REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL MISC. CASE NO. 29 OF 2018

IN THE MATTER OF AN APPLICATION BY KIRIT BHAGWANDAS KANABAR INVOKING THE SUPERVISORY JURISDICTION OF THE HIGH COURT PURSUANT TO ARTICLE 165(6) AND (7) OF THE CONSTITUTION OF KENYA 2010 AND THE REVISIONARY JURISDICTION UNDER SECTION 362 OF THE CRIMINAL PROCEDURE CODE

AND

IN THEMATTER OF THE CONSTITUTION OF KENYA, 2010, ARTICLE 49(1) (h)

AND IN THE MATTER OF SECTION 362 OF THE PROCEDURE CODE

AND IN THE MATTER OF BAIL AND BOND TERMS ORDERED BY THE SUBORDINATE COURT ON 27TH AUGUST 2018 RELEASING KIRIT BHAGWANDAS KANABAR ON A CASH BAIL OF KSHS. 5,000,000/- (KSHS. FIVE MILLION) OR BOND OF KSH. 10,000,000/- MILLION AND A SURETY OF SIMILAR AMOUNT

BETWEEN

KIRIT BHANGWANDA KANABAR.....APPLICANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT KAJIADO...2ND RESPONDENT

RULING

Kirit B. Kanabar, the applicant through Ms. Ayisi Associates brought a notice of motion under Rule 3 of the High Court Practice and Procedure rules, Articles 165(6), (7) of the Constitution 2010, section 362 of the Criminal Procedure Code for orders that bond terms of a cash bail of 5,000,000 and or a surety bond of Ksh. 10,000,000 with a surety of similar amount granted by the Learned Trial Magistrate be reviewed on grounds of being punitive, harsh and excessive in the circumstances of the case. In support of the application are grounds as stated in the body of the motion and an affidavit by the applicant.

The gist of the application for review as deduced from the notice of motion and the affidavit can be summarized as follows: That the applicant though charged with a criminal offence is presumed innocent unless the contrary is proved. That under the constitution and statute law the accused is entitled to be released on reasonable bond terms. That the applicant is a Kenyan with fixed abode and not falling within the flight risk category. That during the application for bond before the Trial Court there was no objection from the state necessitating the trial magistrate to impose punitive terms far in excess what the applicant could afford. That the applicant is committed to attend court at all times when scheduled or required by the court.

The respondent though served filed no replying affidavit on the issues raised in the notice of motion by the applicant.

On review hearing Mr. Ayisi, counsel for the applicant vehemently submitted that the trial court did not take into account the personal circumstances of the accused. Learned counsel contended that the fact that there were no compelling reasons advanced by the state was fair enough for reasonable bond terms to be granted to the applicant. He further delved into the history of the matter since the complaint was made to the police prompting an investigation against the applicant. Mr. Ayisi, invited the court to observe that the applicant is not a flight risk nor would he interfere with the prosecution witnesses. In relation with court appearances learned counsel argued that the applicant is in gainful employment, has strong family ties which are positive indicators that he will abide by any conditions attached to bail terms pending the hearing and determination of his case on the merits.

Additionally, Mr. Ayisi submitted that the court should jealously consider the right on presumption of innocence on the administration of criminal justice as a condition precedent to the right to a fair trial. By ordering punitive bail terms Mr. Ayisi contended that it negates this cardinal principle that every accused person is presumed innocent unless the contrary is proved.

In buttressing his submissions counsel cited the following provisions and authorities: Section **362, 364(1) 123A, 124 of the Criminal Procedure Code, Article 165(6) & (7) 49(h**) of the Constitution. **George Aladwa v Republic eKLR, Kevin Sichunga v Republic 2016 eKLR, Joseph Kimeu v Republic 2017 eKLR.**

Background of the Case

The accused person was on 27/8/2018 arraigned before the Chief Magistrate Court charged of obtaining by false pretences contrary to section 313 of the Penal Code. The brief particulars on count 1 were that on 11/2/2015 at Equity Bank Namanga Branch within Kajiado County jointly with others not before court with intent to defraud obtained from Saimon Ntakizoi Noonkanas the sum of Ksh. 15,900,000 by falsely pretending that they were selling a house No. 27 at Lower Kabete Nairobi and caused the said Saimon Noonkanas to send money from his equity account No. 0700191945167 at Namanga Town.

