REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC CRIMINAL APPLN NO. E202 OF 2021

GEOFFREY MWANGI KAMANDE ..... APPLICANT

VERSUS

REPUBLIC ..... RESPONDENT

RULING

1. By way of a Notice of Motion dated 24th June 2021, the applicant, *Geoffrey Mwangi Kamande*, approached this court's seeking revision of the trial court's decision in a ruling dated 22nd December 2020 in which he was denied bail or bond in Makadara Chief Magistrate's Court Criminal Case No. 749 of 2020. He prayed that the ruling be revised and that this court admits him to bond or bail on terms it finds just.

2. In the grounds premising the motion and in the depositions made in his supporting affidavit, the applicant averred that on 17th February 2020, he was jointly charged with one *Paul Njoroge Muthoni* in two counts with the offences of attempted robbery with violence contrary to *Section 297 (2)* of the *Penal Code* and breaking into a building with intent to commit a felony contrary to *Section 307* of the *Penal Code*; that in the impugned ruling, the learned trial magistrate failed to exercise his discretion judiciously and discriminated against him by granting his co-accused bond of KShs.500,000 with one surety of similar amount to enable him access treatment but denied him bond although he also required treatment.

3. According to the applicant, the decision to deny him bond till after the complainant testified was based *inter alia* on allegations that he had threatened the complainant which allegations were not proved and have not been proved todate though the police were directed to investigate the allegations; that the offences he was facing are bailable and this court has original jurisdiction and discretion to grant him bail or bond. The applicant pledged to abide by any terms imposed by this court as a precondition to bond and promised not to abscond if admitted to bond.

4. The application is contested by the state through grounds of opposition dated and filed on 20th September 2021. The respondent asserted that the right to bail under *Article 49 (1) (h)* of the Constitution of Kenya, 2010 is not absolute; that the trial court's refusal to grant the applicant bond was within the law and that the application amounted to an abuse of the court process as the applicant was aware that the trial court would review its decision once the complaint testified.

5. The application was prosecuted by way of oral submissions. Learned counsel *Mr. Ngugi* represented the applicant while learned prosecuting counsel *Ms Chege* appeared for the state.

6. In his submissions, learned counsel *Mr. Ngugi* reiterated and expounded on the depositions made by the applicant in the supporting affidavit and in addition submitted that the trial court's decision in so far as the applicant was concerned was not only discriminatory but was unfair since the applicant has been in remand since 17th February 2020 and it is not known when the complainant will testify.

7. Counsel further submitted that liberty is precious and there are no compelling reasons to justify continued denial of bond to the applicant until the complainant testifies.

He invited the court to note that no evidence has been availed to prove that the applicant actually threatened the complainant as alleged and urged the court to allow the application and admit the applicant to bond.

8. In opposing the application, learned prosecuting counsel *Ms Chege* submitted that the right to bond was not absolute. She supported the trial court's decision on grounds that it was based on a prebail report which confirmed that the applicant was a flight risk; she conceded that the complainant's allegations of threats by the applicant were supposed to be investigated and that todate, the investigating officer was yet to submit a report to the trial court on his findings regarding the truth or otherwise of the allegations.

She urged the court to dismiss the application for lack of merit.

9. I have carefully considered the application and the rival oral submissions made on behalf of both parties. I have also read the original record of the trial court.

I find that as the application invokes the revisional jurisdiction of this court, they key issue that arises for my determination is whether the application meets the threshold of the parameters within which this court's revisional jurisdiction should be exercised.

10. The revisional jurisdiction of this court is donated by *Section 362* of the *Criminal Procedure Code* which provides that:

"The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court."

11. From the above provision, it is clear that the court can only revise orders or decisions of the lower court if it was satisfied that they were tainted with illegality, errors of law or impropriety or that there was irregularity in the proceedings which gave rise to the impugned order, finding or decision.

12. The trial court's record shows that on 24th February 2020, after the applicant and his co-accused took plea and denied the charges preferred against them, the trial court upon application by counsel on record for the applicant's co-accused (accused 1) granted accused 1 bond of KShs.500,000 with one surety of like amount noting that his health was in bad shape as he could not move on his own and had to be carried to court. He specified that he had guaranteed accused 1 bond to enable him seek treatment.

13. The learned magistrate in the same vein ordered that accused 2 (applicant) will remain in custody to await a report by the investigating officer about alleged threats made to the complainant. This is despite the fact that on 17th February 2020 when the applicant and his co-accused were first arraigned in court, the prosecution brought to the trial court's attention that both accused persons had been injured and on confirming this fact, the trial court deferred taking of plea and ordered that both of them be taken to hospital immediately for treatment.

