



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

MISC CRIMINAL APPL NO. E038 OF 2021

MOHAMOOD CHUTE WOTE.....1ST APPLICANT

HUSSEIN ABDIKADIR SAID.....2ND APPLICANT

QARE ALI SAYA.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By a notice of motion application dated; 3rd February 2021, the applicants are seeking for orders as here below reproduced;

a) That, the ruling of the Chief Magistrate's court made on 1st February, 2020, in case No. MCCR/E034/ of 2020, on deferring granting of cash bail and bond be and is hereby revised;

b) The applicants be and hereby granted reasonable cash bails and bonds in respect of case number MCCR/E034/2020, to be ascertained by the Honourable court,

c) That, the costs of this application be provided for.

2. The application is brought under the provisions of; Article 25(c), 49 (1) (h), 50 (1), 165(6) and (7) and 259(1) of the Constitution of Kenya, 2010, Section 362 & 364 (1) (b) & (2) of the Criminal Procedure Code, (cap 75) of Laws of Kenya, the inherent power and jurisdiction of the court and all other enabling provisions of the law.

3. It is supported by an affidavits of the even date, sworn by the applicants who aver in a nutshell that, they were arrested and arraigned before the Chief Magistrate's court, vide a case; MCCR/E034/2020, charged with the offence of; trafficking in narcotics drugs contrary to the narcotics drugs and psychotropic substances (control) Act No. 4 of 1994, and pleaded not guilty.

4. Subsequently, the 3rd accused and/or applicant who had been charged vide criminal case number; 034 of 2020, was released on bond of; Kshs 3,000,000 with two sureties of a similar amount. She has managed to get one surety, who has deposited a title deed to property, L.R. No. Marsabit/Mountain/283, valued at Kshs 6,000,000. However, she is not able to get the 2nd surety. She therefore, prays that the bond terms be reviewed and she be released her on the surety already before the court. She avers that the application for review made before the trial court was rejected, hence the revision application herein, that the bond terms be varied by an order of provision of; one surety instead of two sureties.

5. The 1st and 2nd applicants on their part aver that, the trial court in the ruling of; 1st February, 2020, deferred the decision on their bail and bond revision. All the applicants aver that, they are entitled to be granted reasonable and affordable bond terms based on the probation officers' reports. That, the bond terms: "should not be excessive bearing in mind their personal circumstances and the depressed economic environment arising out of the effect of COVID-19 Pandemic." The applicants depose that, they are not flight risk and are willing and ready to abide by all the conditions that the court may set.

6. However, the respondent opposed the application and basically argued that, the bond and bail terms granted to the 3rd applicant are reasonable. As regards the other applicants, the respondent submitted that, at the time the court considered their application for bail and bond terms, the trial court was yet to receive their pre-bail reports. However, as at the time of hearing this application, the pre-bail reports were availed, and are favourable, all the three applicants should be given similar bond terms of; Kshs 3,000,000 and two (2) sureties of similar amount.

7. The Respondent further submitted that, under Article 49(1) of the Constitution of Kenya, 2010, an accused person has a right to be released on bail of reasonable terms unless there are compelling reasons. Further, the “Bail and Bond Policy” guidelines provides principles that govern grant of bond and bail, which should be considered.

8. However, the Respondent argued that, although the accused persons are presumed innocent, the court must also consider the seriousness of the offence of; trafficking in narcotic drugs valued at Kshs12,000,000, they are charged with and give bail and bond terms, with stringent conditions that will ensure they will attend trial.

9. I have considered the application, the arguments advanced and the submissions filed. I find that, Article 49 (1)(h), of the Constitution of Kenya, 2010, provided that, an accused person has a right to be “released on bond or bail on “reasonable” conditions pending a charge or trial unless there are compelling reasons not to be released.” Similarly, section 123 (1) and (2) of the Criminal Procedure Code, empowers the trial court to admit an accused person to bail or release him or her upon executing a bond with sureties for his or her appearance and states that in fixing the amount, the court shall take into account the circumstances of the case and it shall not be excessive.

10. The key word is; “reasonable.” Thus, the question that arises is: what criteria should be used in determining what is reasonable? In my considered opinion, the starting point is the recognition of the fact that, under Article 50(2) of the Constitution of Kenya, 2010, every accused person is presumed innocent until proved guilty. The purpose of bail and bond terms is to ensure therefore that the accused attends the trial. Further, the provisions of section 123A of the Criminal Procedure Code provides the relevant circumstances to be considered, including; nature and seriousness of the offence, character of the accused, record of compliance with previous bail and bond terms and strength of the evidence to be adduced.

11. In the same vein, the provisions of; bail and bond policy guidelines, states first and foremost, bail or bond amount should not be excessive, that is, it should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial. Conversely, bail or bond amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case (see; Republic v Taiko Kitende Muinya (2010) eKLR).

12. Further, bail determination must balance the rights of the accused persons and the interest of justice. Consequently, bail or bond will only be denied where the prosecution presents convincing evidence to justify such denial and demonstrate, with convincing evidence that, his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions. As a result of the aforesaid, bail or bond amounts and conditions shall be no more than is necessary to guarantee the appearance of an accused person for trial.

13. In the instant matter, the applicants are challenging the process of the trial court in approving the bail and bond and/or the terms thereof. However, it suffices to note that, the trial court has powers under the provisions referred to herein; to admit an accused person to bail or to release him or her upon executing a bond with sureties for his or her appearance.

14. The exercise of these powers entails the performance of the following judicial and administrative functions of: (a) determining whether or not an accused person should be granted bail; (b) determining the amount of bail; (c) attaching suitable conditions to the grant of bail; (d) verifying security documents; (e) approving sureties; (f) releasing accused persons who have been granted bail from police custody or prisons; (g) committing accused persons who have been denied bail to police custody or prisons; and (h) reviewing bail terms and conditions.

15. The prosecution did not oppose the application for bail and bond in the trial court, save to urge the court to consider the seriousness of the offence and/or the value of the subject matter and order the applicants deposit their passports in court and/or restricted their movements outside the jurisdiction of the court.

16. The trial court further ordered for pre-bail reports and upon availability thereof; noted that the pre bail reports in respect of the 2nd and 3rd applicants indicated that, their permanent place of abode could not be established and that they had refused to answer questions during the interviews. The trial court concluded that, they were flight risk but all the same accorded them another a second opportunity with directions that another comprehensive reports be prepared and presented within ten (10) days. However, the 3rd applicant was granted bail as stated herein.

17. Be that as it were, I note from the record that while approving the surety for the 3rd accused the court stated that: “from the information provided the proposed surety has close relationship with the accused although he is of advanced age the requirement of two sureties will mitigate that.” Subsequently, the learned counsel Mr Bosire appearing for the applicants sought for review of the bond terms of the 3rd applicant, so that, the order requiring two sureties be varied to one. Further, the other applicants be granted bail and bond terms of; Kshs 1,000,000. The prosecution however, urged the court to maintain the bond terms granted as they were adequate.

18. The trial court in the ruling on the application dated 1st February, 2012, reiterated that, the 1st and 2nd applicants were flight risk and denied them bail and bond terms, dismissing their application for review of their bail and bond terms, as there was none to be reviewed. As regard the 3rd applicant, the trial court stated that:

“The review of the bond terms of the 3rd applicant would be a mockery of the very reason this court approval of the persons proposed surety. The number of sureties ought not to be reduced, therefore for that reason, because that makes e requirement of two sureties, even more reasonable”

19. I have considered the reasons given by the court in its ruling referred to herein which forms the basis of this application. Basically the court in granting bail to the 3rd applicant considered inter alia the value of the subject matter. However, I note that, the applicants herein

have been charged jointly with an offence, of the value of; Kshs 12, 000,000. A quick calculation of the amount attributable to each accused would be at most Kshs 4, 000,000, to cover to achieve 100% value of the subject matter. However, allowance must be given for the presumption of innocence. In which case, each will be expected to cover at most bail and bond terms of; Kshs 2,000,000 with one surety of similar amount. However, the trial court has the discretion to enhance any amount or reduce it, based on the circumstances of the case.

20. It is noteworthy that, the order requiring the 3rd applicant to execute a bail and bond in the sum of; Kshs 3,000,000 with two sureties of a similar amount, places her liability alone, at a sum of Kshs 9,000,000 which is about 75% of the value of the subject matter of the suit. In that case and for all intent and purpose, those terms are excessive.

21. As regards, the reasons advanced for the same I find that, the purpose of examination of the surety is to ascertain suitability. The fact that the proposed surety was approved presumes such suitability. Any doubt entertained in the process of approval would either led to disqualification if not, be given to the benefit of the accused. The age of the surety becomes irrelevant once the security offered is approved.

22. In fact, the issue of age may be deemed to be discriminatory, as it is not a requirement for approval of a surety. It may be misunderstood to mean that, advanced age means “early demise”. I will leave it at that.

23. In conclusion, I find that, since the 3rd applicant has already met the bail and bond terms given save for the sureties, I order that her bond terms be revised to; bail and bond of; Kshs, 3000, 000, and one surety of similar amount. As she has met the same, she should be released forthwith unless otherwise lawfully held. It is so ordered.

24. As regards, the 1st and 2nd applicants, I note that, the trial court ordered for further pre-bail reports. It is not clear from the record whether they have been availed or not. The trial court should follow up the process to conclusion. The court is at liberty to set the bond terms that are reasonable, if it is inclined to grant any. The trial court’s discretion in that regard should be respected and this court cannot tell the trial court what terms to impose.

25. Those then are the orders of the court.

DATED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF MARCH 2021 AND SIGNED.

GRACE L. NZIOKA

JUDGE

In the presence of;

Mr Bosire for the Applicant

Mr Kiragu for the Respondent

Edwin Ombuna: Court Assistant