The second count was on a conspiracy to commit a felony contrary to section 393 of the Penal Code the accused pleaded not guilty to both counts.

As a prerequisite pre-trial issue he was released on cash bail of Ksh. 5,000,000 or a surety bond of 10,000,000. These bail terms became the subject matter of this motion seeking to invoke the revisionary power of this court to have them set aside.

Analysis and Resolution

The broad regime on bail introduced by the provisions of Article 49(h) of the Constitution is much more flexible in comparison with the stringent framework in the old constitutional order where serious felonies like murder, robbery with violence and treason were not bailable. To curtail the abuse by the state the constitution laid down the doctrine of compelling reasons in cases where the accused release on bail is to be turned down by the trial court. In essence all manner of offences are bailable unless the state adduces evidence that compelling reason exist not to release an accused person. However, it should be observed that the independence of the trial court and enjoyment of discretion to determine the specific circumstances of each case is still applicable on pre-trial bail release applications.

In Kenya both the constitutional and statutory right to bail exist independent of the application to bail. In the context of section 123A of the Criminal Procedure Code subject to Article 49 (h) of the constitution and not withstanding Section 123 of our Code the accused may be remanded in custody if any of the statutory exceptions in this section applies to his or her case. The statutory exceptions against the right to bail if the court is satisfied they exist include:

> **(a) the nature and seriousness of the offence, (b) The character, antecedent, association and community ties of the accused persons, (c) The defendant's record in respect of fulfilment of obligations under the previous grants of bail, (d) The strength of the evidence of his having committed the offence, (e) Should be kept in custody for his own protection.**

In determining bail application the learned trial magistrate did not mention that any of the exceptions under section 123(A) of the Code are pre-existing conditions to warrant the nature of the bond terms imposed. There is no dispute that the accused faces an allegation of defrauding the complainant of a colossal sum of money over 15 million by false pretences.

In my view, the seriousness of the offence should not be seen from an eye of the quantum or liquidated amount stated to be defrauded or stolen but the nature and gravity of the offence should be in line with prescribed penal provisions and probable sentence on conviction.

It is important to distinguish between the nature of the offence as a category and the seriousness of it as attached by the legislature in its various cluster of punishment in default. I am reminded to observe that trial courts should not take the phase seriousness of the offence on the face value. It is an inquiry to be based on the defined offence and particular facts as laid down by the state. There is no doubt my reading of the constitutional and statutory provisions on bail point to the court to give a particular weight to the various factors and principles governing bail as illustrated in the bail and bond policy of the Judiciary. The independence of the trial court in directing the reasonable conditions applicable in each case has always been a reflection of the provisions in Article 49(h) of the constitution and section 123 and 124 of the code.

It is generally accepted that the requirement of bail is merely to secure the attendance of the accused at the trial. However, from the nature and conditions attached of the different cases at various levels by the trial courts plainly there are other considerations to be factored in releasing the accused person on bail.

In my view, courts have leaned more towards taking into account the elements as illustrated in the case of ***Muite v Republic 1991 KLR 579*** on the basis of **the nature of accusations, the nature of the evidence, the severity of punishment, the strength of the prosecution's case, antecedents character of the accused, safety of the accused and likelihood of interfering with witnesses** etc.

I am in agreement that the court should be free to consider all the relevant circumstances but special weight be accorded the provisions of Article 50 2(a) of the constitution, that every accused person has a right to be presumed innocent until the contrary is proved. Further to be guaranteed the right to freedom and security which includes not to deprived of his or her freedom arbitrarily or without just cause under Article 29 of the constitution.

The offences concerned may be prima facie serious but if the unit of measure is the material before court it may as well remain a mere allegation. Going by the provisions of Article 49(h) of the constitution it should be observed that to safeguard the right to freedom and

security of person under Article 29 conditions on pre-trial bail should not be excessive. The decision therefore by the trial court to release an accused person from detention custody under the appropriate circumstances in Article 49(h), section 123 and 124 of the Criminal Procedure Code contemplate bail conditions which do not result in his or her pre-trial detention because of the inability to meet punitive cash bail or surety conditions.

