



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. CRIMINAL APPLICATION NO. 5 OF 2019**

**MAURICE OKELLO KABURU .....1<sup>ST</sup> APPLICANT**

**JOHNSTONE ERIC BWIRE .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON BAIL**

1. Maurice Okello Kaburu and Johnstone Eric Bwire have petitioned this court for several prayers, First that this court consolidates their several criminal cases pending before different courts and that they be moved to one court station for easy and expeditious hearing and determination; second, that they be granted bail or bond pending trial; third, an order for expeditious hearing of those cases because delay in hearing them has prejudiced them; fourth, that properties seized from them be released to or kept in safe custody and fifth, that their right to property should not be unlawfully or illegally invaded.
2. The application is supported by an affidavit of Maurice Okello Kaburu sworn on 6<sup>th</sup> September, 2019, He deposes that he has been charged in different court jurisdiction across the county with the offences of breaking and stealing contrary to Section 306 of the Penal Code but that he has not been granted bail or bond. He states that he is a family man with a fixed abode and easily accessible and able to attend court at any time. He further states that he is ready and willing to abide by all conditions the court may set or impose.
3. It is the 1<sup>st</sup> applicant's further deposition that continued incarceration is a violation of his fundamental right to fair trial which includes the right to bond or bail guaranteed under Article 49(1) (h) of the Constitution. He states that the police have continued to violate his right to property and that his right to fair trial cannot be limited in terms of Article 25 of the Constitution. The 1<sup>st</sup> applicant deposes that prosecution of the cases has been slow and unfair in respect of production of witnesses which has prejudiced them. He argues that his personal properties have been seized without court orders or warrants.
4. The 2<sup>nd</sup> applicant, Johnstone Eric Bwire, also swore his own affidavit earlier on filed on 1<sup>st</sup> July, 2019. He deposes that he has also been charged in several courts with the offences of office breaking and stealing in criminal cases 934of 2018 – Kwale; 1020of 2018 at Kabarnet; 1561 of 2018 at Kajiado, 1291of 2018 at Kitui and 674of 2018 at Mavoko. He argues that the prosecution's objection to his release on bail was not made in good faith, lacked legal basis, is discriminatory and is meant to humiliate him.
5. The 2<sup>nd</sup> applicant further deposes that he has a family with a fixed abode and will attend court if released on bail. He further states that his continued incarceration violates his fundamental rights guaranteed under Article 49(1) (h) of the Constitution.
6. The application has been opposed by the respondent through two affidavits by the Investigating officer, CPL Linus Lotulya, sworn on 15<sup>th</sup> October, 2019 and 22<sup>nd</sup> October, 2019. He deposes that the crimes committed by the applicants and their accomplices who are still at large are a threat to national security since some of the computers stolen belong to the National Intelligence Service; that the applicants have broken into several public offices including that of the Director of Public Prosecutions in Machakos and stolen several computers containing sensitive information; that the 2<sup>nd</sup> applicant was found with government items including booklets for birth certificates; that the 1<sup>st</sup> applicant was found with a suspicious firearm and ammunition and although he had been issued with 50 rounds of ammunition, only 26 were recovered and he could not account for the rest.
7. He deposes that the applicants have several other cases in various parts of the country namely Kitui, Kabarnet, Mavoko, Kakamega and Kwale. He states that they have no known abode and are a flight risk.
8. In the further affidavit, the investigating officer deposes that the evidence adduced by witnesses who have already testified is overwhelming and that the applicants were denied bail by the trial court at Kajiado and in all other courts where they have cases pending. He denies that there has been delay in prosecuting the criminal cases and particularly the criminal case at Kajiado where 15 witnesses had already testified as at the time of hearing this application.

9. During the hearing of this application, the applicants urged the court to allow their application and grant them bail. They largely reiterated what is contained in their affidavits.

10. Miss Thyaka, learned Prosecution counsel, opposed the application and urged the court to decline the request to release the applicants on bail. Counsel argued that there were sufficient grounds established before the trial court not to release the applicants on bail. Counsel contended that the applicants have several cases in various courts across the country and they may not attend court during the hearing if released on bail.. Counsel relied on the affidavits by the investigating officer and urged the court to dismiss the application for bail.

11. I have considered the application and the response thereto. I have also considered the arguments from both sides. The facts of this application are not disputed. The applicants face several criminal cases in various courts across the country. They have cases at Mavoko law courts in Machakos County, Kitui Law Courts in Kitui County, Kakamega Law Courts in Kakamega County, Kabarnet law courts in Baringo County and in Kwale within Kwale County.. The offences the applicants face are similar in nature in all these cases, that is; breaking and stealing.

12. In the Kabarnet case No. 100/18 they have been charged with 4 counts of the office breaking and stealing while the 2<sup>nd</sup> applicant faces 1 count of handling stolen goods. In Kitui they face similar cases of the office breaking and stealing. In the Kajiado case, they similarly face 3 counts of breaking into a building and committing a felony and the 1<sup>st</sup> applicant faces a charge of handling stolen goods and many more charges. The offences bear similarities in their mode of execution.

