



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CRIMINAL APPLICATION NO. E039 OF 2021

ADAN DIBA RAMATA.....1ST APPELLANT

GUYO SIKO OGOSO.....2ND APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. The Applicants herein have been charged with the offence of; trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 2019 herein “the Act. The particulars thereof states that, on 11th day of November, 2020, at Kisima area in Maralal Sub-county within Samburu County, they jointly with others not before court, trafficked in narcotic drugs namely; cannabis(bhang) to wit 697 kilograms, with a market value of; Ksh20,910,000, by conveying in a motor vehicle registration number; KCG 271K Mitsubishi Lorry, and in contravention with the provisions of the Act.

2. Upon arraignment in court and the charge being read out, each pleaded not guilty. The court then ordered for pre-bail report and fixed the matter for mention on 19th November 2020, for further orders. Subsequently, the reports were filed in court. Thereafter, the learned counsels, Mr Bosire for the Applicants and State Prosecutor; Nora, addressed the trial court on bail and bond terms. The court delivered its ruling dated 27th November 2020, on the same.

3. In determining the reasonable terms of bail and bond, the court was in agreement with the defence submissions that, none of the Applicants is flight risk. It also took into account the value of the narcotic drugs and granted each accused bond of; Kshs3,000,000 with two sureties of similar sum. It further ordered that, each Applicant deposits their travel documents with the investigating officer and not leave the jurisdiction of the court without prior notice and permission of the court and the investigating officer. That, the border points authorities to be notified of the same.

4. On the 7th January 2021, the learned defence counsel applied for review of the bail and bond terms, so that, the same is reduced to Kshs1,000,000 and one surety. In response, the prosecution stated that; the bond terms are sufficient and should be maintained. On 28th January 2021, the trial court rendered its decision and stated that,

“Although the applicants enjoy the presumption of innocence, the bail and bond terms also ought not to be unreasonable low, and as such, the alleged penalty and value of the alleged narcotic drugs, though subject to proof, is a relevant consideration in determining reasonableness of the bond terms. The application is not merited at this stage, but the defence is at liberty to renew their application once the hearing of the case kicks off and the court gets more informed of the case, as the same progresses”

5. The application for bail was consequently rejected. It is against this background and/or the ruling that, the Applicants have filed this application dated 3rd February 2021, seeking for orders that:

- a. The ruling of the Chief Magistrate’s Court made on 29th January in case No. MCCR/E035/2020 of 2020, on cash bail and bond be revised;
- b. The Applicants be granted reasonable cash bail and bond in respect of case; No. MCCR/E035/2020, to be ascertained by the Honourable court;
- c. Costs of the application be provided for.

6. The application is based on the provisions of; Articles 25(c), 49(1) (h), 50(1), Article 165 (6) & (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.

7. It is supported by the grounds on the face of it and the affidavits sworn by the Applicants jointly with the annexures thereto. The Applicants aver that, after they sought for bail and bond, the prosecution did not oppose the same, save to request that, the same be granted subject to consideration of the value of the subject matter, being Kshs20,000,000, surrender of their passports and restrictions on the movement from the jurisdiction of the court.

8. That the bail and bond terms granted in the subject suit were made erroneously, in that, instead of relying on the favourable probation reports, the court put reliance upon the "suspicions that the suspects were alleged to have been direct beneficiaries of these crimes which is not the case".

9. Further, the bail and bond terms are exorbitant, taking into account; each Applicant's personal circumstances, the depressed economic environment arising out of the effects of; Covid-19, and the fact that, they are not in employment. That despite all reasonable attempts made, they have failed to raise the bail and bond terms. The Applicants reiterated that, they are not flight risk and are ready and willing to abide with any conditions the court may impose and prayed that bail and bond terms be revised downwards and an order be made for one surety.

10. However, the Respondent did not file a formal respond to the application but relied to submissions dated 4th March 2021, in response to the averments in the affidavit supporting the application and the submissions dated 1st March 2021. The Applicants referred to the case of; Moses Kusaine Lenolkulal Vs Republic ACEC Revision No. 7 of 2019, arguing that, in that case the superior court intervened and set aside "exorbitant bond terms." The court was invited to take cognizance of the individual capacity of each accused to meet bond terms and their right to a fair trial under Article 50 of the Constitution of Kenya. 2010.

11. However, the Respondent 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 court should consider the "Bail and Bond Policy" guidelines that govern grant of bond and bail.

12. That, although the accused persons are presumed innocent, the court must also consider the seriousness of the offence of; trafficking in narcotic drugs and give bail and bond terms, with stringent conditions that will ensure they will attend trial.

13. Having considered the application and the submission tendered, I find that, the main issue to determine in any bail and bond application and/or setting of the terms therefore is; the balance between the accused's constitutional right to bail and bond and the need to ensure that, the accused will attend the trial.

14. In that regard, before setting the bond terms, the first starting point is to recognize the fact that, an accused person is presumed innocent until proved guilty. Similarly, each accused has a constitutional right to bail and bond unless there are compelling reasons to deny the accused the bail and bond.

15. The bail and bond terms set must take into account, inter alia; the gravity of the offence, value of the subject matter, personal circumstances of the accused to meet the terms set. Additionally, whether the accused has previously been accorded bail and bond terms and how the accused favoured on the same and/or whether the accused is a flight risk. The issue of public interest cannot also be ignored, though it cannot override the accused's right to reasonable bail and bond terms, based on the principle of presumption of innocence.

16. In the instant case, the prosecution did not oppose the bail and bond application. Further, the trial court concurred with the defence that, the Applicants are not flight risk. The pre- bail assessment reports gave details of the Applicants personal circumstances; as persons of meagre means.

17. The value of the subject matter herein is; Kshs 20, 910,000, which is subject to proof. Based on the presumption of innocence, the Applicants cannot shoulder 100% liability thereof. The bail and bond terms granted herein are; Kshs 3,000,000 for each Applicant plus two (2) sureties. Thus, each has a liability of; Kshs 9,000,000 totaling; Kshs 18,000,000, which is over 50% or approximately 80% of the value of the subject matter. The scale of justice is not balancing.

18. It therefore follows that, as much as the trial court has the discretion to assess and grant bail and bond terms, unless there are circumstances that warrant those bond terms, the least each Applicant would be held liable to at most is a value of; Kshs, 2, 500, 000, plus one surety of similar amount, giving a total liability at Kshs, 10,000,000. Of course as stated herein, the trial court is at liberty to consider a lesser or high amount, subject to justification.

19. Indeed, I note that, the trial court has indicated that, the Applicants can seek for review of the bail terms as the case progresses. However, it is not clear how soon the case will proceed. In the given circumstances, I find, it is in the interest of justice to revise and/or review the bond terms given in the trial court.

20. I therefore order that, each Applicant will be released on personal bail and bond 2,500,000, plus one surety of similar amount. All the other conditions imposed shall remain the same. The sureties shall be processed by the trial court. Further, all subsequent applications for review shall be made before the trial court.

21. Those then are the orders of the court.

DATED, DELIVERED VIRTUALLY AND SIGNED ON THIS 25TH DAY OF MARCH, 2021

GRACE L. NZIOKA

JUDGE

In the Presence of:

Mr Bosire for the Applicant

Mr Kiragu for the Respondent

Edwin Ombuna: Court Assistant