To me it is just appropriate to say that trial courts when considering a person's suitability to be released on bond should remember that they are guardians and gatekeepers of the constitution. From the wording of Article 49(h) of the constitution and inquiry among other matters as to the financial resources and suitability of the person for whom he/she proposes to stand surety, should be evidentially proven before imposing the bail terms. The concepts to be released on reasonable conditions should be accorded the ordinary meaning to give effect to the purposeful interpretation of the constitution.

The above test should not be taken to mean that an accused person with more financial resources should be released on punitive or excessive bond terms in comparison with a man of straw. In exercising discretion, the right on equality and freedom from discrimination under Article 27 of the constitution will apply in the same spirit.

The bail conditions involve payment of money to the court or provision of a surety to stand as a guarantor for the release of an accused person pending trial. The effect of this two scenarios call upon the courts not to impose bail terms in one way or another that withholds bail arbitrarily without a just cause. The court is also obliged to consider other terms of reasonable bond terms beside surety recognizance and cash bail. A recognizance by a surety or cash bail should satisfy the criteria of reasonable bond terms contemplated in Article 49(h) of the constitution.

I am alive to the fact that neither Article 49(h) of the constitution nor the criminal procedure code has defined the phase to be released on reasonable bail terms. It has been left wholly to the jurisdiction and discretion of the court. It is not in dispute that the court retains the residual power to decide the appropriate cases to have accused person right to be released from police or prison custody upon fulfilling certain conditions. The following comparative jurisprudence from other jurisdictions sheds light on this important subject on pre-trial bail and the concept as to what constitutes excessive bail.

The Eighth amendment of the American Constitution prohibits the use of excessive bail. The **Supreme Court of the United States of America** in the case of **Stack v Boyle U.S. 1.3.1951**

> **"the court provided guidelines in assessing "whether bail is excessive starting from the premise that the traditional right to Freedom before conviction permits the unhampered preparations of a defence and serves to prevent the infliction of punishment prior to conviction. The court defined excessive as:** ***Bail set at a figure higher than an amount reasonably calculated to assure the presence of the accused. Significantly, the court tied the question of whether a bail determination is excessive to the purpose of bail. As the court explained, the purpose of bail is to help assure the presence of the defendant at subsequent proceedings. Since the freedom of bail is limited, the filing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant."***

In the case of **Bearden v Georgia 461 U.S 660. 672-73 1983 Griffin v Illinois 351 U.S 12 19 1956** it has been reaffirmed that: ***"there can be no equal justice where the trial a man gets depends on the amount of money he has".***

I wish also to draw the attention to a report by professor **Friedland; On Detention before trial ,a study of criminal cases tried in Toronto magistrates courts**, **Toronto Press 1965**, where he observed.:

> ***"The practical challenges of setting the quantum of cash deposit, as well as the fairness it produced. System which requires security in advance often produces an insoluble dilemma. In most cases it's impossible to pick a figure which is high enough to ensure the accused's appearance in court and yet low enough for him to raise. The two seldom if ever overlap. The ability of the accused to Marshall Funds or property in advance whether he or she would be released pauses even a bigger challenge".***

It's worthy referring to what the supreme court of India said on this issue in the cases of **Mortiram v State of Madya Pradesh 1978 AIR 1594** the court held imposing of harsh conditions in bail orders is against the law. The same court in **Ramathai v Inspector of Police and another 2009 SC 443** stated that a "***bail condition of a subordinate court to deposit huge amount should be held to be onerous and oppressive in nature".***

So on the strength of these persuasive authorities dealing with the same circumstances as it pertains to the facts of this application, I agree with the legal principles expressed therein as relevant to the matter at hand. It is noteworthy that the policy of money bail in our criminal justice system has failed to guarantee the right to freedom and security of the person under Article 29 and Equality before the law in Article 27 of the constitution. Though bail is available at the discretion of the court even when an accused person is charged with a serious offence denial of it should not be used as a form of pre-trial punishment.

