



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CRIMINAL APPLICATION NO 407 OF 1993**

**JULIUS KALOKI WAMBUA..... APPLICANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

**RULING**

This is an application for variation of bail terms imposed by the learned Chief Magistrate in his Criminal Case No 5238/93 wherein the applicant is charged with stealing by servant contrary to section 281 of the Penal Code. It is alleged in the charge that between the 3rd of August, 1992 and 30th day of November, 1993 at Mecol Ltd in Nairobi within Nairobi Area, being a servant to Mecol Ltd stole 3127 filing cabinet locks from the said company valued at Shs 2,501,600/-. He denied the charge and the case has been set down for hearing.

The application for bail made by the applicant before the learned Chief Magistrate was duly granted. Initially the learned magistrate imposed bail terms in the sum of Shs 500,000/- with one sureties of similar amount. The actual number of sureties then required were not disclosed to this court during the hearing of the application. However, the applicant could not afford the amount of bail imposed and so applied before the same magistrate for variation of such bail terms. This was again granted and the amount of bail/bond initially required was reduced by half to shs 250,000/- with 2 sureties with similar amount. Once again the applicant has not been able to get sureties for the amount required. He therefore bows before this Court to reconsider the amount of bail imposed by the Court below which learned counsel for the applicant submits to be unreasonably high as to amount to a denial of bail.

Unfortunately, counsel for the applicant has come before this Court under the wrong section of the law. As rightly pointed out by learned state counsel, he ought to have come under section 123(3) of the CPC. However, this Court has inherent powers to entertain any application which is perfect in term and substance but brought under a wrong section of the law. I will therefore entertain this application and deem it to have been brought under section 123(3) of the Criminal Procedure Code which provides that:-

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

Learned state counsel has opposed the application and pointed out that in view of the nature of the charge and value of the stolen goods, the amount of bail fixed by the trial magistrate is not unduly excessive to warrant any interference from this Court. Learned counsel for the applicant, speaking from the bar, stated that the value of the alleged stolen goods appears to have been grossly exaggerated to attract innocent claim made by the complainant, but with respect, I do not take him seriously on this because the number of stolen items ie 3,127 filing cabinet locks could very well amount to Kshs 2,501,600/- given the fact that such items no longer attract price control required by the Court of Kenya.

It appears to me that in fixing the amount of bail terms, the learned trial magistrate was unduly influenced by the value of the alleged stolen goods. Whereas this is not a matter that can be ignored, it should not unduly weigh on the mind of the Court as the purpose of granting bail is preliminarily to ensure the attendance of the accused to trial of his case. The value of the stolen goods or alleged stolen goods would

only become an important matter for consideration after conviction has been entered and the Court is considering the suitable sentence impose.

In line with my previous decisions on bail, I consider that for many ordinary Kenyans like the appellant herein who was merely a sales supervisor or representative, bail/bond in the sum of Shs 250,000/- would invariably amount to a denial of bail because in his status in life he cannot get sureties for that amount or if he succeeds, then after a great deal of effort. I am informed by learned counsel for the applicant that the efforts by the wife of the applicant who is a humble school teacher in Kitui district has been unsuccessful.

The truth is that our prison conditions are quite bad and very little attention in terms of diet and other facilities is given to remand prisoners as compared to convicted prisoners which the prison authorities quite emonously regards as unproductive. The approach which we would like to see develop within our court system is to keep as fewer people as possible both in remand and in prison. This means that the Courts should make greater use of bail/bond and make flexible or liberal terms that could ensure that attendance of the accused in Court whenever required while leading a normal life with his family at time pending the determination of his case.

Having had regard to all the matters that have been urged before me by both counsel, I consider that the amount of bail/bond imposed by the learned Chief Magistrate were extremely high as to warrant interference by this Court. I will vary the said bail terms which I hereby set aside. I order that the applicant be released on his cash bail of Shs 10,000/- with one surety in the sum of Shs 100,000/- to be approved by the Deputy Registrar of this Court. It will be a condition of his release that he appears for the trial of his case before the subordinate court as and when required. It is so ordered.

Dated and delivered at Nairobi this 17<sup>th</sup> day of September, 1993

**S.O.OGUK**

.....

**JUDGE**