



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Misc Crim Appli 52 of 1997

EMMANUEL KARISA MAITHA..... APPLICANT

Versus

REPUBLIC.....RESPONDENT

RULING

Before me is a Miscellaneous Criminal Application No.52 of 1997. It has been brought by Mr. Emmanuel Karisa Maitha (herein referred to as the Applicant) through his advocates M/s. Madzayo & Madzayo & Company Advocates.

The State is represented by Mr. Gacivih, Senior Principal State Counsel, Mombasa.

The application is one for bail pending the determination of a trial.

On the 5th of September, 1997, the Applicant filed a certificate of urgency dated the 4th of September, 1997 whereby the advocate certified the matter as urgent on the grounds that:-

"The application filed herein is urgent and prays that the same be heard as a matter of urgency on the grounds that the Applicant herein has fallen sick and secondly has been in custody for unreasonable period of time." During the submission of the main application the advocate for the Applicant mentioned nothing of the Applicant's ailment nor of his long and unreasonable period in remand.

This fact being brought up by the State Counsel, the court permitted that the Applicant be examined as to his medical status. A report was submitted whereby it was quite clear from the said report that the Applicant was not ill.

He was of course suffering from stress, failure of sleep and had had a history of an accident 5 years ago.

It is unfortunate that the advocate for the Applicant misled the court on this when in fact the right to be heard is available to all parties, especially so in criminal matters where personal liberty is in issue.

I will examine the application on merit.

The notice of motion dated 4th of September, 1997 and filed on the 5th of September, 1997 prays for the following orders:-

"That this Honorable Court be pleased to admit the Applicant to bail pending the hearing and final

determination of Mombasa Chief Magistrate's Court, Criminal Case No. 2535 of 1997 between the Republic -versus- Emmanuel Karisa Maitha. "

The said application was supported by the affidavit of the Applicant's advocate which deponed that the trial Magistrate had refused to release the Applicant on bail and as such prays for this court to do so.

A brief summary of what occurred in the lower court is as follows and according to the attached proceedings of the lower court:-

The Applicant was charged with two counts before the Chief Magistrate's court.

In Count I:

Being in possession of offensive weapons contrary to Section 89(1) of the Penal Code.

That on the 18th day of August, 1997, at Provincial Police Headquarters Kizingo in Mombasa District within the Coast Province, was found in possession of offensive weapons namely, one panga, one knife, in circumstances which raised a reasonable presumption that such offensive weapons were intended to be used or had been used in a manner or for a purpose prejudicial to public order.

Count II:

Preparation to commit a felony contrary to Section 308(1) of the Penal Code.

On the 18th day of August, 1997 at Provincial Police Headquarters Kizingo in Mombasa District within the Coast Province was found armed with offensive weapons namely one panga, one knife in circumstances that indicated that he was so armed with the intention to commit a felony, namely, grievous harm."

The Applicant appeared before the Chief Magistrate on the 28th of August, 1997, He pleaded not guilty to the charge on both counts, Mr. Madzayo then appearing stated that he had instructions to apply for bail. The prosecution stated:-

"We don't object the release of the Accused on bond."

The Applicant was remanded to the 4.9.97 when the Chief Magistrate indicated he would reconsider the said application.

On the 4.9.97 Mr. Madzayo for the Applicant renewed the application for bail and indicated that his client would turn up for trial. That it was his client's constitutional right to bail.

In his response the prosecution stated:-

"I do not have instructions to object to release of Accused on bail."

The Chief Magistrate then made a ruling in which he denied bail pending the trial. His main reason is that the offence is extremely serious. That there has been a widely published attack and/or disturbances on police stations with the loss of lives. That he recognizes that the Applicant is innocent until proved guilty, that he is a Kenya citizen, but that the decision to grant bail is a judicial one. That there was the wider interest of the country to be looked at. With that bail was denied. An early hearing date was thereafter given. This hearing date of the 22.9.97 was given with a mention date of 18.9.97.

In his address before me the advocate for the Applicant stated that he comes to this court to seek prayers that the Applicant be released on bail.

The offences charged are bailable. The Applicant was denied bail because the trial Magistrate connected the incident of the Likoni disturbances that recently occurred to the Applicant.

The Applicant was arrested at Kizingo and had no connection with the Likoni incident.

That the Applicant has a constitutional right to bail and as such should be given that bail.

The requirements that the Applicant ought to meet are that:-

- 1) The offence is bailable.
- 2) The Applicant is a citizen of Kenya

He will not interfere with witnesses.

