



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
MISC. APPLICATION NO 8 OF 2015
DUKE MAKORI ORINA ALIAS CAPTAIN.....APPLICANT
=VERSUS=
REPUBLIC.....RESPONDENT

RULING

This application dated **30th September 2015** is brought by Duke Makori Orina Alias Captain. The application is brought under **Article 49 (1)** and **SS. 81, 123(3)** and **362** of the **Criminal Procedure Code**.

He prays as follows:

1. *For admission to bail pending his trial*
2. *For declaration that the proceedings of **15th July,2015** was a nullity as the case proceeded in the absence of the applicant.*
3. *Alternatively and without prejudice to prayer (2) above, this court calls for **KEROKA PM's COURT CRIMINAL CASE NO. 378 OF 2015** for the purposes of revision.*
4. *For transfer of the said **KEROKA PM'S COURT CRIMINAL CASE NO. 378 OF 2015** from **KEROKA LAW COURTS** to **NYAMIRA LAW COURTS**.*

His grounds are as follows:

1. *Under **Section 123 (3)** this Honourable Court has unlimited powers to admit the Applicant to bail.*
2. *Under **Article 49(i) (h)** requires that any person is to be released on bond or bail on reasonable conditions pending charge or trial unless there are compelling reasons.*
3. *The Applicant faces the charges of obtaining money by false pretences contrary to **Section 313** of the **Penal Code** in the lower court and the offences are bailable.*
4. *The Applicant first appeared in the Magistrate's Court for plea on **30.03.2015**.*
5. *The Applicant was not given bond until on or about **08.04.2015** when police added more charges and*

then the Applicant was granted bond of Kshs. 300000/= plus one surety of the like amount.

6. One of the Complainants in the case stood surety for the accused and accused was released on bond and case fixed for hearing on 15.07.2015

7. The Applicant developed High Blood Pressure (Hypertension)

8. In the month of June, while staying at Kericho, he became seriously sick and he sought medication at **Kericho District Hospital** and he was in and out for the control of the pressure.

9. The Applicant did not attend court on 15.07.2015 because he was still seeking medication at Kericho District Hospital. A warrant of arrest was issued. The court took the evidence of two witnesses in the absence of the Applicant.

10. On or **about 15.07.2015**, the said surety applied to withdraw from standing in as the Applicant's Surety.

11. When the Applicant left hospital on **18.08.2015**, he was arrested on **19.08.2015** and taken to **Keroka Law Courts** under warrant.

12. The Applicant through his Lawyers presented the treatment notes to Court and the DCIO Kericho request that the Applicant be remanded at Kisii GK Prisons to enable him find out whether the Applicant had committed any offence while out on bond.

13. Thereafter the case was mentioned severally.

14. On **29.09.2015**, the Court despite admitting the treatment notes refused to lift the warrants of arrest and even when the DCIO Kericho had said there is no complaint against the Applicant and instead the Court has reserved its ruling and remanded the Applicant once again at Kisii GK Prisons.

15. The treatment notes are in the Court file and the Applicant has no any other copies.

16. This Court has powers to recall for and examine the records of any criminal proceedings before any subordinate Court for purposes of satisfying itself as to the correctness, legality or propriety of finding sentence or order recorded or passed and as to the regularity of any proceedings of any such Subordinate Court.

17. The magistrate has ignored the bail and bond policy Guidelines of **March 2015** by National Council on the Administration of Justice.

18. It is apparent that the Court misunderstood the procedure in **Criminal Proceedings** and/or he believed extrenous facts or was influenced by some information or remarks by the Prosecutor.

19. The Magistrate is bent towards punishing the Applicant who he knows is sick and has even made orders for him to be taken to hospital.

20. It is only fair and just that this Honourable Court do grant this Application.

The applicant was charged in a Keroka Court for obtaining money by false pretence contrary to **Section 313** of the **Penal Code**. The particulars thereof that **DUKE MAKORI ORINA** on diverse dates between

11th March, 2015 and **27th March, 2015**, at Ramasha market, in Masaba South District, within Kisii County, with intent to defraud obtained Kshs.153,730/= from **ROSE AKINYI**, by falsely pretending that he was in a position to supply, 30 bags of sugar, 10 bags of 25kg sugar and 10 bags of 50kg rice to **ROSE AKINYI**, a fact he knew to be false.

Under Article 49(1) (h), it says:

An arrested person has the right:-

"(h) to be released on bond or bail, on reasonable conditions pending a charge or a trial, unless there are compelling reasons not to be released"

This is a Constitutional right and the Constitution overrides other provisions of the law .The right to liberty is also paramount. The accused person is also presumed innocent.

The respondent counsel **Mr. Malesi** for the DPP, had no objection to the application and supported the relief sought by the applicant.

Accordingly, this court will give a personal bond of **Kshs.50,000/=** pending the hearing of the applicant's case. The surety to be approved by the Deputy Registrar of this Court.

Upon the immediate release the applicant will be expected to report to court for mention of his case monthly until the hearing and determination of his case or until further orders.

Further, this court will declare the proceedings of 15th July, 2015 as a nullity as the case proceeded in the absence of the applicant.

As the consequence of declaring the said proceedings as a nullity, this case **CRIMINAL CASE NO. 378 OF 2015** hereby is transferred to **NYAMIRA LAW COURTS** for hearing de novo and determination.

It is so ordered

Dated and delivered at Nyamira on this 19th day of October 2015.

C. B. NAGILLAH

JUDGE

In the presence of:

.....**for the Applicant**

.....**for the Respondent**

.....**court clerk**