Imanyara v Republic

High Court, at Nairobi May 9, 1991

Porter J

Criminal Application No 190 of 1991

Criminal Practice and Procedure – bail –renewed application for bail – whether a rehearing of a previous bail application . Criminal Practice and Procedure – bail – whether an applicant is entitled to apply for bail as many times as he can – section 123(3) Criminal Procedure Code.

The appellant who was facing sedition charges was denied bail by the High Court. Subsequent to the refusal he suffered from medical problems while in custody to an extent that he suffered several fits by unconsciousness while attending court sessions.

His counsel therefore renewed his bail application on a somewhat different footing to the normal. He argued that taking the overall view of the case the court could find that there was obviously something seriously wrong with the applicant which was aggravated by whatever he had to suffer in prison and that the court had a discretion in such matters and should release the applicant on bail as a merciful act and the only alternative.

Counsel further applied that the presiding judge do disqualify himself from hearing the renewed bail application as he had rejected the previous one and was thus looking to reach the same conclusion in the current one.

It was suggested in submission by counsel for the applicant that an applicant for bail under section 123(3) was entitled to trail his coat through every court and before every judge for fresh hearing.

Held:

1. It is quite clear that the earlier decision on bail must be taken as a starting point, and any discretion exercised to grant bail must be based on the new matter presented before the court.

2. That new matter in this case relates to fits suffered by the applicant as explained by medical evidence presented in the application .

3. On the evidence the applicant should remain in custody if his place of custody is to be under the care of Kenyatta National Hospital but not if he is to be returned to remand prison.

4. The court finds that the suggestion that the applicant for bail can trail his coat before every judge once an application under 123(3) is decided is incorrect.

5. What an applicant is entitled to do however is to present new matter in a fresh application for bail

under section 123 (3) before the High Court.

Cases

No cases referred to.

Statutes

Criminal Procedure Code (cap 75) section 123(3)

Advocates

Dr Khaminwa for the Applicant.

May 9, 1991, **Porter J** delivered the following Ruling.

This is a further application for bail by Gitobu Imanyara. This Court has already considered a previous application for bail which was refused. Since that refusal the applicant has quite clearly and admittedly suffered from medical problems while in custody. This to the extent that he suffered a fit of some kind while appearing in court. The applicant was admitted to Kenyatta Hospital by the Prison Authorities and exhaustive investigations have been carried out by his own doctor and by doctors from Kenyatta Hospital and I am infull possession of the medical facts which are admitted. Dr Khaminwa for the applicant took the view that it would not be necessary to call the doctors for cross-examination.

Indeed Dr Khaminwa put this application on a somewhat different footing to the normal. He said that taking on overall, view of the case this Court could find that there was obviously something seriously wrong with Mr Imanyara, but whatever that condition was it was aggravated by whatever he had to suffer in prison on remand and that this Court had a discretion in such matters and should release the applicant on bail as a merciful act and the only alternative.

At the start of this application Dr Khaminwa asked me to disqualify myself from hearing it on the basis that I had heard the earlier application for bail and therefore could be expected to come up with same order in this application. I pointed out to Dr Khaminwa during his application for me to disqualify myself that I took the view that the present bail application was not a rehearing of the original bail application before me, but a hearing on the basis of additional matter. He put forward the proposition that an application for bail before the High Court under section 123 (3) was entitled to trail his coat through every court and before every judge in the High Court for fresh hearing. I have heard this submission before although I have not been called upon to decide it. There seems to be a general misconception and misunderstanding on this matter, and I think I should say something about it.

The practical problems in respect of such a submission are quite obviously enormous. One’s first reaction to such a suggestion is that it cannot be right as it mounts to judges sitting on appeal on each other. I therefore asked Dr Khaminwa for some authority for such a suggestion and gave him the time he asked for to obtain it. Dr Khaminwa, whose experience in such matters I do not need to detail, was unable to present any such authority and I therefore take it that there is none. And that would accord with common sense. It is interesting to notice that the CPC does not provide for appeals against orders for bail, which are interlocutory orders in criminal matters as a general rule are frowned upon by the Courts and unauthorized by the CPC. It would seem that the only way in which a bail application can come before the High Court is under s 123 (3) which has been recently amended to enable the High Court to allow or refuse bail. The High Court does so exercising its own discretion and there is no provision

whatever for appeal of any kind either to another judge or to the Court of Appeal. The terms of the section quite clearly make the order made by the judge a final order on an interlocutory matter. I find that the suggestion that the applicant for bail can trail his coat before every judge in the High Court, or even one other judge once an application under s123(3) is decided in incorrect. What an application is entitled to do however is to present new matter in a fresh application for bail under s 123(3) before the High Court. I would leave for a moment the question of whether that new matter should be presented before the same judge to another time for consideration at another time. It does not arise in this case as this application has come before me in the ordinary course.

