REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO. 101 OF 1982

WILLY MUNYOKI MUTUNGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant was arrested on June 10, 1982 and charged before the learned Senior Resident Magistrate, Nairobi on June 12, 1982 for being in possession of seditious publications contrary to section 52(2) of the Penal Code. He pleaded not guilty and applied for bail, which was refused at that stage. On June 18, 1982 he appeared before the learned chief magistrate when the applicant's counsel renewed the bail application but the same was again turned down. He now seeks the assistance of the High Court.

Briefly it is urged on his behalf that he has been in custody now for 18 days, that the charge was a simple one and once the prosecution had found a prohibited publication in his possession there was hardly any necessity for further investigations, that in any event he has already been in custody for almost 3 weeks and that should be sufficient time to complete any investigations, that the mere fact that the Attorney-General's consent to prosecute had not been forthcoming was no reason to deny him bail that under the Kenya Constitution a person charged with a bailable offence as the present one is entitled as of right to bail if his trial is not held expeditiously, that fundamental rights of the individual are enshrined in chapter 5 of the constitution, and they include the right to liberty, that such a right did not depend upon good-will, permission benevolence or charity, that the Criminal Procedure Code makes bail available for all offences except those punishable by death and even in respect of those the High Court has power to grant bail, that the charge of possession of seditious publications was not serious as it only carried the maximum sentence of 7 years imprisonment which was same in respect of a number of other offences for which bail is granted as a matter of course, that the learned chief magistrate erred in holding that the offence was very serious touching the stability of the country, that if the legislature intended it to be serious and grave it would have prohibited bail for the same, that there were 2 cases of 1952 and 1960 respectively in which bail was infact granted for a similar offence and the circumstances of those cases were no different from the present, that the primary consideration that the applicant would turn up for his trial was not even considered by the learned chief magistrate,that in view of the applicant's position, status, antecedent and marital standing there is absolutely no reason to believe that the applicant will abscond and that the applicant was willing to abide by any conditions imposed by the court plus offer substantial sureties.

Mr Chunga, the principal state counsel, opposed the application on behalf of the Republic. He submitted, in brief, that the mere finding of the prohibited publication in possession of the applicant did not mean the end of prosecution's investigations and matters like the possible sources , origin, distribution and authorship of such documents needed thorough and careful investigations in the interest of the security of the State, that the offence is serious and grave is evident from the very heading of the document recited in the charge-sheet, that in determining whether an accused will turn up for trial the nature of the offence, gravity of the charge and all its circumstances have to be considered and that the constitutional provisions are not mandatory where the interest of justice is otherwise.

Mr Chunga referred me to those recent rulings of the High Court on the same issue: Miscellaneous Criminal Application No 61/81 George *Kamau Nganga v Republic* (Chesoni J), and Miscellaneous Criminal Application No 78/81 *Jonesmas Mwanza Kikuyu v Republic* (Muli J), and Miscellaneous Application No 178/81 *Opinder Singh Nauhl v Republic* (Hancox J) in all of which respective applications for bail pending trial were refused by my learned brothers although in *Nauhl's* case the

accused had been in custody for about 10 months at the time of the hearing of the application.

The principles governing such applications have been considered by my brothers in the aforesaid applications at great detail and I need not repeat them, except to state with all respect, that I am in full agreement with them.

It is true that the protection of fundamental rights and freedom of the individual is contained in Chapter V of the Constitution but it is, I think, worth emphasising that section 70 of the constitution, with which the Chapter V begins, makes such rights subject to respect for the rights and freedoms of others and for the public interest and again, subject to limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. The underling is mine.

The learned chief magistrate, in my view, was quite correct to take into account the seriousness and gravity of the charge. As Mr Chunga has pertinently pointed out Constitutional rights cannot be considered in isolation. It cannot be stressed too often that such rights exist and are enforceable, only where law and order prevails. Once peace and stability disappear such rights also go overboard without a whimper.

Furthermore, as again properly submitted by Mr Chunga, it is too simplistic an approach to argue that once the prosecution had found a prohibited publication in the applicant's possession, there could be no real necessity of any further investigations: the origin, authorship, printing, publication, circulation etc of a publication headed "J M Day Solidarity: Don't Be Fooled reject the Nyayos" are all matters requiring full and thorough investigations.

Courts do not operate *in vacuu* and cannot be oblivious of the fact that some subversive elements have unfortunately crept into the university and the State cannot simply ignore them.

In all the circumstances of this application, I am satisfied that the learned chief magistrate quite properly refused to grant bail to the accused, and I am further satisfied that as matters stand it is not a fit case to admit the accused to bail at the present time and I refuse the application.

I would, however, like to stress here that nothing in this ruling should be construed as indicative of the applicant's guilt. An accused person is entitled to plead not guilty (see section 77 of the Constitution) and it is incumbent upon the prosecution to prove his guilt beyond a reasonable doubt.

Dated and Delivered in Nairobi this 30th day of June 1982.

S.K.SACHDEVA

JUDGE