REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Criminal Application 399 of 2012

JOB KENYANYA MUSONI…….....…….APPLICANT

VERSUS

REPUBLIC ……RESPONDENT

RULING

The Applicant herein Job Kenyanya Musomi moved this court by way of a Notice of Motion dated 26th July 2012 praying that he be admitted to bail on such terms as the court may deem reasonable. The application is expressed to be made under Section 123(3) of the Criminal Procedure Code and Article 49(1)(b) of the Constitution of Kenya. The citation of Article 49(1)(b) of the Constitution appears to me to be a typographical error since the correct constitutional provision under which bail applications should be grounded which the applicant had correctly invoked in his earlier application seeking courts leave to have the instant application heard during the court vacation is Article 49(1)(h). That application had been made by way of a chamber summons dated 8th August 2012 which was certified urgent by Hon. J. Muchemi on 9th August 2012 and leave was granted for it to be heard during the court vacation.

The brief background against which the instant application was filed before this court as can be discerned from the supporting affidavit sworn by Charles Lutta Kasamani Learned Counsel representing the applicant herein is that the applicant was one of the accused persons in Criminal Case No.961 of 2012 registered at the Chief Magistrate's Court at the Milimani Law Courts.

According to the charge sheet filed in Cr. Case No.961 of 2012 which is annexed to the application, the applicant was charged in two counts with the offence of Robbery with Violence Contrary to Section 295 as read with Section 296(2) of the Penal Code. He was also charged in a third count jointly with another person one Abel Alika Mugeni with the offence of Breaking into a Building and Committing a Felony Contrary to Section 306(a) as read with Section 306(b) of the Penal Code.

From the proceedings in the subordinate court also annexed to the application, the applicant through his counsel applied in the lower court to be admitted to bail/bond on 12th July 2012 which application was opposed by the State on the strength of an affidavit said to be sworn by one Sgt. Mwaura which apparently documented reasons meant to persuade the court that there were compelling reasons to justify denial of bond/bail to the applicant. The prosecution did not however oppose bail in respect of the applicant's co-accused.

I must state at this juncture that the said affidavit was not availed to this court by the State to enable the court see for itself the reasons allegedly stated therein that according to the prosecution amounted to compelling reasons sufficient to warrant the denial of bail to the applicant.

Be that as it may, relying on the reasons stated in the said affidavit and without specifying the said reasons, the trial court in a ruling delivered on 16th July 2012 denied the applicant bond/bail but admitted his co-accused to bail on terms that he was to deposit cash bail in the sum of Kshs.1,000,000 together with one surety of Kshs.2,000,000.

The applicant through his Counsel sought a review of the orders made on 16th July 2012 declining to admit him to bail but the application for review was also declined by the Chief Magistrate.

Having exhausted the avenues through which he could apply to be admitted to bail in the trial court, the applicant filed the instant application.

The application was canvassed before me on 28th August 2012 by Mr. Kasamani Learned Counsel for the accused and M/s Matiru Learned State Counsel instructed by the Director of Public Prosecutions.

It was submitted on behalf of the applicant that the only reason the applicant was denied bail by the trial court was that he was a repeat offender as he had other matters pending at the Makadara Law Courts and that if released on bail/bond he was likely to abscond. Mr. Kasamani argued that those were not compelling reasons as envisaged under Article 49(h) of the Constitution to warrant denial of the accused's constitutional right to bail. He urged the court to exercise its discretion and admit the accused (Applicant) to bond/bail in terms similar to those granted to his co-accused by the lower court or on any other terms that the court found appropriate.

M/s Matiru on her part opposed the application relying on the affidavit sworn by Sgt. Mwaura in which it was allegedly deponed in Paragraph 5 that accused jumped bail in another criminal case at Makadara Law Courts and that he is alleged to have committed the current offence while out on bond in other criminal cases. It was her prayer that the accused be remanded in custody till the case was heard and determined.

Having considered the rival submissions made on behalf of the parties herein, I wish to state from the outset that in my understanding, the applicant in filing the instant application was making a fresh application before this court for bail pending trial in the lower court invoking its original jurisdiction under the Constitution and that it was not meant to be an appeal against the decision of the trial court to deny him bail as earlier stated. I will therefore proceed to deal with the application as a fresh application for bail/bond and I now propose to embark on a consideration of the same on its merits.

Looking at the submissions made on behalf of the parties herein, it is apparent that both counsels are in agreement that the right to bail under Article 49(1)(h) of the Constitution is not absolute and that it can be denied if the court is satisfied that compelling reasons exist to justify denial of that right.

This is indeed the correct legal interpretation of Article 49(1)(h) of the Constitution which states as follows:

> ***"An arrested person has the right -***
>
> ***(a).....***
>
> ***(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released".***

The Constitution has however not defined the term **"compelling reasons"** or given an indication of what reasons a court may consider to be compelling to justify denial of bail/bond when deciding whether or not to grant bail pending trial to an accused person.

In view of this lacuna in the Constitution, what amounts to compelling reasons in situations where bail/bond is opposed by the State is a question to be determined by the court considering an application for bail depending on the reasons given in opposition thereto, the nature and seriousness of the offence

and the totality of the facts and circumstances of the case in question. This is to say that each case would have to be decided on its own merit given its peculiar facts and circumstances. It is however important to note at this juncture that under the Constitution of Kenya 2012, all offences are bailable including capital offences like Robbery with Violence for which the applicant ***(hereinafter referred to as the accused)*** is facing trial in the lower court.

