REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL APPLICATION NO 43 OF 1993

NJEHU GATABAKI …….…..…. APPLICANT

VERSUS

REPUBLIC……..……. RESPONDENT

RULING

This is an application by one Njehu Gatabaki, hereinafter called the applicant for orders that he be admitted to bail. The application is brought under section 123(3) of the Criminal Procedure Code Cap 75 Laws of Kenya, the Constitution of Kenya, the court's inherent jurisdiction and all enabling provisions of the law. The applicant is represented by Mr Muturi Kigano while Mr Etyang the Assistant Deputy Public Prosecutor appears for the State.

The applicant is the Editor in Chief and Publisher of "Finance" magazine a periodical publication said to be released once every month. He has been arraigned before the Chief Magistrate with offences of publishing seditious publication contrary to section 57(1) (c) as read with section 56(1) (b) of the Penal Code. As at the time of hearing this application there were three (3) criminal cases pending before the learned Chief Magistrate. For purposes of this ruling it is necessary to give a brief mention of the record in respect of each of those cases.

In Criminal Case No 4140 of 1992 the applicant is charged jointly with his wife one Rachael Mwihaki Gatabaki with seven (7) counts under the said sections of the Penal Code. They were first arraigned in Court on 3rd August, 1992 but were not required to plead to the charges as consent to prosecute them had not been received from the Attorney General as required under section 58(2) of the Penal Code. A week after, both the applicant and his wife were released on bail of Kshs 500,000/- with two surities each and ordered to deposit their passports with the Court until further orders. On 11th November, 1992 the Hon Attorney General gave his consent to prosecute the applicant and his wife and the hearing has been set to start on 15th March, 1993.

In Criminal Case No 7168 of 1992 the applicant is charged with two (2) counts of publishing a seditious publication contrary to section 57(1)(c) of the Penal Code. He was brought to Court on 18th December, 1992 but was not required to plead as consent to prosecute had not been received from the Attorney General. After three days he was released on bond of Kshs 300,000/- with one surety of equal sum. To date or rather as at the time of writing this ruling the time of writing this ruling the Attorney General has not given the consent to prosecute the applicant so no plea has been taken and a hearing date is yet to be fixed.

The latest is Criminal Case No 727 of 1993. Here the applicant is charged with two (2) counts of

publishing a seditious publication and one (1) count of offering a seditious publication for sale contrary to section 57(1)(c) of the Penal Code. He was brought to Court on 3rd February, 1993 but was not required to plead as consent to prosecute him had not been received from Attorney General. A hearing date is yet to be taken. This time his application for bail was refused by the Chief Magistrate.

The application before me is not an appeal against the refusal to grant bail by the learned Chief magistrate. This Court has original jurisdiction to address the issue under section 123(3) of the Criminal Procedure Code Cap 75 Laws of Kenya. The application is supported by an affidavit sworn by the learned counsel for the applicant to which the learned counsel for the State has filed a replying affidavit. Several authorities have also been cited which I have had time to read through. In the event, however, that I do not make a specific reference to any of the said authorities that should not be construed to be wanting in substance.

I must from the outset commend both learned counsel for the applicant and the State for the seriousness with which they conducted their briefs. Their respective insight handling of the matters at hand has been of great assistance to the Court.

The basis of objection to bail by the State is to be found in paragraph 13 of the replying affidavit sworn by Mr Etyang. The same states as follows:

> "13. That from above facts the respondent contends that if the applicant is released on bail or bond by this honourable Court there is a very real danger that he will commit a similar offence. The respondent's prayer is therefore, that this application for bail be dismissed."

The offences that the applicant is charged with are bailable. Indeed the learned Chief Magistrate did grant bail in two such cases. Section 72 of the Constitution of Kenya provides that no person shall be deprived his personal liberty save as may be authorized by law. Sub-sections 3(b) and (5) of the said section provide that where a person is arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence then if he:

> ". . . is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial" Sec 72(5) (underlining mine):

Section 124 of the Criminal Procedure Code provides as follows:

> "124. Before a person is released on bail or on his own recognizance, a bond for such sum as the Court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient surities, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the Court or police officer."

The basic consideration on whether or not to grant bail is whether or not the accused shall avail himself to stand trial. There are other secondary considerations that I shall deal with later herein below. The High Court in Kenya has had occasion to deliberate on the issue of bail in similar circumstances as in the present case.