That is why the decision on bail conditions is so fundamental since it deals with the right on presumption of innocence under Article 50 2(a) and the right to liberty and security of the person in Article 29 of the constitution. Bail being an important piece of the puzzle between these two constitutional rights provides a mechanism to guarantee protection of each of this right.

The independence and discretion of the trial court in ordering the reasonable bail conditions applicable in each case ought to reflect the provisions in Article 49(h) of the constitution as operationalised by section 123 and 124 of the code "**One Distinguished Author Roscoe Pound in his writings on the theory of justice in 1951 edition stated The law means to balance the competing interests of an individual along with the social interest of society".**

That to me means in bail applications fundamental rights and freedom of an accused person can be denied where the state has discharged the

burden of proof by way of evidence that compelling reasons exist not to have him or her released on bail. However, this discretion is to be exercised judiciously by subjecting the issue to due process before limiting or depriving the accused of his or her rights.

Given this framework the automatic trigger on the cash bail being based on a particular percentage or ratio of the alleged amount in the offence charged to me is a fallacy not attributable to any rationale or legal craft. In other words, exercise of discretion in determining bail terms should apply the fundamental rights to ensure fairness, access, justice, consistency, predictability, speedy trials and due process of the law. I say so because the framers of the constitution forged a new path under Article 49(h) which mirrors the rule against the use of excessive bail. Setting bail amounts at ratios that are unaffordable contravenes equal protection and due process rights of an accused person.

One major ground driving this application for revision against the order of the trial magistrate was that the bail posited by the applicant was excessive in the circumstances of the case.

From the record carefully examined the learned magistrate never considered the issue of the ability by the accused person to pay the five million, equally there was no inquiry as to the availability of a surety ready and willing to enter a covenant with the court by depositing the security bond of 10,000,000 million to guarantee release of the accused.

Thus given the provisions of Article 49(h) of the constitution the bail terms imposed must be regarded as reasonable conditions and terms to the accused. It is eminently desirable that reasonable and moderate bail terms be granted as of right to give effect to the constitutional provisions.

In the instant case the learned trial magistrate in fashioning the order on bail erred in requiring a huge amount of cash deposit. Secondly, she made a decision in the alternative release condition of a personal bond of 10 million with a surety which to me was unattainable. Why do I say so, taking into account the record before me there was no inquiry carried out to satisfy the court that the accused person had the ability to deposit the cash bail or recognisance of a surety of ten (10) million in lieu of cash. If the accused person has lived within the community his or her entire life, has a permanent employment or business, has a family tie, he cannot be said to be a flight risk unless the state discharges the standard of proof on compelling reasons to that effect.

Whether the accused person will turn up for trial in the event he or she is granted bail should be the key driver in the decision. At the bail application in this matter we are not told that the accused was a flight risk nor will he fail to attend court as required. Its thus apparent that the learned magistrate erred in granting excessive and punitive bail terms against the provisions of Artcle49 (h) of the constitution and the weight of evidence at her disposal. It's not lost to state that pre-trial incarceration is one of the contributing factors of congestion in our prisons facilities. By virtue of section 7 of the Fair Administrative Act i agree with submissions made on this ground that there is an error of law or wrong applications of the principle in Article 49(h) on reasonable bond terms and conditions.

The salient feature of this application compels me to make a commentary on an important duty placed on the judges and magistrates to give reasons for their decisions.

The right of the accused person to be informed of the reasons for a particular requirements and conditions attached to his bail/bond terms is enshrined in the constitutional conception in Article 10 on National values and principles of governance which binds all state officers. The duty to give reasons is also enshrined in section 4 of the Fair Administrative Act of 2015.

The essence of transparency and accountability of Judges and Magistrates is tenured and stems from reasoned decisions which emerge at an adjudication process between the litigants to a dispute. In sum when it comes to an appeal or revision an aggrieved party may not be in a vantage position to contest the decision of the trial court efficiently without reasons for the decision.

It is trite that a judgement or a ruling of a court or tribunal is a decision determining the rights and liabilities of the parties in a legal contest or proceedings. It is the basis upon which the public holds us accountable by providing reasons why a particular path was taken giving rise to the outcome in resolving the dispute.

