

Lolo v Republic

High Court, at Nairobi November 21, 1986

Patel J

Criminal Application No 465 of 1986

November 21, 1986

Patel J delivered the following Judgment.

This is an application for bail under section 123(3) of the Criminal Procedure Code as amended by Act No 19 of 1985 which made robbery with violence contrary to section 296(2) of the Penal Code which is a capital offence bailable whose sentence is death, by the applicant who has been charged jointly with others before the chief magistrate's court on count I with robbery with violence contrary to section 296(2) of the Penal Code where mandatory sentence is death.

The two affidavits in support of the application sworn on October 28, 1986 and on November 5, 1986 by Mr Moses Masika Wetang'ula. The advocate for the applicant states that, the applicant was arrested on September 25, 1986, subsequently charged with the offence of robbery contrary to section 296 (2) of the Penal Code, that the offence is bailable, that he has been assured by the applicant which assurance he believes to be true, that he will raise the necessary sureties if necessary and will avail himself at all times he is required to do so by the court, that he has been further instructed which instructions he has no reason to doubt as true that at the time of the commission of the alleged offence, the applicant was peacefully in his house with his family and he (the applicant) was nowhere near the scene of the robbery.

Mr Wetangula for the applicant submitted that the issue is that if granted bail whether the applicant will turn for trial. The applicant is a Kenyan who is charged with 3 other people who appear to be Ugandans. He is an employee of Nairobi City Commission. He is prepared to offer sufficient sureties. The sureties will ensure that the applicant attends court when required. He cited an authority for **George Kamau Nganga v Republic**, Misc Cr Appl. No 61 of 1981, at page 4 the grounds upon which bail should be granted are stated. The applicant will not do this. He has an assurance that the applicant will turn up for his trial. The appellant's defence is an alibi. There is no doubt here that if the appellant is found guilty the sentence is death. At the moment he is presumed innocent. Misc Cr Appl No 446 of 1986, **Eliud Mwangi Mwaura v Republic**, defence of an alibi is exceptional or special circumstance, personal to the applicant. Bail is a constitutional right.

Mr Muchira the state counsel for the respondent conceding that bail is a constitutional right, opposed this application on the grounds that, the applicant is charged with robbery with violence contrary to section 296(2) of the Penal Code, where the sentence is death. He is charged with three Ugandans, and other persons not before the court, it is alleged that a gun was used which has not been recovered. In Misc Cr Appl No 61/81 page 4, para (a) says "the nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty, etc. He submitted that that condition applies to this case. Misc Cr Appl No 446/ 86, **Eliud Mwangi Mwaura v Republic**, defence of an alibi is not an exceptional or special circumstance personal to the applicant. Question of an alibi is to be considered in evidence by the trial magistrate in establishing the guilt or innocence of the applicant. This case is fixed for hearing on December 10, 1986. In the circumstances the temptation of the applicant absconding or jumping bail are great and this is the temptation that the applicant should not be exposed to. He cited Misc Cr Application No 178/ 86 **Opinder Singh Naul v Republic**, last page and **Misc Cr Appl No 59/85 Margaret Magiri Ngui v Republic**, in this case the applicant was charged with the offence of robbery with violence contrary to section 296 (2) of the Penal Code, and bail was refused.

It is not in dispute that bail is a constitutional right of an accused, and that the decision whether or not to grant bail to an accused person is in the discretion of the court to which an application for bail has been made, and subject to the discretion being exercised judicially each case has to be considered on its own merits. The factors to be considered in granting or refusing bail are well settled in this country, as is clear from the authorities cited and relied upon by both counsels in support of their respective submissions. These factors are summarized in the case of ***George Kamau Ngang'a – v Republic*** Criminal application No 61 of 1981, in which Chesoni J (as he then was) restated the principles as set out in Halsbury's Laws of England, 3rd Edition, page 373 para 678. That para states:

“In exercising their discretion with regard to bail the justices must consider the nature of the offences. The strength to the evidence, the character or behaviour of the accused and the seriousness of the punishment which may be awarded if the accused is found guilty.”

The underlying principle is whether an accused will turn up at the trial. Hancox J (as he then was) enunciated the same principles in the later decision of ***Opinder Singh Naul v Republic*** High Court Misc Cr Appl No 178 of 1981 except that he seemed to say that the risk of an applicant absconding outweighed his quest for freedom. However the decision in case of Margaret Ngui vs Republic High Court Cri Appl No 59 of 1985, deals specifically with offences which carry the mandatory death penalty. That was decision of a Constitutional Court of no less than three judges. The court said

“We wish to add however that following the practice in Kenya prior to November 10, 1978 and subject to the provisions of section 72 (5) of the constitution, bail as a general rule should not be granted where the offence carries a mandatory death penalty, so great is the temptation to abscond or jump bail in such cases. This is the practice in England in cases of murder although the death penalty has been abolished”.

In certain cases there may well exist exceptional or special circumstances personal to the applicant which the court will consider sufficient to grant bail.

I have given very careful consideration to this application. The applicant is charged with robbery with violence contrary to section 296(2) of the Penal Code and it carries a mandatory sentence of death. So the applicant has so great the temptation to abscond or jump bail. The defence of an alibi in my opinion is not an exceptional or special circumstances personal to the applicant. I see no sufficient justification for disregarding the general rule in considering this application for bail for offence carrying death penalty and exposing the applicant to the temptation to jump bail, and this application for bail is refused.