



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NUMBER 94 OF 2018**

**VIRGINIA WAKINI WANGECHI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING.**

1. By way of a Notice of Motion dated 26<sup>th</sup> April, 2018 brought under Articles 49(1)(h), 20, 21, 22, 23, 24, 25, 27, 28 and 29 of the Constitution and all other enabling provisions of the Law the Applicant urges the Honorable court to further review cash bail of Kshs. 120,000/- downwards to a reasonable amount. The orders were sought on the grounds that the Applicant has been unable to raise the sum of Ksh. 120,000/- which is the current bail based on an earlier revised amount. She alludes that she is a single mother and the sole breadwinner to three children and in her continued absence the family was falling apart as the children were out of school and lacked a place to stay due to the failure to pay rent. That the presumption of innocence favored her and that bail terms are not meant to be punitive but to procure the attendance of the accused person. That a failure to grant the orders sought would result in her suffering irreparably whilst in prison.
2. The application was supported by an affidavit sworn by the Applicant in which she reiterated the grounds on which the application is premised. She added that she was a Kenyan citizen from Muranga County and therefore not a flight risk.
3. Ms. Kimiri for the Respondent submitted that if the court was to reduce the bond terms it should require a surety be deposited. Mr. Swaka advocate for the Applicant introduced one Julia Nyambura Kanyari, a pastor who, it was submitted, would ensure that the Applicant attends court. The court did interrogate her as a possible guarantor.
4. Mr. Momanyi who took over from Miss Kimiri submitted that after perusing the court file he noticed that counsel for the Applicant had requested that bail deposited in another file that was withdrawn, Kshs. 500,000/-, be transferred to the present file. That he had considered the pre bail report and that it was not satisfactory since the prophetess resides in Mombasa while the Applicant resides in Nairobi and she could therefore not supervise her in an effort of ensuring she attended court. Further, that the fact that the Applicant could afford Kshs. 500,000/- in another case was a demonstration that she was a person of means. He therefore opposed the application.
5. Mr. Swaka submitted that the cash bail in the other case was utilized to pay school fees. That the revised bail terms were still too high for the Applicant who is the sole breadwinner for her family as her husband was repatriated. That the pastor would ensure the Applicant attended court when required to do so. Further, that the Applicant was a Kenyan and therefore not a flight risk and she would abide by any conditions set by the court.

**DETERMINATION**

6. This court in a ruling delivered on 20<sup>th</sup> March, 2018 reviewed the Applicant's bail and bond terms to a cash bail of Kshs. 120,000/- or in the alternative a surety bond of Kshs. 300,000/-. The procedure to be followed when entertaining such applications was ably set out in **R. v. Nottingham Justices Ex parte Davies[1981] QB 38** as follows;

***“The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that “Has there been a change?” It is “Are there any new considerations which were not before the court when the accused was last remanded in custody?”***

7. The test then is whether there existed new considerations. The Applicant has submitted a surety to the court and further alluded that she cannot raise the amount of bail as earlier reduced. It behooves this court to lay a factual background of the matter at hand. The Applicant

took plea on 10<sup>th</sup> November, 2017 whereupon a cash bail was set at Kshs. 500,000/-. She was released on 17<sup>th</sup> November, 2017 pursuant to a professional undertaking from her advocate and pending the transfer of Kshs. 500,000/- from Nairobi Chief Magistrate's Court, where it had been paid as bail in Criminal Case 1422 of 2013. It appears that the money in question was never transferred and the Applicant was therefore remanded on 23<sup>rd</sup> February, 2018. She has therefore been in custody for three months and 18 days.

8. The court has also considered the bail report which indicates that she was a resident of Vescon 1 in Bamburi, Mombasa at the time of her arrest. That she was preciously married to one Emmanuel Peter, a Nigerian National, who was deported to his country. Further, that she was the mother of four children and the eldest was taking care of the children in the absence of the mother. A pre bail inquiry dated 21<sup>ST</sup> June, 2018 indicated that the family was in dire financial need and the children were dependent on Bishop Julia Nyambura of Revival Gathering Ministry, Ngara to cater for immediate needs.

9. From the above it is clear that one of the circumstances that the Applicant wishes to rely upon is her inability to raise the amount in question. The pre bail report was clear that the Applicant's family was in dire financial need as she had exhausted her savings and had no tangible assets to ensure her secure release. However, this was questioned by Mr. Momanyi who submitted that there was Kshs. 500,000/- that was to be transferred to the present case as bail. The amount was to be used as bail payment but the same never occurred and the Applicant's advocate submits that the money was used to pay school fees.

10. With regards to the personal guarantor the court tested her suitability with chief consideration being ascertaining the viability of whether she is acquainted with the accused. The proposed guarantor stated that she knew the Applicant who was a member of her church and who last visited the church before her arrest. She stated that the Applicant was however a resident in Mombasa. In this regard, the fact that the Applicant was a resident of Mombasa and the fact that the proposed guarantor operated churches in Nairobi, at Kayole and Ngara raises doubt of her ability to supervise the attendance of the Applicant in court. There is also the question about the nature of the relationship between the two, which appears to be that of a pastor/bishop/prophetess and her followers. In as much as a pastor may know her/his flock, where the two live so far apart raises questions of their contact. If for instance the Applicant absconded, it is abundantly clear that the pastor would not be in a position to track her in Mombasa. I do not therefore think she can vouch for the Applicant's court attendance.

11. The nature of the offence facing the Applicant requires that either a cash bail or surety bond be deposited. The amount granted to her by this court is extremely reasonable and I cannot vary it. Accordingly, I dismiss the application. The Applicant shall appear before that trial court on 26.7.2018 for mention to take a hearing date. Production Order to issue. Trial court file should forthwith be remitted back.

**DATED and DELIVERED this 18<sup>th</sup> day of July, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. Mr. Swaka for the Applicant.
2. Mr. Momanyi for the Respondent.