



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NO. 68 OF 2014

ABRAHAM IRUNGU MAINA APPLICANT

VERSUS

REPUBLICRESPONDENT

(From original conviction and sentence in criminal case Number 2787 of 2012 in the Chief Magistrate's Court at Kibera – A. Mwangi (RM) on 13th June 2013)

RULING

1. This application filed in court by way of Chamber Summons dated 4th March, 2014 was brought under **Articles 19,20,21,24, 50 and 159** of the **Constitution** and **Section 132** of the **Criminal Procedure Code**. In prayer No. 3 thereof, the applicant seeks a review of the court's decision reached at **Kikuyu Law Courts in Cr. Case no. 13 of 2013** which denied him bail/bond terms. The applicant was charged with two counts of robbery with violence. In the alternative count of handling suspected stolen property, he was jointly charged with Minnie Wanjiku Wambugu who was granted bail.
2. The application was opposed by learned counsel for the Respondent, Miss Nyauncho, who agreed with the trial court that the pre-bail report dated 11th November 2013 was not exhaustive. The report showed that the probation officer failed to trace the area chief who would be helpful in tracing the applicant if he absconded. Miss Nyauncho submitted that owing to the seriousness of the offence he was charged with, which carries a mandatory penalty of death he is likely to abscond.
3. The paramount issue for determination in considering an application of this nature is whether the respondent will avail himself for trial if he is admitted to bail. The constitutional right to bail applies to all persons who come before our courts without discrimination. **Article 49(1)(h)** of the **Constitution** in which the right to bail is enshrined however, is not coached in absolute terms. The Article states as follows:

“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 not to be released.”

Clearly then the right to be released on bail or bond is constitutionally circumscribed by the presence of compelling reasons not to be released.

4. Granting of bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. On the one hand is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution. – See the Court of Appeal decision in **GERALD MACHARIA GITHUKA VS REPUBLIC, CR. APPEAL NO. 119/04**

5. The duty lies on the prosecution to demonstrate compelling reasons justifying denial of bail. In this case it is noted that the state which is vested with the onus of proving that there are compelling reasons for the denial of bail had nothing to say in the trial court. With the advent of the new Constitution prosecutors must take an interest in their work and address the court on the question of bail in cases involving serious crime. This will give the court material upon which to base a decision on whether to allow or deny bail.

6. Be that as it may, what amounts to compelling reasons as envisaged in **Article 49(1) (h)** of the **Constitution** is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the **Bail Act of England** and **Section 60(4)** of the **Criminal Procedure Code** of **South Africa**, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case.

7. **Section 60(4)** of the South African, **Criminal Procedure Act** lists the grounds on which it would not be in the ‘interests of justice’ to grant an accused person bail. These are that the accused person, if released on bail, would:

- a. Endanger the safety of the public, or any person, or will commit a certain specified offence;
- b. Attempt to evade trial;
- c. Attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- d. Undermine or jeopardise the objectives or the proper functioning of the criminal justice system,
or,
- e. Where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security.

8. In **Republic v Danson Mgunya & Ano. HCCR NO. 26 OF 2008**, Hon. Ibrahim J, as he then was, borrowed from Nigeria a comprehensive list of issues to be taken into account in determining “**compelling reasons**” not to release an accused person on bail. Some of those issues include the nature of the charges, the gravity of the punishment in the event of conviction, the strength of the evidence which supports the charges and the likelihood of the accused interfering with witnesses or suppressing evidence that may incriminate him.

9. **Section 123(3) Criminal Procedure Code**, vests in the High court the jurisdiction to interfere with the decision of the trial court on matters of bail, emanating from a trial court. That intervention by the High Court however, ought to be exercised with great circumspection, and in reliance of principles which have been developed by the courts. It is not to be exercised capriciously.

10. Compelling reasons as alluded to in **Article 49(1)(h)** of the **Constitution** must be stated, described and explained. If based on belief, the justification or basis for the belief must be demonstrated or shown. Sometimes this may call for more than oral submissions. As stated elsewhere in this case the prosecutor remained mum and was of no help to the court.

11. The learned trial magistrate denied bail for reasons that the applicant was a flight risk. This was based on a pre-bail report which indicates that the applicant did not or would not divulge who his area chief was. Miss Nyauncho agreed with this view but also brought in the aspects of the seriousness of the offence, the severity of the sentence in the event of conviction and the applicant’s own safety.

12. We note that the applicant’s circumstances are rather fluid. His abode is uncertain and the occupation

is the kind that can be relocated elsewhere at short notice. He is new in Pangani area and was not able to refer the Probation Officer to anyone other than his mother and his wife, who we note is his co accused, to vouch for him. We are not certain that these two exert enough influence upon him to ensure he comes to court should he decide to skip bail.

13. Without losing sight of the fact that by dint of the provisions of **Article 50(2) (a)** of the **Constitution**; **“Every accused person has the right to a fair trial”**, we are persuaded for the foregoing reasons and observations that the trial court exercised its discretion properly.

14. The application is therefore found to be lacking in merit and in the circumstances, we decline to grant the prayers for bail terms. We dismiss the application with an order that the trial be expedited and that, if possible, the hearing should proceed on a daily basis. Further that the applicant is at liberty to re-visit the application for review of bail terms in the trial court after the trial commences.

It is so ordered.

SIGNED DATED and **DELIVERED** in open court this **1st** day of **July 2014**.

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A. MBOGHOLI MSAGHA

L. A. ACHODE

JUDGE

JUDGE