



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.89 OF 2018**

**DICKSON PATRICK KIPONDA MUSOKE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Dickson Patrick Kiponda Musoke is facing the charge of **causing death by dangerous driving** contrary to **Section 46** of the **Traffic Act** before the trial magistrate's court. Pending trial, the Applicant was released on cash bail of Kshs.100.000/-. On 9<sup>th</sup> February 2018, his bond was cancelled by the trial court because, on a previous occasion when the case had been scheduled for trial, the Applicant failed to attend court. The Applicant's application to have the bond reinstated was dismissed by the trial magistrate's court. This decision was rendered on 12<sup>th</sup> February 2018.

The decision provoked the present application. The Applicant moved this court pursuant to **Article 165(6)** of the **Constitution** and **Sections 362** and **364(b)** of the **Criminal Procedure Code** seeking to have that decision brought to this court so that this court may examine the legality of the same and issue an appropriate order to remedy the situation. In the grounds in support of the application, the Applicant contends that he did not deliberately fail to attend court when the case was scheduled for trial. It was his case that he attended court on the specific date but went to the wrong court on the advice of his counsel. His counsel mistakenly thought that the case was before another court and not the court that eventually cancelled his bond. He urged the court not to punish him on account of the mistake of his counsel. During the entire pendency of the trial, he had not failed to attend court. He undertook to attend court faithfully until the conclusion of the case if his bond is reinstated.

During the hearing of the application, Mr. Muyuri for the Applicant reiterated the contents of the Applicant's application. He pleaded with the court to exercise its discretion and reinstate the bond that was cancelled by the trial magistrate's court. Ms. Atina for the State did not oppose the application. She was of the view that the Applicant's bond should be reinstated. **Article 49(1)(h)** of the **Constitution** grants every accused person the right to be released on bail pending trial unless there are compelling reasons. The most important consideration that the court always takes into account is whether the accused will attend court if he is granted bail. In **Republic -Vs- Danson Mgunya & Another [2010] eKLR**, 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, having perused the record of the trial magistrate's court, it was clear to this court that it was only on that one occasion that the Applicant failed to attend court when the case was scheduled for trial. The trial court justifiably formed the impression that the Applicant failed to attend court because he wanted to frustrate the trial of the case. This was in view of the fact that the case had remained pending for a period of over two years. When an accused is released on bail pending trial, it is not a licence for such an accused to scuttle the trial by failing to attend court on the dates he knows that prosecution witnesses will be present. This court will exercise its discretion in favour of the Applicant but give stern warning to the Applicant not to fail to attend court on the days that the case will be fixed for trial.

In the premises therefore, this court exercises its jurisdiction under **Section 362** of the **Criminal Procedure Code** and calls the record of the trial magistrate's court to this court for the purposes of setting aside the order that was made cancelling the Applicant's bond. In the circumstances therefore, the Applicant's bond is reinstated. The Applicant shall be released from remand custody forthwith and shall appear before the trial court on 19<sup>th</sup> March 2018 when the case is scheduled for trial. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF MARCH 2018**

**L. KIMARU**

**JUDGE**