Having made that observation, I would like to point out that there has been an attempt to define what amounts to a compelling reason like the one contemplated under Article 49(1)(h) of the Constitution. Stella Mutuku J in **Republic -Vs- Mohamed Hagar Abdirahiman & Another (2012) eKLR** afterhaving looked at the definition of the word **"compel"** in various online dictionaries came up with the following definition which I find most appropriate and which I am persuaded to adopt when considering this application. She defined a compelling reason in the following terms -

"a compelling reason would be such a reason that is forcefully convincing to persuade this court to believe that something is true".

As I have already pointed out, any person accused of having committed any criminal offence is entitled to be admitted to bail on reasonable conditions subject only to the existence of compelling reasons. It is trite law that a party alleging the existence of certain facts has the burden of proving that such facts do in fact exist. The law is that he who alleges must prove. Where, as in the present case the prosecution is opposed to the release of an accused person on bail claiming that there are compelling reasons to justify denial of bail, it is the duty of the prosecution to prove on a balance of probabilities that such compelling reasons do infact exist to warrant the exercise of the court's discretion against an accused person by denying him his constitutional right to bail. The burden to prove the existence of compelling reasons rests on the prosecution and not on the accused person.

Let me state at this point that it has been held in numerous decisions of this court that in deciding whether or not to admit an accused person to bail, the main or primary consideration that a court must have in mind is whether or not the accused will voluntarily and readily attend his trial and that he will not abscond. If the prosecution is able to demonstrate to the satisfaction of the court that if released on bail, there is a real danger or risk that an accused person will jump bail and fail to turn up for his trial, then the prosecution will have established the existence of a compelling reason to justify denial of bail. Similarly, if there is proof that if admitted to bail, an accused person will interfere with witnesses, denial of bond/bail would in my view be justified.

I make this finding because the enjoyment of fundamental rights and freedoms is subject to the rights of others and in matters of crime in society the right to bail must be enjoyed subject to the interest of justice considering that the courts' primary role is to do justice in accordance with the law. An applicant who does not turn up for trial after being released on bail or interferes with witnesses would be subverting the cause of justice. It is not in the public interest to allow the subversion of justice.

In this case the prosecution relied on an affidavit sworn by one Sgt. Mwaura in which it was allegedly deposed that the accused herein had jumped bail in a Makadara Court and that he is alleged to have committed the current offence while being on bail in other cases.

The inference from M/s Matiru's submission is that as accused had jumped bail in a Makadara case, he was likely to jump bail if admitted to bail in this case.

It is however worth noting that the prosecution did not avail the said affidavit to this court for the court to confirm for itself the depositions therein and did not file a replying affidavit to tender any evidence in its possession to prove its claim that the accused had jumped bail in another case from which the court would have been able to draw an inference that if granted bail in the current case the accused was likely to abscond.

As matters now stand, the State has not tendered any evidence by for example exhibiting a warrant of arrest or copies of proceedings in the lower court to prove that accused has indeed jumped bail in a

criminal case filed at the Makadara Law Courts. Counsel for the accused appeared to dispute this claim by the State when he submitted that accused was infact on bail in the case facing him at the Makadara Law Courts.

Mere allegations cannot suffice. In order to satisfy the court that accused is a flight risk, the State must tender tangible evidence to substantiate its claim that accused has previously jumped bail in another case. The state has failed to do so in this case.

The prosecution's other reason in opposing the accused's admission to bail in this case is that the accused is a repeat offender as he is suspected to have committed the current offence while on bail in other cases. I do not find substance in this argument because the Constitution guarantees to every accused person the right to be presumed innocent until proved guilty. The existence of other criminal cases facing an accused person cannot of itself be a basis for denying an accused person bail in subsequent cases. This would in fact be a good basis for inferring that such an accused person can be trusted to honour his bail terms if he has not breached the terms of bonds granted to him in several other cases which are pending trial in different courts.

On the material placed before me, I am satisfied that the prosecution has not established any compelling reasons to convince the court that accused herein should be denied his constitutional right to bail.

This court has a duty under the Constitution to protect and promote the fundamental rights and freedoms guaranteed to all persons, including accused persons by the Constitution subject only to the limitations stated therein.

I wish to conclude by borrowing the words of J. Ibrahim (as he then was) when he stated in **Republic -Vs- Danson Mgunya & Another [2010] eKLR** that -

"Liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted.....".

I cannot agree more.

In view of the foregoing, having found that the State has failed to discharge its burden of proving that compelling reasons exist in this case to disentitle the accused person of his constitutional right to bail/bond, I find that the accused's application for bail/bond is merited and it is hereby allowed.

The accused is accordingly admitted to bail on terms similar to those granted to his co-accused in Criminal Case No.961 of 2012.

It is so ordered.

Dated, **Signed**and**Delivered** by me at Nairobi this **4th** day of **September, 2012.**

C. W. GITHUA
JUDGE

In the presence of:

Accused person

Tabitha - Court Clerk

Mr. Kasamani for Applicant

Mr. Kimanthi for Respondent