REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO 142 OF 1989

BETWEEN

MURAGURI..... APPELLANT

AND

REPUBLIC.....RESPONDENT

RULING

April 7, 1989, **Porter J** delivered the following Ruling.

The application in this matter is for bail pending trial. The applicant is charged before the Chief Magistrate with one count contrary to section 6 (a) of the Societies Act for being a member of an unlawful society, namely Mwakenya, and attempting to do an act with seditious intention contrary to section 57(1)(a) of the Penal Code, namely to recruit members of Mwakenya.

Application has been made before the learned Chief Magistrate for bail, and it has been refused. The applicant now comes before this court under section 123(3).

Much law has been quoted in this application. I was referred to *Jaffer v Rep* [1973] EA 39, *Panju v Rep* [1973] EA 282, Misc Application 61/81 *Nganga v Rep*, Misc Application 178/81 *Opinder Singh Maul v Rep*, Misc Application 83/88 *Ratemo v Rep*, Misc Application 446/86 *Mwaura v Rep*, Misc Application 101/82 *Mutunga v Rep*, and Misc Application 81/ 85 *Mazrui v Rep.*

This mass of authorities in my view does little to change what Chesoni J had to say in *Nganga's* case (ibid) at P 4 of his judgment:-

> "The primary purpose of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In consideration whether or not the accused will attend his trial the following matters must be considered:-
>
> (a) The mature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty where the charge against the accused is more serious and punishment heavy there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.

(b) The strength of the prosecution's case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong it may be justifiable to remand him in custody.

(c) The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.

(d) Accused's failure to surrender to bail on a previous occasion will itself be a good ground for refusing bail.

(e) Interference with prosecution witnesses: where there is a likelihood of the accused interfering with prosecution witnesses, if he is released on bail, bail must be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference."

Sachdeva J and Abdullah J both pointed out that the appellant's constitutional right to bail had to be considered together with the rights and freedoms of others, and were probably not absolute.

Dealing first with the question of likelihood of interference with witnesses, Mr Chunga draws a distinction between the situation where interference has already occurred, and where it has not, but is relied upon by the prosecution. In the first case presumably the decisions in *Jaffer v Rep* (ibid) and *Panja v Rep* (ibid) can be relied upon, and evidence must be given of the facts.

But in the second case Mr Chunga says that the authorities of *Jaffer* and *Panju* are not to be applied wholesale in every case, and seeks to distinguish them on the basis that where the interference feared by the prosecution has not taken place, an inference can be drawn from facts presented by the prosecution on submission only that the accused will be tempted to interfere with the witnesses.

Jaffer's case was one which fell into the second category established by Mr Chunga. Such facts were put before the court in that case, in a similar manner without success. Chesoni J in *Nganga's* case was presented with a first category case in which he appears to have relied upon submissions only, but said that in a second category case evidence which was not rebutted was required.

Patel J had the point before him but did not consider it in *Ratemo's* case, as he felt there was not sufficient before him in any event.

Here Mr Chunga said the prosecution were relying on the fact that some of the witnesses are people who are the acquaintances, friends and contacts over a long period of time of the accused, particularly with regard to the second count, and in the event of being released on bail there was a very real and very high temptation to contact these people or influence them. These are facts which could be proved or admitted: they are certainly not admitted, as the plea shows quite clearly.

"If the courts are simply to act on allegations fears or suspicions then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made"

"The investigator could have sworn an affidavit explaining what he had done and who he has contacted and what had been the results so far (*Panju's* case).

"The Tests laid down (in English cases) were that there should be a definite allegation of tampering or attempted tampering with witnesses supported by proved or admitted facts showing reasonable cause for the belief that such interference with the course of justice was likely to occur if the accused was released.

In the present case there was no more than mere assertion by the prosecutor that the applicant would interfere with prosecution witnesses if released on bail."

I do not see that the prosecution's duty is any less where tampering with witnesses is merely feared as opposed to having already occured or been attempted. *Jaffer's* case and *Panju's* case show what should be done. It has not been done here, and I do not consider that what is before me is sufficient to show that there is reasonable cause for belief that such interference with the course of Justice is likely to occur if the accused was released.

The other matters which the prosecution rely upon are detailed by Mr Chunga in his submission:-

> The applicant will jump bail if released, under which heading I should consider the charge, the surrounding circumstances as known to the court, and the penalty in the event of conviction. I am to bear in mind that the fact that the security of the State is involved shows that the situation is the more serious, from the point of view of the likelihood of a more grave sentence. Mr. Chunga says that the charges, if proved show that the applicant was not a passive member only, but engaged in recruitment.

On this question Mr Wetangula points out that the applicant was in custody for 2 weeks before his arrest, and that he was released by the Police after interrogation. He says that the applicant was told that he would be rearrested, but still carried on his business and looked after his family, and was at work when he was arrested on this occasion. He had been free almost 2 months. Mr. Chunga points out that the fear or even expectation of arrest when no charges have been preferred is far less a spur to leaving one's home business and family than two specific and serious charges involving acts said to be prejudicial to the State.

While considering how to exercise my discretion in this matter, I will give credit to the matter raised by Mr Wetangula, but I am bound to say that there is much in what Mr Chunga says in this respect.

I will also give credit for the assurances given by the applicant that he will comply with the conditions of bail if it is granted, for the fact that his plea is unusually in such cases, one of not guilty, and other matters relating to his citizenship, travel etc.

Mr. Chunga says that Investigations are proceeding: and although it is conceded that the applicant has been under investigation for a long time, Mr Chunga points out that the period of time during which the applicant is alleged to have been active in the organisation is 6 years, and it can therefore be taken that there are many investigations to be carried out, and that it can therefore be understood that they are not complete. Once again the security of the State is to be considered as the basis for the necessity of these further enquiries.

Mr. Wetangula says that investigations must be complete now that so long has past, and the specific charges brought: and I shall bear that in mind too, although I shall also bear in mind what Mr Chunga has said.

I do not think that the attempts of either counsel in this matter to liken the facts of this matter to other cases in which bail has or has not been granted assist in any way. As Hancox J (as he then was) pointed out in *Opinder Singh's* case, each application must be determined on its own facts.

I also bear in mind the medical difficulties of the appellant, but I do not consider them as being anything that the Prison authorities cannot deal with in the ordinary course.

Weighing everything which has been said before me together, and bearing very much in mind the presumption of the applicant's innocence, nevertheless I am of the view that the seriousness of the offence in all the circumstances is such that there is a very real risk that if released upon bail the applicant would be sorely tempted to abscond (I follow the wording of Hancox J as he then was), and I am therefore constrained to refuse bail in this case.

Delivered this 7th day of April, 1989,

PORTER

JUDGE