During his application for me to disqualify myself I told Dr Khaminwa of my view of the law in this matter and asked for authority to find differently which was not forthcoming as I have said and since the application for disqualification was based upon the suggestion that having once ruled upon the question of bail per se, it would be wrong for me to consider the point again, and since I was not hearing those matters again, Dr Khaminwa withdrew his application for me to disqualify myself and we turn to the application itself.

To clear away any misconceptions as to the position of this court, it is quite clear that the earlier decision on bail must be taken as a starting point, and any discretion exercise to grant bail must be based on the new matter presented before the Court. That new matter in this case relates to fits suffered by the applicant as explained by the medical evidence presented in the application. As to how to treat that evidence in relation to bail, there are two approaches:-

1. Given that the Court takes the view that remain in custody is necessary in the particular circumstances argued before it in the earlier application, whether that decision should be changed as a result of the application of the discretion of the Court in the way of general mercy arising from execessive suffering which can be said to outweigh the danger of releasing the applicant on bond for whatever reason that decision was taken. In this case that decision was taken on grounds that, amongst others there was a danger of the applicant committing offences whilst on bail. There should be no mistake about what is suggested and already accepted by this Court to be a danger. The applicant is charged with offences which allege that he did certain acts with an intention to bring into hatred or contempt or to excite disaffection against the Government of Kenya as by law established. It is not for this Court to try this charge, but to have in mind that in the state has moved itself to present those charges before the court. This court is not unware of speculation circulating in the country and outside as to the likelihood of success of such a prosecution, but such speculation is totally irrelevant to these proceedings. It is interesting to notice that in these application only one point of law has been argued to indicate that there is no likelihood of success of the prosecution, relating to the consent to prosecute. I have dealt with that point of law and ruled against Mr Nowrojee’s submissions.

Nor does what “I have said above mean that I am convinced the State will succeed: I do not know, and that is not relevant either. One of the considerations set forward for consideration for bail in the, with respect, admirable ruling of Chesoni, J as he then was in Nganga v Rep Misc Application 61 of 1981, which ruling I have followed on many previous occasions is the strength of the prosecution case. That ground is not an invitation to the parties to argue the whole case before the Court considering bail, but there might be circumstances in which the Court considering bail could see, without hearing the evidence, that there was nothing in the prosecution case. Mr Nowrojee thought that he had found one such point in the earlier application for bail by Mr Imanyara, but I found that he was wrong.

And, I repeat, speculation in this matter is irrelevant. There is nothing before me to indicate that I should take into consideration the strength of the prosecution case in considering the bail. All I should consider is the obvious difficulty the applicant has suffered whilst in remand as against the obvious

danger to which I referred in the earlier application of commission of the offence whilst on bail. In view of the nature of the offence which I feared may be committed whilst on bail, I take the view that I would have to be convinced that there were very real medical problems which could not be dealt with whilst the applicant was in custody before I would consider that the discretion for mercy would outweigh the danger above mentioned.

2. In recent cases on the subject I have considered the same point to which I have come in 1 above. I would accept that there are circumstances arising from medical problems in which it would be either unfair or impractical to continue remand in custody, I would for instance consider the position very carefully indeed if the medical facts showed that an operation was necessary for there are other considerations to apply in those circumstances.

It is therefore right in these cases to consider the way in which the remand of the accused has been conducted in so far as the prison is concerned, the way in which medical facilities for the particular problem of the accused in question can be and have been provided as at the time of application.

Therefore both considerations come down to the same thing: does the particular medical problem of the accused outweigh in a general sense the risk of releasing him on bail already established, and as an indicator to that, can the medical problem be dealt with whilst in remand.

I turn now to consideration of the medical condition of the applicant. I start by once again being forced to refer to speculation inside and outside Kenya which has been based upon the possibility that Mr Imanyara has suffered brain damage whilst in custody. The conclusion which has been leapt to is that he was assaulted whilst in his cell. I am happy to dispel this misconception. There is no medical evidence whatever of such a misconception and those representing Mr Imanyara, who must have been aware that proof of such an allegation would have had a great effect on my mind in this application have not put such a suggestion forward. It was Dr Kuria who started the medical ball rolling with a report dated the 17th April, 1991 when he saw Mr Imanyara and examined him for a complaint of migraine and he came to the conclusion that he was suffering from migraine which was leading to loss of consciousness. He was also suffering from hypertension, sinusitis due to a problem which required surgery, but not urgent surgery and neuralgia. The most serious problem was that he was concerned that Mr Imanyara might be developing temporal lobe epilepsy.

His recommendations were for various tests to be carried out and he concluded his report by saying that he discussed his examination with Dr Owino, the Prison Medical Officer of Health and entered his comments and recommendations in the prison entry note book.

It does not appear that anyone took any notice, for not only was Mr Imanyara brought to court from custody on the 19th April, 1991, but he was returned to the remand prison after he had a fainting fit in the cells. It was as a result of that event that Dr Kuria was called in the afternoon of the 19th April, 1991. Dr Kuria examined him in the remand prison.