14. The record further shows that in response to a second bail application on behalf of the applicant by his learned counsel, the trial court ordered for filing of a prebail report on the strength of which the learned trial magistrate declined to admit the applicant to bond mainly on grounds that it was satisfied that the applicant was a flight risk. The finding was based on a claim in the prebail report that the applicant had failed to give accurate information about his family to the probation officer. The learned trial magistrate concluded his ruling as follows:

"…. the accused has a duty to give accurate information about himself. Being economical with his details makes one think that he is a flight risk. Thus the bond terms in place remains. But will only come to effect after the complainant has testified and am assured that accused 2 cannot interfere with the accused."

Here, I think reference to the accused on the last sentence was a slip of the pen. The trial must have meant to refer to the

complainant.

15. Prior to making the above ruling, the complainant had stated on oath that he feared for his life allegedly because a person had blocked his path twice and pointed a finger at him; that he had reported the matter to the police for investigations.

16. Having summarized the background against which the applicant was denied bond and the reasons cited by the learned trial magistrate for his decision, I think it is important to reflect on the law that governs the grant of bond or bail to an accused person. Under *Article 49 (1) (h)* of the *Constitution*, an arrested person has a constitutional right to be admitted to bond or bail pending a charge or trial unless compelling reasons exist to justify denial of that right.

17. The Constitution has not defined what constitutes compelling reasons but the term "compelling" has been defined *in Black's Law Dictionary 10th Edition* as:

"to cause or bring about by force, threats or overwhelming pressure; to convince a court that there is only one possible resolution of a legal dispute."

18. It is now settled law that the onus of proving the existence of compelling reasons where the prosecution was opposed to grant of bond lies squarely on the prosecution. Taking the definition of the phrase "compelling" as shown above, it means that for the prosecution to demonstrate compelling reasons, it must present before the court sufficient evidence to prove the claims made in opposition to bond pending trial. Considering that denial of bond/bail amounts to a limitation of an accused person's constitutional right to liberty, bail as a general rule should not be denied on flimsy grounds or on the basis of unsubstantiated allegations.

19. In this case, I find that the learned trial magistrate erred on three fronts when he suspended the applicant's right to bond until the complainant testified. First, the learned trial magistrate relied on allegations of threats on the complainant's life whose truth or otherwise were not ascertained since the investigating officer had not filed a report of his findings by the time the trial court delivered its ruling. This in effect means that the complainant's allegations were not based on any evidence and in any event, there was no claim leave alone proof that the applicant was in any way connected to the alleged threats. The applicant was still in custody at the time the complainant alleged threats on his life and the prosecution did not demonstrate how the applicant would have been responsible for the alleged threats.

20. Secondly, in declining to admit the applicant to bond, the learned trial magistrate heavily relied on the contents of a prebail report which introduced another dimension to the matter that the applicant was a flight risk even though the prosecution which had the duty of proving existence of compelling reasons to justify denial of bond had not claimed that the applicant was a flight risk. Moreover, the reasons relied upon by the trial court to arrive at the conclusion that the applicant was a flight risk were based on pure speculation.

21. Thirdly and more importantly, the learned trial magistrate in admitting the applicant's co-accused to bond pending trial and declining to do the same for the applicant despite having noted earlier that both of them had suffered injuries prior to their arraignment in court amounted to discrimination of the applicant and violated his constitutional right to equal benefit and equal protection of the law enshrined in *Article 27 (1)* and *(2)* of the Constitution.

22. In my view, the learned trial magistrate wrongly exercised his discretion by failing to give both accused persons equal treatment whereas they faced the same charges and although the 1st accused had far more serious injuries than the applicant, the applicant also had some health challenges which the trial court should have considered.

23. Besides, the learned trial magistrate failed to give any reason why he found it necessary to suspend bond or bail in respect of the applicant and not his co-accused until the complainant testified when it was clear that the alleged threats on the complainant's life were not attributed to the applicant only but were made in general terms.

24. For the foregoing reasons, I am satisfied that the trial court made several errors and wrongly exercised its discretion in denying the applicant the exercise of his right to bond pending trial at the earliest opportunity. This court in its supervisory jurisdiction is duty bound to correct those errors by exercising its power of revision under *Section 362* as read with *Section 364 (1) (b)* of the *Criminal Procedure Code* and *Section 123 (3)* of the *Criminal Procedure Code* which *inter alia* grants this court jurisdiction to

direct that an accused person be admitted to bail or bond pending trial.

25. I consequently find merit in the application and it is hereby allowed on terms that the orders made by the trial court in the ruling delivered on 22nd December 2020 are hereby set aside. They are substituted by orders of this court granting the applicant bond in the sum of KShs.500,000 together with one surety of the same amount which are the terms that were granted to his co-accused. The surety shall be approved by the trial court.

26. Lastly, I direct that the original record be returned to the trial court for trial to be conducted expeditiously.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 8TH DAY OF OCTOBER 2021.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Byamukama holding brief for Mr. Ngugi for the applicant

Ms Chege for the respondent

Ms Karwitha: Court Assistant