



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISCELLANEOUS CRIMINAL APPLICATION NO. 58 OF 2014**

**IN THE MATTER OF REVISION OF BAIL TERMS FOR ELEMING ATSANGO MULOCHI**

AND

**IN THE MATTER OF THE CRIMINAL PROCEDURE CODE**

**SECTIONS 123(2), (3), 362, 364(1) (b)(CHAPTER 75)**

AND

**IN THE MATTER OF ARTICLE 165 (6)(7) CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CRIMINAL CASE NO. 1176 OF 2013 AT THE CHIEF MAGISTRATE'S COURT AT MAKADARA**

**BETWEEN**

ELEMING ATSANGO MULOCHI .....APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

**RULING**

1. This is a Notice of Motion dated 19<sup>th</sup> day of February 2014, brought under **Sections 123(2), (3), 362 and 364 (1), (b)** of the **Criminal Procedure Code**, and **Article 165(6), (7)** of the **Constitution of Kenya**. In it the applicant seeks orders *inter alia* that this honourable court:
  1. Certifies the application as urgent and be heard *ex parte* in the first instance.
  2. Do exercise its supervisory jurisdiction by calling for Makadara criminal case file number 1176 of 2013 for purposes of varying the bail terms pronounced by the Hon. Mrs. Nyutu on the 6<sup>th</sup> February 2014.
  3. Be pleased to further remove the proviso therein to the effect that the cash bail amount so deposited will be paid to the complainant in the event of non-attendance by the accused.
  4. For reasons to be recorded, be pleased to order the aforesaid file to be transferred to any other

magistrate and prosecutor in the station for purposes of the main hearing and final disposal.

On 21<sup>st</sup> February 2014 the application was certified urgent as prayed in prayer no. I and was consequently set down for interpartes hearing on 13<sup>th</sup> March 2014.

2. At the hearing Mr. Masaviru learned counsel, urged on behalf of the applicant that the court be pleased to revise the bail terms issued by Hon. Nyutu Principal Magistrate at the Chief Magistrate's court Makadara. Mr. Masaviru submitted that the applicant was admitted to a cash bail of Kshs.700,000/= which he considered to be excessive, unreasonable and inconsistent with the charges against him. He contended that the applicant is alleged to have obtained kshs.700,000/= and it was unreasonable and unconstitutional for the trial court to set a similar amount of cash bail and with a proviso for forfeiture of the cash bail should the applicant fail to turn up in court.
3. Learned state counsel Mr. Kabaka conceded the application, stating that the application for bail pending trial was made under **Article 49(1)(h) Constitution**, and the presumption was that the applicant is innocent until proven guilty. Mr. Kabaka urged that the right to bail is aimed at securing the attendance of the applicant during trial and the terms of bond should not therefore, be punitive as to prejudice the enjoyment of that right.
4. The right to bail pending trial is circumscribed. Bail can be denied if there are compelling reasons to warrant such denial.

*"An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons (Article 49(1) (h))"*

The compelling reasons must however be demonstrated by the prosecution.

5. The setting of bail terms is therefore discretionary and the power to exercise that discretion vests in the court. The said power must however, be exercised judiciously to meet the ends of justice. To this end the court will usually consider the gravity of the charges facing an applicant; and the severity of the sentence in the event of a conviction being entered; the applicant's antecedents if any, and whether he is a flight risk, among other considerations.
6. In applying its mind to these considerations the court ought to interpret the provisions of the Constitution in a manner that enhances the rights and freedoms of individuals, rather than in any manner that curtails them. This is in tandem with the provision of **Article 20 clause 1(b)** that provides that:

**"In applying a provision of Bill of Right a court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom."**

Each case must however, be decided on its own circumstances and context.

7. With the foregoing in mind I have considered the submissions of both parties before me and the proceedings that came from the lower court anxiously. On prayer no. 2 of the application the amount subject matter of the trial is Kshs.700,000/=. That is the same amount ordered as cash bail without the alternative option for the deposit of security. The terms do appear harsh and excessive in the circumstances of the case.
8. There is no evidence on record that the applicant was first served with summons to attend court as required under **Section 92 of the Criminal Procedure Code** and that he failed to attend. There is also no evidence that he played any part to frustrate the effecting of the warrant of arrest issued against him. From the record the applicant did present himself to the court when he became aware that a warrant of arrest had been issued against him. This court therefore finds that it would be in the interests of just to grant prayer no.2 of the application and vary the bail/bond terms in favour

of the applicant.

9. On prayer no. 3 the court finds that, the proviso by the trial court that if the applicant did not turn up, the amount so deposited would be forfeited to the complainant is indeed irregular. The said order is irregular and unconstitutional as it amounts to condemnation of the applicant without trial. This effectively curtails the applicant's right to the presumption of innocence under **Article 50(2) (a)** of the **Constitution**.
10. On prayer no.4 in which the applicant prays that Makadara criminal case file no. 1176 of 2013 be transferred to any other magistrate and prosecutor, Mr. Masaviru contended that the applicant is apprehensive that the trial court will not accord him fair trial in view of the harsh bail terms and the irregular conditions imposed against him. I find that the material presented is not sufficient for the court to make a finding of bias on the part of the court. The fact of the bail terms being deemed to be harsh or excessive or even where they are altogether denied, is not sufficient as a basis to transfer a case from one court to another.
11. It is now established that in assessing whether or not there is apparent bias, regard is to be had to a reasonable person. The test of a reasonable person' was adopted by the Supreme Court of Kenya in the case of **Jasbir Singh Rai and 30 others Vs. Tarlocha Singh Rai and 4 others; S C Petition No. 4 of 2012** *unreported*.
12. In the **American case of Pery Vs. Schwarzenegger 671 F.3d 1052 (9th Circ. February 7, 2012)** it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a **"well-informed, thoughtful observer who understands all the facts" and who has "examined the record and the law"**, and thus, **"Unsubstantiated suspicion of personal bias or prejudice"** will not suffice.
13. The bail conditions and the strange proviso should be understood in the context of the warrant of arrest having remained pending for about 1 year and is not an indication of the learned trial magistrate's bias.
14. For the foregoing reasons the court grants orders as follows:
  1. The application is granted in terms of:
    - i. Prayer no. 2 the applicant's bail/bond terms are reduced to cash bail of Kshs.200,000/= and in the alternative bond of Kshs.300,000/= with one surety of like amount.
    - ii. Prayer no.3 the proviso to the effect that the cash bail amount so deposited will be paid to the complainant in the event of non-attendance by the accused be and is hereby expunged from the record.
  2. Prayer no. 4 is dismissed as lacking in merit.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **14<sup>th</sup> day** of **March 2014**.

**L. A. ACHODE**

**JUDGE**