that offences are capital offences and that a firearm was involved in the commission of the offences. He contended that the bail terms have already been reasonably reviewed. He contended that the rights of the victim are also important. Reliance was placed on the case of **Stephen Gitau Karanja vs Republic (2018) eKLR** where it was stated that there will be cases where it may not be prudent or even practical to allow a single bail condition to apply in separate trials.

8. The court has considered all the material canvassed in respect of the application. There is no gain-saying the fact that the Applicant herein is entitled to be released on bond or bail, on reasonable conditions in the pendency of the trials. He is also entitled to the presumption of innocence throughout the trial (**Articles 49 and 50** of the Constitution). Whereas the trial court must consider the nature of the charges and other relevant matters in deciding whether to grant bail and what conditions to impose, it must also bear in mind that the accused person is presumed innocent until proven otherwise.

9. Hence the caution in **Watoro v Republic (1991)KLR 220** as cited by **Achode J** in **George Kamau's** case:-

“ The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion....What I think is important for the court to bear in mind, and reason for the caution to remember the presumption of innocence, is that, it would be wrong to leap to the conclusion that the accused was guilty because has been charged and decide the bail application on that basis.”

10. The ultimate purpose of bail is to ensure that the accused person will attend trial. Obviously, the more severe the likely punishment for the offence charged, the more likely that an accused person may be tempted to abscond to avoid the eventuality of punishment. Therefore, in as much as the court must pay attention to the charges facing an accused person, it must be careful to give effect to the right to bail while determining what conditions to impose. If that does not happen, the terms imposed may well turn out to be effectively a denial of the right to bail.

11. There must be a balance between the presumption of innocence and the nature of the offence, as observed by **Ibrahim J** (as he then was) in **Philip Anyanya v R (2010) eKLR**

“Whatever the court will decide, the fear and anxiety exerting on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing a capital offence is real and cannot be wished away. It is therefore true that the seriousness of an offence and the sentence for which is possible upon conviction is a matter which can bear on the accused and can affect his decision to attend trial or not.”

12. The balance between the presumption of innocence and the seriousness of the offence can only be struck through consideration of the peculiar facts of the case at hand. The Applicant herein is charged with nine counts of Robbery with violence contrary to section 296(2) of the Penal Code, that is, one count in Criminal Case No. 610 of 2018; two counts in Criminal Case No. 611 of 2018; three counts in Criminal Case No. 612 of 2018; two counts in Criminal Case No. 613 of 2018 and one count in Criminal Case No. 614 of 2018.

13. Having reviewed the matter before me, I am of the view that a consolidated bond in respect of all four cases may not be prudent, or even helpful to the Applicant, in light of the nature of the charges he faces and which fact needs to be borne in mind. Accordingly, I would grant the application for consolidation of bail as follows:-

a. With regard to **Criminal cases No. 739/2017 and 778/of 2017**, the bail terms in the former, namely bond of Shs. 1 million with one surety in like sum will suffice as consolidated bail terms to cover both matters. In the alternative, the Applicant may be released upon depositing cash bail in the sum of Shs. 250,000/- (Two hundred and fifty thousand).

b. With respect to **Criminal cases No. 738/17 and 726/2017**, the Applicant may be released on terms that he executes a personal recognisance in the sum of Shs. 500,000/- and furnishes a surety in like sum. In the alternative, he may be released on a cash bail of Shs. 150,000/- (One hundred and fifty thousand).

14. There can be no doubt that the Applicant faces very serious charges. He is however presumed innocent until otherwise proven. The Applicant has emphasized his right to bail under Article 49 of the Constitution. Bail terms are set to ensure the attendance of an accused person for his trial. Under Article 49 of the Constitution, the Applicant is entitled to reasonable bail terms. And while there is no express provision in the Constitution or the Criminal Procedure Code specifically providing for consolidated bail terms, in appropriate cases, such order may be made in furtherance of the Accused’s rights under Article 49 and 50 of the Constitution. Each case must be considered on its merits and circumstances remembering always the presumption of innocence in favor of the Applicant. But also the rights of the complainants under Article 50(1) and the Victims protection Act. There will be cases where it may not be prudent or even practical to allow a single bail term to apply in separate trials.

15. The trial court granted bail on terms that the Accused person be released on a bond of KShs.950,000/=; KShs.1 million; Kshs 1million; Kshs.500,000/=and Kshs. 900,000/= respectively, with like surety in each case. In light of the offences the terms cannot be said to be excessive, but evidently, procuring five sureties who qualify for the required recognizances might prove a tall order for the Accused person. Nevertheless, the temptation for the Accused in this case to abscond cannot be ignored, in light of the seriousness of the offences and the sentences they attract.

16. At the same time the complainants, dates of offences and scene of offences are different. The Court was told that different investigators are involved. It may not be prudent or practical to have a single bail term or surety in all these cases; indeed it would be onerous for a single surety to shoulder the heavy responsibility in respect of such multiple serious offences. I am not satisfied therefore, that this is a proper case for consolidation of bail terms or even the granting of a consolidated cash bail. Instead, the court will review individual bail terms as follows:

a) In Criminal Case No 610 of 2018, the Accused may be released on a bond of Kshs. 500,000/- and one like surety;

b) In Criminal Case No 614 of 2018, the Accused may be released on a bond of Kshs. 500,000/- and one like surety;

c) In Criminal Case No 613 of 2018, the Accused may be released on a bond of Kshs. 600,000/- and one like surety;

d) In Criminal Case No 611of 2018, the Accused may be released on a bond of Kshs. 600,000/- and one like surety;

e) In Criminal Case No 612 of 2018, the Accused may be released on a bond of Kshs. 700,000/- and one like surety. In the alternative, the Accused may, be released on a cash bail of Kshs. 1 million. For the avoidance of doubt, this alternative term applies only to Criminal Case No. 612 of 2018.

17. A copy of this ruling is to be placed in the respective files above

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF DECEMBER 2019

C. MEOLI

JUDGE

In the presence of: