



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISCELLANEOUS CRIMINAL APPLICATION NO 61 OF 1981**

**NGANGA .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The applicant was charged with four others with conspiracy to commit a felony contrary to section 393 of the Penal Code. The particulars of the offence alleged that on divers dates between September 10, 1980 and October 2, 1980 in Nairobi within the Nairobi Area, the accused jointly with others not before the court conspired together to commit a felony namely theft of Kshs 20,032,602.05 (equivalent to DM 4,875,654.60) the property of the Kenya Government.

One of the five accused pleaded guilty to the charge and was dealt with accordingly. Of the remaining four the first accused Elseus Peter Ahenda successfully applied for and was granted bail pending the hearing of the case. This took place before his co-accused were arrested and charged. The first accused was arrested on October 2, 1980, and on October 8, 1980, he appeared in court when he was released on his own bond of Kshs 100,000 plus two sureties of like amount. This, in fact, forms the basis of the present application. The applicant has applied to be released on bail pending the hearing of the case. The applicant (3rd accused), second and fourth accused are in remand. They were arrested in November 1980, and the applicant in particular was arrested on November 7 and taken to court when his bail application was objected to by the prosecution and refused by the court.

The affidavit in support of the application was sworn to by the applicant's counsel, David W Karanja, who in paragraph 8 thereof has deponed as follows:

“8. That I verily believe that the release of the 1st accused in the circumstances was discriminatory on the face of it and cannot in any way be justified in law.”

This argument is based on the contention in paragraph 7 of the same affidavit where the deponent states:

“7. That the Applicant and the 1st accused in the said criminal case face the same charge and should have been treated equally before the law.”

It is true all the accused in the case are charged with the same offence and they are charged jointly, but whether that calls for the same treatment in granting or refusing each accused person's bail application is another matter. In support of his contention, Mr Karanja referred the court to section 82(2) of the Constitution of Kenya which provides that:

“82.(2). Subject to subsections (6), (8) and (9), no person shall be treated in a

discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.”

At the hearing of the application, Mr Karanja expounded further on what he had deponed to in paragraphs 7 and 8 of his affidavit. He contended that the Senior Resident Magistrate was acting by virtue of a written law, ie section 123 of the Criminal Procedure Code, when he considered the bail application of the applicant, but she treated the applicant in a manner contrary to section 82(2) of the Constitution. Citing section 72(5) of the Constitution, he added that it was the applicant’s constitutional right to be released on bail if he was not to be brought before the court as soon as is reasonably practicable. Section 72(5) of the Constitution says:

“72.(5). If any person arrested or detained as mentioned in subsection (3)(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including, in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.”

Mr Karanja argued further that it had taken five months and unless the applicant was going to be tried within a reasonable time he was entitled to be released on bail. The only relevant question, he maintained, was whether or not the accused if released on bail would turn up at his trial and as far as his client was concerned, he would turn up. The applicant was a Kenya citizen with no travel documents and would be able to furnish substantial sureties.

The application was strongly opposed by the Principal State Counsel, Mr Chunga, who outlined the history and circumstances of the case. He submitted that section 82 sub-section (2) of the Constitution had no application and that there had been no discrimination in the manner the applicant had been treated within the meaning of section 82(2). He advanced his argument on the basis that even where more than one accused persons are jointly charged with a criminal offence, the case of each accused must be examined in its own facts against that accused and that this was a cardinal rule of the criminal law and the same principle applied with the same force and validity to applications for bail. The application of each accused where several or more persons are jointly charged with an offence, must be considered on its own facts, circumstances and merit.

With respect, I agree with the Principal State Counsel. Just as finding one accused charged with others jointly guilty or innocent does not implicate or set free the co-accused and is not discriminatory treatment, so is the case with granting or refusing bail to one or more accused persons charged jointly with others some of who may be out on bail. This is so because the facts, circumstances and merit of one co-accused may be such that granting him bail is justified, whereas those of his co-accused may mitigate against bail. Each case must be considered on its own merit, facts and circumstances before the court exercises its discretionary powers of granting or refusing bail.

Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. 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

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 considering whether or not the accused will attend his trial the following matters must be considered:

- (a) The nature 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 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 previous occasion will by 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 may 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.

It, therefore, follows that the court, in exercise of its discretion under section 123(1) or (3) of the Criminal Procedure Code, in considering the accused's constitutional right to bail, it does not do so in the abstract but also considers the factors I have outlined above. In the light of this it cannot be said that granting or refusing one accused bail where his coaccuseds jointly charged are granted or refused bail is treating the accused in a discriminatory manner contrary to section 82 subsection (2) of the Constitution.

I further agree with the learned Principal State Counsel that the meaning of the phrase "discriminatory" in section 82 subsection (2) of the Constitution is not the same as the natural or ordinary meaning of the word "discriminatory". The word has been assigned a special meaning as stated in section 82 sub-section (3) which reads as follows:

“(3). In this section, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”

The expression “discriminatory” is, therefore, here used in a special restrictive manner and is specially defined by section 82 sub-section (3).

I should point out here that great emphasis was placed on the argument that the applicant was treated in a discriminatory manner which was confusing as this was not an appeal from the decision of the court below refusing bail. It is a fresh application for bail pending trial. Be that as it may, the applicant does not fall within any of the discriminatory categories in sub-section (3) of section 82 of the Constitution. In the circumstances, to refuse the applicant bail will not amount to treating him in a discriminatory manner contrary to section 82(2) of the Constitution.

This application has come before this court under section 123(3) of the Criminal Procedure Code which empowers the High Court in any case to direct that any person may be admitted to bail or that the bail required by a subordinate court or police officer be reduced.

I have considered the third accused's application for bail and found that the fact that the first co-accused is out on bail does not constitute a discriminatory treatment of the applicant as to offend section 82 subsection (2) of the Constitution of Kenya. When the first co-accused was granted bail he was charged with a misdemeanour ie conspiracy to defraud contrary to section 317 of the Penal Code and even when that charge was substituted with the more serious charge of the conspiracy to commit the felony of stealing contrary to section 393 of the Penal Code, the court did not have to cancel the first accused's bail

if it was satisfied on the facts, merit and circumstances of the matter that it was safe to let the first coaccused remain out on bail. That by itself did not create an automatic right for the applicant to be let out on bail and since that is what has been made the basis of the present application, no merits or circumstances justifying the granting of bail have been advanced. The charge which the applicant faces with his co-accused is most serious and the Principal State Counsel has informed the court from the bar that further investigation indicated a likelihood of further charges and there has been attempts by the applicant through agents to interfere with prosecution witnesses. The date set for trial, though said to be tentative, is, in my opinion, reasonably soon and there is no delay in the trial.

The reasons I have given coupled with those put forward by the Principal State Counsel opposing the grant of bail compel me to find that bail ought not to be granted to the applicant. In the result the application is refused.

**Dated and delivered at Nairobi this 7th day of April , 1981.**

**Z.R CHESONI**

**JUDGE**