



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPLICATIONS NOS. 81,82,83 OF 1985 (Consolidated)

MOHAMED KHAMIS MAZRUI.....1ST APPLICANT

PATRICKLITUNYA LUMUMBA..... 2ND APPLICANT

EVANS MOTENDE GETONGA..... 3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(In intended appeals from the convictions and sentences of the Chief Magistrate's Court at Nairobi)

RULING

The three consolidated applications are for bail pending trial in accordance with s. 123(3) of the Criminal Procedure Code which reads:

“The High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence direct that a person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”

The applicants were arrested, together with two others on February 10, 1985 and appeared before the learned Chief Magistrate's Court on February 14, 1985. They were then unrepresented.

The three applicants were charged with (1) taking part in an unlawful assembly contrary to section 5(11) (c)(i) of the Public Order Act, cap 56, Laws of Kenya as read with section 5(11) (c)(ii) of the said Act and (2) failing to comply with an order issued by a police officer contrary to section 5(1)(a) of the said Public Order Act as read with section 5(11)(c)(ii) of the same Act. According to Mr. Chunga, the Assistant Deputy Public Prosecutor, both the offences are felonies and are punishable with an imprisonment of not less than three years. Be that as it may, neither of the offences is excepted from section 123(3) of the Criminal Procedure Code and the High Court has discretion to grant bail. There is no dispute on that score.

After the accused persons pleaded not guilty to various charges, the case was set down for mention after two weeks, at the request of Mr. Chunga, who appeared before the learned Chief Magistrate on behalf of the Republic and all the accused persons were ordered to be remanded in Kamiti Prison.

On February 19, 1985, applications for bail on behalf of the 1st applicant (Mohamed Khamis Mazrui) and the 3rd applicant (Evans Motende Getonga) were made by Mr. Wetangula for the 1st applicant and Mr.

Adala for the 3rd applicant. It was opposed by Mr. Chunga for the Republic and the learned Chief Magistrate ruled against the applicants.

Another attempt for bail was made on February 28, 1985 when the case was mentioned before the learned Chief Magistrate and the case was set down for hearing before a Senior Resident Magistrate starting from 11th to 15 March, 1985. This time, Mr. Ombete for the 2nd applicant (Patrick Litunya Lumumba) joined forces with Mr. Wetangula and Mr. Adala. Again bail was opposed by Mr. Chunga. Once again, in a considered ruling the learned Chief Magistrate, found that there were no new matters to differ from his earlier discretion to grant bail.

The applicants have now come to the High Court to seek directions that each of them be admitted to bail.

The 1st applicant, Mohamed Khamis Mazrui, is 23 years old and a third year art student at the University of Nairobi. The 2nd applicant, Patrick Litunya Lumumba, is 22 years old and a second year medical student at the University. The 3rd applicant, Evans Motende Getonga, is 22 years old and a second year law student at the University. All are citizens, on the threshold of various professional careers, with everything in stake in Kenya. Each of them is ready and willing to get any reasonable sureties and comply with any reasonable conditions or restrictions that may be imposed by the court.

Mr. Wetangula, who appeared for the 1st applicant in the proceedings commenced the arguments which were adopted by both Mr. Ombete for the 2nd applicant and Mr. O’Nyamwamu for the 3rd applicant.

Mr. Wetangula commenced by criticizing the various passages in the two rulings of the learned Chief Magistrate and as rightly pointed out by Mr. Chunga, the present proceedings were not on appeal from the rulings of the learned Chief Magistrate but independent applications under section 123(3) of Criminal Procedure Code. Nevertheless, it may be borne in mind that this Court, in considering the applications for bail may in so far as the circumstances so necessitate, look at the rulings of the Chief Magistrate, to enable it draw its own conclusions with regard to the question of bail.

The main thrust of the argument for bail was that it is a constitutional right and quoting from an American case, *Frimble vs Stone*, it was contended that “The right to bail pending trial is absolute”. A Zanzibar case of *Rahim Obedi vs People* (1977) Zanzibar Law Report p 119 went so far as to say that

“the only ground for refusal of bail is the ability of the accused person to abscond from Court’s jurisdiction when he is required.”

Not being aware of the constitutional and statutory provisions with regard to those prevailing in the U.S.A. and Zanzibar, all that I would say is that neither the provisions or the Constitution, the Criminal Procedure Code, nor of practice and precedents of courts in Kenya are in accord with the absolute right to bail in America or the ability to abscond criterion in Zanzibar. Suffice it to say that all the counsel were in agreement with the propositions laid down by Chesoni J (as he then was) in *George Kamau Nganga vs Republic* Misc Criminal Application No. 61 of 1981, that

“Even without the constitutional provisions (section 72(5)) generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that:

- (a) the accused will fail to turn up at his trial or to surrender to custody; or
- (b) the accused may commit further offences; or
- (c) he will obstruct the course of justice.”

It may be mentioned that in the *Kamau’s* case (*supra*) and in *Opinder Singh Haul vs R* Misc. Criminal Application No. 178 of 1981, the essential criterion for consideration of bail was whether the accused may fail to turn up at his trial.

In the instant case, it is contended on behalf of the applicants, that there is nothing to show that the applicants, if released on bail, will abscond or fail to turn up at their trial, indeed, the learned Chief Magistrate was of the opinion that

“there was nothing to show that the accuseds would not turn up if allowed bail. This is mere apprehension”.

It was argued on behalf of the applicants, that they being at various stages of their academic careers, they have everything to lose by absconding than attending trial. The fact that the appellant would lose more by absconding was a relevant factor in favour of granting bail.

In opposing bail, Mr. Chunga’s main objections were whether arising from the circumstances and incident at the University leading to the present charges against the accused persons, it was in the public interest to release them on bail (see *Willy Mutunga vs R.* Misc. Criminal Application No. 101 of 1982) and if so released whether the applicants were likely to abscond and fail to turn up for trial.