In the case of ***S v Mokela 2012 1 SACR 431*** the court emphasized the need and duty to give reasons either at the interlocutory state or at conclusion of a trial Bosielo JA stated:

> ***"I find it necessary to emphasize the importance of judicial officers giving reasons for their decisions. This is important and critical in engendering and maintaining the confidence of the public in the judicial system. People need to know the courts do not act arbitrarily, but base their decisions on rational grounds of even greater significance is that it is only fair to every accused person to know the reasons why a court has taken a particular decision, particularly where such a decision has adverse consequences for such an accused person. The giving of reasons becomes even more critical, if not obligatory, where one judicial officer interferes with an order or making made by another judicial officer"***

The Fair Administrative Action Act in Section 4 provides for entitlement of rights of every person adversely affected by any administrative action to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review. The information includes the reasons for which the action was taken.

In **Wunohu 2011 243CLR.** The court held on the relationship between the duty to give reasons and the principles of open justice:

> ***"The provision of reasons for decision is also an expression of the open core principle, which is essential incident of the judicial function. A court which does not give reasons for a final decision or for important interlocutory decisions withholds from public scrutiny that which is at the heart of the judicial function. The judicial ascertainment of facts, identification of the rules of law, the application of these rules to the facts and the exercise of any relevant judicial discretion."***

Having exercised the discretion and a conclusion reached as to the bail conditions to be imposed, I hold the view that Judicial Officers must give reasons to the accused person for imposing specific terms and conditions as of right. For all purposes and incidental to the determination on conditions on bail equal protection before the law and due process demands that an accused person be heard on affordability of bail terms which are likely to affect his right to liberty and security. As reaffirmed by **Madan JA** in **Peter Ndegwa Criminal Appeal 125 of 1984**:

> "***No rule of natural justice, no rule of statutory protection, no rule of evidence, and no rule of common sense is to be sacrificed, violated or abandoned when it comes to protecting the liberty of the subject, he is the most sacrosanct individual in the system of our legal administration"***

The learned trial magistrate was the one better placed to carry out an inquiry in assessing the accused ability to pay the cash bail before ordering for its execution as a condition for his release from police or prison custody. In this respect the reasons for the decision is mandatory in terms of accountability, transparency and fair administrative action.

This is more so where an applicant finds himself before an appellate court on appeal or review from the decision of the trial court challenging its validity and sustainability. When scrutinizing the facts of each particular case there should be clear findings and the reasons for the decisions upon which a sum of money or surety was made to apply in view of the legal proposition that no one case is identical to the other.

By the dictates of the constitution every person is entitled to his personal liberty and when he is deprived of it in accordance with the provisions of the same law, like the duty to facilitate his or her release on bail he or she must be supplied with the reasons for that decision. It is not enough on bail application to just impose a particular order or a summary ruling without an elaborate discussion on the facts and the court's reasoning on the merits of its decision.

It is against this backdrop to rely on the above principles to show that the trial court in making the decision exercised discretion which to me violated the provisions of Article 49(h) of the constitution. The court has therefore the power to review the alleged procedural impropriety and error of law on the substantive order of the learned trial magistrate.

In this regard the High Court has the power under Article 165(6) and (7) of the constitution to exercise supervisory jurisdiction by calling of the record and examining the propriety, legality, regularity, justness and correctness of the order, or proceedings in the said record. (See also ***Section 362 of the Criminal Procedure Code on revisionary jurisdiction).***

As regards the adequacy and validity of the order or proceedings Section 7 of the Fair Administrative Action provide instances in regard to the orders or proceedings that the party aggrieved by such orders, or decision could apply for it to be discharged or quashed by instituting judicial review proceedings.