13. The applicants were denied bail by the trial court at Kajiado on 2<sup>nd</sup> January, 2019 prompting the present application. The application is opposed by the prosecution on the grounds already alluded to above.

14. Bail is a constitutional right and every person charged with a criminal offence is entitled to be released on bail or bond on reasonable conditions unless compelling reasons are established. In that regard the court begins from the premise that the applicants have that right to be released on bail unless the prosecution establishes compelling reasons not to grant bail. The applicants have argued that they have a fixed abode and will attend court if released on bail. They further argue that they have families and therefore their abode is known

15. The prosecution has advanced the argument that the applicants have no fixed abode; that they have several cases scattered across the country and if released they may not attend court to proceed with their trial.

16. This is not the first application for bail. It is an application essentially, for revision of the decision of trial court declining to release the applicants on bail. They applied for bail before the trial court which considered that application and in a considered ruling delivered on 2<sup>nd</sup> November, 2019, it declined to grant the applicants bail.

17. The applicants have sought a number of prayers in their application which they have called a petition. They have asked this court to consolidate all their criminal cases pending in various court stations so that they can be heard in one court station. On this plea, the court's answer is this; the applicants were arrested for offences committed in various places and were charged in courts within whose jurisdictions the offences were committed. The law, the Criminal Procedure Code, requires that offences be tried in the courts where offences are committed.

18. Section 72 of the Code provides that:

***“When a person is accused of the commission of an offence by reason of anything which has been done or of any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued”***

19. That is indeed where the applicants have been charged and are facing trial. This court whether moved as a constitutional court or otherwise, will not take it upon itself to consolidate criminal cases for offences committed in various counties into one and order that they be heard in one court station. The law is that if there is good reason to transfer one case from one subordinate court to another, only High Court superintending that subordinate court can exercise that jurisdiction. For that reason, this court, sitting at Kajiado, cannot order that all other criminal cases whether in Kakamega, Kabarnet, Kwale, Kitui or Mavoko be consolidated since they do not arise from the same transaction. They were allegedly committed by the applicants in different places and on different dates and are therefore to be tried in the courts where the offences were committed.

20. There is the second aspect of the cases, namely; convenience of witnesses and fair trial. The applicants have argued that due to the fact that their cases are scattered in various court stations across the country,, it has negatively impacted on them in that the trial of these cases has not been prompt. The same argument the applicants have put forward, can be said of the prosecution and its witnesses. For instance, there are cases in Kwale, Kitui, Kabarnet and Kakamega which are far flung areas from Kajiado and Mavoko. If all these cases were to be consolidated, it would affect the ability of witnesses to attend court and therefore result into unfair trial. The applicants' request for consolidation cannot therefore be granted.

#### **Whether the applicants should be granted bail**

21. The trial court declined to release the applicants on bail and stated as a fact that the applicants were facing several criminal cases in various courts in the country and that the 1<sup>st</sup> applicant while in police custody got in touch with some people including the 2<sup>nd</sup> applicant and instructed them on how to dispose of exhibits. Whether in this court or any other court, denial of bail should be on compelling grounds. Authorities are clear on this. (See Republic v Godfrey Madegwa & 6 others [2016] eKLR; Nganga v Republic [1985] KLR 45; Watoro v Republic [1991] KLR 220 and Grace Kanana Namulo v Republic [2019] eKLR.)

22. In the present case, the applicants face not less than 5 criminal cases that are related in the *modus operandi* that is breaking into offices and buildings and stealing there from. They are also alleged to have been found with some of the suspected stolen goods. These are however allegations subject to proof.

23. The question that this court must consider is how the applicants will manage to attend their cases in the various stations from Kwale to Kitui to Kabarnet, to Kakamega, to Kajiado and Mavoko to have them heard on schedule and without delay if released on bail. The cases the applicants face are not in neighbouring stations. They are scattered across the width and breathe of the country.

24. In any trial the court should consider not only fair trial but also interests of justice. Both the victim and the accused are entitled to a fair trial that encompasses justice. The applicants have not demonstrated to this court how they will manage to attend all the cases without default given the distance between the various court stations where they have been charged and are expected to be present during the hearing of those cases..

25. The applicants themselves appear to appreciate this difficulty by asking that their cases be consolidated and heard in one court station. That in itself is evidence of the complex web the applicants find themselves in and this court must stay alive to this fact that their presence during trial is fundamental to fair trial and dispensation of criminal justice. To this end the principal consideration before granting bail is the ability of the applicants to attend court when required to do so. This court is not, in the circumstances of this case, satisfied that the applicants will have the ability to attend court without fail.

26. Looking at the totality of the circumstances of the cases the applicants face, it is my view that they militate against their release on bail. There is no guarantee that they will attend courts for the hearing of their cases given how far they are stretched. Even the means of transport to those various courts might be a challenge that may end up delaying their own quick trial as an aspect of fair trial.

27. For the above reasons, the applicants' application is declined and dismissed.

**Dated Signed and Delivered at Kajiado this 2<sup>nd</sup> Day of December, 2019.**

**E. C MWITA**

**JUDGE**