In Criminal Application No 125 of 1991 *Gitobu Imanyara vs Republic* one of the allegations was that the applicant had committed an offence whilst on bail in respect of a similar offence. The learned judge in dealing with the issue had the following to say:

> "First the prosecution say that he was arrested for a similar offence over 7 months ago, and bailed. He was on bail at the time these alleged offences were alleged to have been committed. He is already alleged to have committed offences whilst on bail, they say. Mr Nowrojee argues that in addition to the presumption of innocence, the strength of the allegation that the applicant did

commit an offence earlier is weakened very much by the fact that the consent of the Attorney General still has not been presented to the Court in respect of that earlier case. There is something in that. Nevertheless he was in fact on bail and that bail has not yet been discharged.

Then it is clear from the article which is the subject of these proceedings, which has been provided attached to the affidavit of Mrs Imanyara, in its last paragraph, that the applicant published this article in full knowledge of the dangers attendant, phrased in such a way that I can only fear that if the applicant were to be released on bond there is a very real danger that he might commit offences. (I deliberately refrain from the phrase further offences. As Mr Nowrojee points out, it has not been proved that he has committed any seditious offences as yet) whilst on bail. Added to the weighty matters which are to be considered in relation to whether he will turn up for his trial, I do not think my discretion should be exercised for bail in this case.

The application will be refused, therefore."

In Misc Criminal Application No 344 of 1992 *Republic v Francis Kipyego Rotich* the State applied to the High Court to cancel bail granted to the applicant on the grounds that he had repeated the offence when he was out on bail. Although the learned judge was dealing with a different issue from the one at hand, I find the following part of his judgment relevant for purposes of this ruling:

"It cannot, in my judgment, be enough for the Republic to merely assert that the accused has been charged with a similar or other offence after having been granted bail, and on that basis to expect the accused's bail to be cancelled. It hardly needs to be stated that to be charged with an offence is a far cry from repeating it."

In yet another application Nru Misc Criminal Application No 261 of 1992 *Geoffrey Gatungu Njuguna Ngegi & Others v Republic*, the first applicant, Ngegi who was out on bond in an earlier case was denied bond in a subsequent case similar to the first. The learned judge however acknowledged that:

"Basically the primary purpose of bail is to secure the accused persons attendance to take his trial on a specified date and time. In determining whether or not an accused person is one that could turn up for his case, the Court should take into account among others, the nature of the charges and the seriousness of punishment he is likely to receive if found guilty. This is based on the belief that where an accused is facing more serious charges and the punishment is heavy, there are more probabilities and incentive to abscond whereas no such incentives exist where he is facing minor offences. Bail will generally be refused where the granting of the application will be detrimental to the interest of justice. It is however, for the prosecution to satisfy the Court that this would be so. (See *Jaffer vs R* [1973] EA 39 at page 41). Similarly, if the prosecution is opposing bail on the ground that the accused is likely to interfere with their witnesses, they must adduce strong evidence of such likelihood to interference which is not rebutted and it must be such that the Court cannot impose conditions to prevent such interference while granting bail."

An examination of the local authorities reveals that considerations other than to secure the attendance of the accused to take his trial are taking a centre "stage" in deciding whether or not to grant bail. Yet in the words of section 72(5) of the Constitution what is required are "such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial" (emphasis mine). Section 124 of the Criminal Procedure Code aforesaid also contains the words that execution of bond is "conditioned that the person shall attend at the time and place mentioned in the bond . . . ." (emphasis mine). In my view that has been and still is the law.

The position is different in England where bail in all criminal proceedings is to be granted in accordance with the Bail Act, 1976. Under that Act part one of the first schedule, the accused may not be granted bail if the Court is satisfied that there are substantial grounds for believing that the accused, if released on bail (whether subject to conditions or not) would –

(a) fail to surrender to custody, or

(b) commit an offence while on bail, or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

There are other considerations that are not relevant to the present situation. (See *Archbold* 40th Edition p146). Either of the above considerations may disentitle the accused to bail. This is what I am being asked to find by the State. Our law on bail is not codified and that English Act is not applicable here. As can be seen, our courts have been invoking the Bail Act, 1976 of England, knowingly or unknowingly. The provisions of our Constitution are clear on this issue.