- 4) He will not abscond.

He relied on the case of NJEHU GATABAKI -vs- THE REPUBLIC, HCCR.C. 43 of 14.2.93 at Nairobi, whereby this court has powers to address the issue as raised in Section 123(3) of the Criminal Procedure Code.

The case of GEOFFREY TATUNGU NJUGUNA NGEGI & OTHERS -VS- R. Cr. A. 261 of 1992, which was relied on in the Njehu Gatabaki case above emphasized the attendance of the Accused to court.

He also relied on Section 77(2)(a) of the Constitution of Kenya.

"Every person who is charged with a criminal offence-

- a) shall be presumed innocent until he is proved guilty."

JAFFER -Vs- R. , 1973 E. A. 39.

Principal laid down must be supported by facts. In the above case the trial Magistrate had accepted the submission that the Applicant was likely to interfere with the witnesses. There were no facts to support this.

There is also no evidence, said the advocate, for the Applicant that his client would abscond.

The advocate for the prosecution in reply stated that the court is a creature of the Constitution. That the rights of society vis a vis the individual is paramount. In this particular application he objects to the Applicant to be released on bail pending the determination of his trial.

He prayed that the court take judicial notice of certain aspects of society and the circumstances prevailing at the moment.

As to the delay the case was coming for hearing on 18.9.97 -but the hearing is actually on the 22.9.97. There would thus be no delay in the hearing of the Applicant's case.

In the case of JAFFER -vs- R. - the authority relied on by the Applicant was not relevant.

The grounds of urgency have been abandoned .

He prayed that this application be dismissed.

My task in this application is to decide whether or not bail should be granted to the Applicant.

I have stated earlier that there are no medical grounds to be relied on nor the arguments of inordinate delay.

What the Applicant is seeking is to be released on bail pending the determination of his trial. This is prayed for under Section 123(3) of the Criminal Procedure Code that reads:-

"The High Court may in any case, whether or not an Accused person has been committed for trial, direct that the person be or NOT admitted to bail or that bail required by a subordinate court or police officer be reduced."

From the ruling of the Chief Magistrate dated the 4th of September, 1997 the said Chief Magistrate denied bail to the Applicant, The main ground for such denial is that there has been some police station burnt, police officers killed and insecurity in such circumstances would not permit the Applicant to be released on bail.

(The police too are anxious he be released on bail).

I must take judicial notice that a few weeks back there was a random attack that occurred in the Likoni area of Mombasa. This incident has caused alarm and insecurity. It seems that based on this incident the Applicant has been denied bail.

Although the prosecution in the lower court did not object to the application for bail made by the Applicant they did object to the same at the High Court level through the State Counsel.

The same reasons were put forward. That there are disturbances in recent weeks which points to the Applicant. If the release of the Applicant is allowed no indication as to what effect it would have on society.

I find the arguments put forward by the State Counsel and the Chief Magistrate difficult to understand.

If the Applicant is involved in the recent Likoni disturbances, then the prosecution should state so and declare that the charge before court is "a holding charge".

If they required more time to investigate the incident before the charge was put forward an apprehension report ought to have been filed.

I find that the charges or offence that should be brought against a suspect is up to the police on condition that it is supported by facts and proper investigations.

When one is to be denied bail it is on grounds that he is likely to abscond, that he may interfere with witnesses, that he will refuse to surrender to custody when called for. None of these grounds have been relied on by the prosecution.

The ground relied on is an incident that occurred in Likoni. This incident is connected with the Applicant. If this is so, then specific charges should be brought against him on the same. Clear facts should be given to the court.

This brings us to the question - If the Applicant is released on bail, will he cause another out-break of violence? Whilst in custody or on bail has he control over the violence?

I find that in the absence of any source of information put before the subordinate court the law must guide this court.

Under Section 77(1) of the Constitution of Kenya it reads:-

"If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

2) Every person who is charged with a criminal offence -

a) SHALL be presumed to be innocent until he is proved or has pleaded guilty."¹

The offence before me is bailable. I hereby will allow the application as prayed with the following conditions:-

That the Applicant be and is hereby released on bail of Kshs.2,000,000/- with two sureties for the like sum.

That he is to report to Central Police Station every Monday, Friday and Wednesday at 9.00 a.m. until the determination of the trial.

DATED this 7th day of September 1997 at Mombasa.

M. ANG'AWA

JUDGE