



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 137 of 2012

REPUBLIC.....PROSECUTOR

VERSUS

BARNABA KIPSONGOK TENAI.....RESPONDENT

RULING:

The Application is brought under Certificate of Urgency and by way of Notice of Motion made under Articles 22, 49 (h) and 50 of the Constitution and Section 123 93) of the Criminal Procedure Code and all other enabling provisions of the law.

The Applicant was charged with a total of six (6) counts of various offences two (2) of them being stealing by agent contrary to Section 283 of the Penal Code.

The Applicant applied for Bail and was released on a Bond of Kshs 200,000/= with a surety of a similar amount.

The Applicant's Bond was canceled on the 17th September, 2012 by the trial magistrate on the grounds that the Accused failed to appear in court on the 22nd August, 2012 which was the date that had been set for hearing but due to the Judicial Marches the court was not sitting on that date.

The Applicant seeks re-instatement of the canceled Bond or in the alternative, the Applicant be released on fresh Bail/Bond on terms that this Honourable court may deem fit.

The Applicant relies on the grounds set out on the face of the application and on the supporting Affidavit made on the 17th day of October, 2012.

At the hearing of the application Counsel for the Applicant submitted that the Applicant was diabetic and asthmatic and annexed a medical report by Dr. Kimaiyo in support.

Counsel submitted that the Applicant had appeared in court on the 22nd August, 2012 but the court was not doing its routine duties due to the Judicial Marches.

That the Applicant had failed to turn up in court on the new date fixed for hearing, 17th September, 2012 as he had another case in Kapsabet court, namely criminal case No. PMCC 7875 of 2009.

Counsel further submitted that the Applicant did not abuse the Bond terms and tendered his apology to the trial magistrate for failing to attend court.

Counsel urged this court to reinstate the Bond or in the alternate grant the Applicant bail as provided under Article 49 (h) of the Constitution of Kenya (2010) or under Section 123 (3) of the

Criminal Procedure Code.

The application was not opposed by prosecuting Counsel for the State who submitted that the reasons given by the Applicant were convincing and urged the court to invoke the provisions of section 362 of the Criminal Procedure Code, for revision.

After hearing both Counsel for the Applicant and Counsel for the State and upon perusal of the court record, this court is satisfied that the Applicant requested the trial magistrate to review its order canceling the Bail terms and to re-instate the same, which application was denied.

This court is of the opinion that the correct method of approach, would have been by way of appeal to this superior court nevertheless this court will proceed to look at the merits of the application as provided for under Article 49 (h) of the Constitution and Section 362 of the Criminal Procedure Code..

Upon considering the reasons given by the Applicant for non-attendance, this court is satisfied that the same was not tantamount to absconding. The Applicant offered an explanation and tendered an apology to court.

This court finds that this is a suitable case for intervention and finds no compelling reasons have been given by prosecuting Counsel for the State to deny the Applicant his Constitutional right to Bail.

For the reasons stated above the application is hereby allowed and the Applicant is hereby admitted to a Bond in the sum of Kshs 250,000/= with a surety of a similar amount.

It is so ordered.

Dated and delivered at Eldoret this 1st day of November 2012

**A.MSHILA
JUDGE**

Coram: Before Hon. A Mshila J
CC: Andrew

Counsel for the Applicant: Mokuu holding brief for Omwenga.

Counsel for the State: Wainaina

**A.MSHILA
JUDGE**