To my mind the very clear provisions under Section 7 touch on the fundamental rights which are accorded by the law and indeed the principle of Natural Justice. If this is so these statutory provisions apply in equal measure when a question arises to be determined under the provisions in Section 362 of the Criminal Procedure Code. In accordance with Section 7 of the Act the High Court may review an administrative action or decision inter-alia on the following grounds: **There is evidence of the impugned order having been obtained in excess of jurisdiction or power conferred under any written law, denied the person a reasonable opportunity to state his case before the decision was taken, the action or decision was procedurally unfair, the action or decision was materially influenced by an error of law, the administrator failed to take into account relevant considerations, there was an abuse of discretion, the administrative action or decision is not proportionate to the interests or rights affected etc.**

As these are fundamental questions to be answered on appeal or review want of reasons in my view amounts to an error of law.

Considering the impugned order what matters were taken into account by the learned trial Magistrate? This was a case involving grant of pre-trial release on reasonable bail terms. The learned Magistrate had the duty to consider the application fairly under the power conferred upon her of unfettered discretion with regard to every aspect of this right to bail. However in construing Article 49(h) and the Criminal Procedure Code on bail provisions or for any other reasons she exercised her discretion as to thwart or run counter to the policy and objects of the constitution. The most important view as far as this revision is concerned is that setting bail terms so high which are not attainable by the accused persons is simply another way of lawfully denying bail altogether.

The decision is also questionable for its legality; regularity and propriety for no reasons were given for the decision. Its effect was substantial and as a result of the error the accused was deprived the benefit of reasonable bail terms and was not accorded the reasons that might have been conceivably taken into account by the learned trial Magistrate.

The powers of the High Court under this jurisdiction takes an approach to satisfy itself sufficiently that the subordinate court did error in law or on findings of fact in arriving at the impugned decision.

Looking at the facts of this case and the set standards of review and supervisory jurisdiction in Article 165 (6) (7) of the constitution and section 362 of the Criminal Procedure Code and guiding legal principles illustrated elsewhere in this ruling, I hold the following view: the learned trial magistrate factual findings on how she arrived at a monetary bail of 5,000,000 is not supported by any evidence nor reasons given for the decision. From the record I find no evidence to support the conclusion reached that the interest of justice was to be served by an order of cash bail of Ksh. 5,000,000 or a surety of Kshs 10,000,000. The learned trial magistrate choice of these two permissible decisions lies within her discretion but with a rider that the factors she took into account must be considered and the verdict should be in tandem with the weight of the evidence on record.

In the instant application I have read and considered the affidavits by the applicant and the nature of the offence obviously involves large amounts of money of over 15 million.

As argued elsewhere, bail condition should not be equated with punishment against the offender for committing an offence yet to be proved by the state. The record shows that the other conditions on grant of bail were responsive and in favour of the applicant. It is abundantly clear that we have no reasons to go by why the excessive bail terms were imposed by the learned trial magistrate.

There were no submissions at the pre-trial hearing that the accused person will not attend court when scheduled nor did his case fall within the exceptions provided for under section 123A of the Criminal Procedure Code. It is also relevant to mention that during the pre-trial bail application the state did not object nor place before court any existence of compelling reasons for the accused not to be released on bail.

To that end, the mitigating factors which will influence the trial court from setting bond terms which were favourable and not punitive as it is in this case never featured at all. The fundamental right on due process was not afforded to the accused on whether he had the capacity to pay the cash bail of 5million before the learned magistrate ruled on it.

There is no point in granting bail terms which are excessive or punitive depending on the size of the wallet of an accused person in order to secure his or her liberty and freedom from police or prison custody.

In the instant case I arrive at this inescapable conclusion that the errors and irregularity referred to by the accused did occasion prejudice and a failure of justice which cannot be remedied by section 382 of the criminal procedure code.

So to this extent the application on revision is allowed by setting aside the trial court order on bail terms and it's substituted with the order that the accused person be released on cash bail of one million or in the alternative he signs a personal bond of two million with a surety of identical amount. One further matter to be mentioned is an order directed to the Deputy Registrar to have the balance of initial cash bail of 4 million to be released to the accused person with immediate effect. Accordingly the notice of motion dated 7th September, 2018 is hereby allowed.

Dated, delivered and signed in open court at Kajiado this 5th day of December, 2018.

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HON. R. NYAKUNDI

JUDGE

Representation

Mr. Ayisi for the accused

Ms. Njeri for DPP