Section 72(5) of the Constitution provides that without prejudice to any further proceedings that may be brought against him, the accused shall be released on bail. The learned counsel for the applicant has submitted that not a single Court has had occasion to consider the use of the phrase "without prejudice" in that section. In this ruling I shall not attempt to define that phrase but interpret the same with the context used. This cannot be extended beyond the ordinary and natural meaning of those words. Release on bail is limited to the case against which bond is executed. (See section 125(2) of the Criminal Procedure Code). Each case is therefore considered on its own merits. My understanding of the phrase "without prejudice" therefore as used in section 72(5) of the Constitution is that the accused shall be released on bail notwithstanding any further proceedings that may be brought against him. That is to say that any fear that the accused may commit further similar offences should not be used as a roadblock across the avenues of justice towards personal liberty. In my view to hold otherwise will be doing violence to the language used, its tenor and context.

The foregoing now brings me to the issue of presumption of innocence. Section 77(2)(a) provides that:

"(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."

In the American Case of *Stack vs Boyle* (1951) USI 342 Mr Justice Jackson said:

"The practice to admission to bail, as it has evolved in Anglo American Law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses and preparing a defence. To open a way of escape from this handicap and possible injustice, Congress commands allowance of bail for one undercharge of any offence not punishable by death . . . . Admission to bail always a risk that the accused will take flight. That is a calculated risk which the law takes the price of our system of justice. We know that congress anticipated that bail would enable some escapes, because it provides a procedure for dealing with them" (See also sec 130 CPC).

In the Irish Case of the *State vs Purcell* (1926) IR 207 Hanna J said:

"According to the theory of the law an accused is committed in custody for trial in a serious case because there is a probability that he might not otherwise be available, and not because there is any presumption against him of guilty.

I am satisfied from an examination of the decisions that the fundamental test on bail motions is the probability of his evading justice, but I am entitled only to have regard to certain matters which have been from time to time laid down by Courts of high authority as the guides to a decision on that probability. These matters, in so far as they are relevant to the present case are:

1) the seriousness of the crime charged;

2) the severity of the punishment provided by law for the offence;

3) the strength of the case as it appears against the accused on the depositions;

4) the prospect of a reasonably speedy trial;

5) the opposition of the Attorney General for the State."

The foregoing however are not independent tests. The presumption of innocence as enshrined in the Constitution is absolute hence the use of the work "shall". In this regard I respectively agree with the learned counsel for the applicant that admission to bail is effective mechanism of giving practical meaning to the spirit of the constitutional presumption of innocence. If this were not the case, this presumption would be a hollow platitude in the Constitution.

I recognize what the learned counsel for the State rightly terms "Judge Made Law" in our criminal jurisprudence relating to bail matters. But in making that law the Courts must guard against imminent danger of compromising personal liberty of an individual as guaranteed under the Constitution. That is why, with profound: respect, I am unable to agree with the reasons advanced by the learned judge in the *Imanyara* Case when refusing to admit the applicant to bail. The applicant therein was not charged with a violent offence. He was out on bail. His guilt was yet to be established. His personal liberty was compromised.

I am however in total agreement, but not surprisingly, with the learned judge in the *Ngengi* Case for refusing the first applicant bail is a subsequent charge. He, jointly with others, was awaiting trial for the offence of preparation to commit a felony contrary to section 308(2) of the Penal Code. In the subsequent case he was charged with the offences of possession of firearm and ammunition without a firearms certificate contrary to section 4(1) of the Firearms Act. Both cases were violence oriented. They were alleged to have been committed somewhere in Molo which was then ablaze with tribal and/or land clashes. There was an affidavit sworn by an inspector of police to that effect.

I must now turn to the present applicant. He faces serious charges related to sedition. If the allegations contained in the particulars of the charges are anything to go by, they may raise some concern. He is not however on trial before me so submissions on whether there is any truth or that freedom of expression is being stifled are not within my province.

It has not been alleged that if released on bail the applicant may abscond. It has not been alleged that he is likely to interfere with witnesses. He has not been charged with a violent offence. Indeed his most offensive weapon, so to say, is the barrel of his pen. His innocence must be presumed until otherwise proved by evidence. Consent to prosecute is yet to be received from the Attorney General. Plea has not been taken and hearing dates have not been fixed.

In my judgment, guided by all the relevant provisions of the law and the cited authorities together with all attendant circumstances, I have reached the conclusion that the scales of justice tilt in favour of the applicant. His application for admission to bail hereby succeeds.

In the end I make the following orders:

(a) The applicant shall be released on executing a personal bond of Kshs 200,000/-.

(b) There shall be one surety in the like sum ie Kshs 200,000/-.

(c) The applicant, on his release shall appeal before the Chief Magistrate or trial magistrate as the case may be as and when required to so do.

Orders accordingly.

Dated and delivered at Nairobi this 24th day of February, 1993

A.MBOGHOLI-MSAGHA

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JUDGE