Dr Kuria now became very concerned about Mr Imanyara and recommended that he be seen by a neurologist. Amongst the many tests which now Dr Kuria thought to be necessary was a CAT Scan. In fact the recommendation was quite rightly, for practically every test associated with such problems.

These reports were produced before the learned Chief Magistrate during bail applications made before him. It was not until the 23rd April, 1991 that Dr Kioy, the Consultant Neurologist, and Neurophysiologist at Kenyatta Hospital made a report on Mr Imanyara for the Court, and he also was very concerned by his condition. He agreed with much of what Dr Kuria was concerned about, and

recommended much the same tests. He also added that there was a real possibility of an intracranial structural abnormality which was presenting as migraine.

Pausing there for a moment, it to be noted that whilst both of his doctors acknowledge that there was something going on which needed to be investigated and in respect of which they both had their separate ideas as to the cause, nevertheless nothing definite could be said as to the care required or the cause of the problem until the tests were completed. Meanwhile Mr Imanyara was kept in Kenyatta National Hospital under observation and drugs prescribed for the various problems which he was presenting.

It was at this stage in the medical history that I started hearing this bail application, and although Dr Khaminwa submitted that as a general proposition it was clear that Mr Imanyara should be released on bail due to his medical condition, and that there was no necessity to await the reports from the tests which had been ordered, I took the view that it was time that speculation on Mr Imanyara's condition was ended so that I could exercise my discretion based upon medical facts as far as possible and I adjourned to await those results.

Dr Kioy presented a report dated the 6th May, 1991 which was an axact copy of his earlier report with the addition of some later observations which included the fact that whilst in Kenyatta National Hospital Mr Imanyara remained stable, did not have any fits, and was much improved. He had one migraine headache on the 6th May, 1991. He had a nasal blockage which was reviewed and treated, and one occasion of mildly elevated blood pressure.

He set out in his report the result of investigations: EEC and EEG tests were normal as were blood sugar, urine and blood tests. In particular the matter which was worrying me the most, the CAT Scan was also normal. These tests quite obviously removed many of the causes of concern of Mr Imanyara's health, although they still leave a question mark.

Mr Kioy however in his conclusion thought that Mr Imanyara might be suffering seizures as a result of functional abnormalities, and prescribed anticonvulsant and migraine prophylactic drugs, for a prolonged period. He pointed out that frequent medical reviews would be necessary to calibrate doses and pointed out the need for a proper medical history, on the basis that since Mr Imanyara became unconscious during seizures he would need someone near by him constantly to document the problems. He pointed out that the risk of seizures could not be considered to be past until the patient had been free from seizures for several years and situations should be avoided where loss of consciousness might result in injury of loss of life.

What I distil from all this is that Mr Imanyara is still in danger of suffering fits and that those fits could cause him injury or loss of life. Those fits can and have been controlled during his time at Kenyatta National Hospital, but it is quite clear that the conditions in remand are such, whatever the reason, as to exaggerate those fits and whatever I do in this application must be based upon this conclusion.

It was because of this that I asked Mr Etyang to obtain instructions and to give undertakings as to how Mr Imanyara would be handled if he were released from Kenyatta National Hospital and returned to the remand prison . Those undertakings related to whether he would be kept in solitary confinement which has obviously contributed to his condition, and whether he would be allowed the necessary exercise recommended by the doctors and visits from his lawyer, his doctor and his family. The undertakings were forthcoming. I accept them and I view the whole situation in the light of them and everything which is available to me as evidence and not as speculation and I conclude as follows:-

Experience has shown in past cases that the sort of observation, regular diet etc, but in particular the perhaps finicky but necessary observation and recording which Mr Kioy recommends are extremely difficult for the prison's staff to undertake. Even in this case unknown problems seem to have intervened to delay Mr Imanyara's obviously necessary removal from court direct to hospital after his fit at the Law Courts. It is absolutely clear from Mr Kioy's report that the cause of these problems is still not known, and if it is to be known then poor observation must be available to his medical advisers. I am not satisfied that the prison authorities will be able to provide the facilities which are clearly absolutely necessary in this case.

On the other hand, neither am I convinced that the situation as it appears from the evidence before me now the tests have been conducted is sufficiently serious for me to say that with the facilities available, namely Kenyatta National Hospital, Mr Imanyara cannot be maintained and investigated in custody. It will be remembered that far above in this ruling that was the test I set myself.

In simple terms then I find on the evidence before me that weighing everything together Mr Imanyara should remain in custody if his place of custody is to be under the care of Kenyatta National Hospital but not if he is to be returned to remand prison.

Before I make the necessary order in this case, I wish to extend my gratitude to both doctors for their assistance. The sort of reports I have before me are clearly unbiased assessments based on the best of information available at the time the reports were written, and are a welcome change.

I accordingly dismiss this application on condition that Mr Imanyara remain in custody at Kenyatta National Hospital. Should the authorities there as a medical consideration which is not a matter for me decided that he should not remain there then I would invite further application on this matter on behalf of the applicant.