In order to comprehend fully the thrust of Mr. Chunga’s objections, it may be relevant to set out the circumstances, which in the opinion of prosecution were so serious as to justify refusal of bail.

On February 5, 1985, the University announced expulsion of three students from the University and suspension of scholarship of five students. It is submitted that such orders for expulsion and suspension were defied by boycott of lectures by the entire student body in sympathy with the affected students. There were repeated appeals by the University authorities and the Government to the students to resume classes but such appeals were not heeded. Instead, the students congregated at University Great Court without lawful authority. Such situation continued for 6 days until 10th February, 1985 when the students held an unlawful gathering at the University Sports Ground and were addressed by student leaders. At this gathering, the police informed the students that they had unlawfully gathered and that they should disperse. However, the students ignored the directions of the police. The police moved in to disperse the gathering, which resulted in injuries suffered by both police and the students, one of whom subsequently died. The applicants were arrested arising out of that incident.

It is Mr. Chunga’s submission that these are matters which cannot be downplayed and are of such grave consequences and show such disregard for law and order, public security and peace, that coupled with the prosecution’s apprehensions that the applicants may not turn up for trial, the Court should refuse bail.

However, the counsel for the applicants submit that the gathering where the incidents took place was confined to the students, that events are of the past, that the University having been closed and students having dispersed to various parts of the country where they are required to report to local administration, it is practically impossible for a similar gathering to be convened that would likely cause breakdown of law and order or prejudice public peace, tranquillity and security. It would seem that the counsel for the applicants recognise that the crucial assembly was such that a breakdown of law and order was precipitated though confined to student community. The student community is as much part of the citizenship of this country as are other citizens and the fact that the incident was confined to the student community cannot minimize the impact of the breakdown of the situation of law and order.

Time and again, advocates come to the courts and propound that

“Bail is a constitutional right; it is one of the fundamental rights; that bail is automatic and absolute”.

With respect, I do not subscribe to the above propositions. It must be underscored that Chapter V of the Constitution is the one dealing with fundamental rights, and it is particularly section 70 which sets out the fundamental rights and freedoms of the individual. One of those fundamental rights is liberty. However, all such fundamental rights are subject to respect for the rights and freedoms of others and for the public interest. Moreover, such fundamental rights and freedoms are subject to limitations set out in subsequent sections 71 to 83 of the Constitution, which are designed to ensure what the enjoyments of those rights

and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

Section 72(1) of the Constitution sets out the circumstances and conditions under which a person may be deprived of his personal liberty, one of which being (e)

“upon reasonable suspicion of his having committed or being about to commit, a criminal offence under the law in Kenya”.

The subsequent subsections of section 72 lays down the procedure to be complied with upon arrest or detention of a person, who is required to be taken before a Court and not to be further held in custody save upon the order of the Court. Section 72(5) of the Constitution, which is often quoted by the criminal lawyers for the purposes of bail, sets out conditions under which a person may be released.

Although the term ‘shall’ is used in section 72(5), it is not with regard to fundamental right that the word ‘shall’ is so used. It is, I would think, with regard to “is not tried within reasonable time” that the word “shall” has been used. Be that as it may, it must be borne that fundamental rights of liberty are subject to respect for the rights and freedoms of others and for public interest. Public interest cannot be considered in isolation with public peace, tranquillity, and security. Public interest does include maintenance of law and order without which rule of law, which is the fountainhead of any constitution of any country, would not subsist or sustain.

In the context of the provisions of the Constitution, the circumstances which led to the arrest of the applicants become relevant and one may not give a blind eye and deaf ear to these very provisions of the Constitution on which the structure of the Kenya Society and Government is founded. To do so would be to abdicate judicial responsibility to safeguard the canons of the Constitution.

The Public Order Act is designed to provide for the maintenance of public order. Reading various provisions of the said Act, it becomes at once apparent that they deal with public peace, tranquillity and security. It would therefore seem that the alleged contravention of certain provisions of the Act, in the context of fundamental rights and freedoms of other persons and of public interest, become relevant.

It has been suggested by the Counsel for the applicants that the University having been closed and the students being dispersed in various parts of the country, consequent upon the directions of the Government, there is no likelihood of threat to public peace, tranquillity and security. Can such submission be accepted on its face value? Must one conclude that the fears with regard to public interest and rights of other persons are imaginary and not real? I think not. Be that as it may, it must be emphasized the University of Nairobi is one of the important institutions of the Republic and its closure cannot be looked upon with equanimity and unconcern. It is a serious and grave matter. The closure of the University has been occasioned on more than one occasion because of the situation of law and order. In this context, also the issue of public interest as well as rights of others become relevant.

In considering the exercise of judicial discretion to admit the applicants on bail, I am very much conscious that those charged with the criminal offences are presumed innocent until proven or plead guilty. In the instant case, it may well turn out that the applicants were innocent victims caught in the police dragnet of that day. If otherwise, the temptation of not turning up at the trial may not be irrelevant .

In any event, the trial of these applicants upon the charges laid against them has already begun before a Senior Resident Magistrate. Under section 123(1) of the Criminal Procedure Code, the magistrate is empowered at any stage of proceedings to admit an accused person on bail. If during any stage of trial, the circumstances indicate so, there is nothing which would preclude the trial magistrate to exercise his discretion to grant bail.

However, at the moment, having considered all the circumstances anxiously and carefully, I have come to the conclusion that it would not be prudent and judicious to exercise the discretion of admitting the applicants to bail. The applications for bail are refused.

Dated and delivered at Nairobi this 12th day of March , 1985.

ABDULLAH

JUDGE