



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL DIVISION

CRIMINAL REVISION NO. E018 OF 2021

BETWEEN

BWANA SAID ABOOBAKAR.....1ST APPLICANT

MWANASOMO MOHAMED BAKARI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Application.

1. By a Notice of Motion Application dated 10th March, 2021, brought under Article 49 (1) (h) of the Constitution of Kenya, 2010 and Section 123 (3) of the Criminal Procedure Code, BWANA SAID ABOOBAKAR and MWANASOMO MOHAMED BAKARI (*the Applicants*) prays for the following order: -

1. **THAT** this Honourable Court be pleased to order that the Applicants herein be released on bond and or granted bail on such terms as the Court may deem fit.

2. The application is premised on the grounds on the face of the application and the supporting affidavit of Jared O. Magolo, Counsel for the Applicants herein sworn on 10th March, 2021. The Applicants case is that the Applicants have been charged in Criminal Case No. E514 of 2021 before the Senior Resident Magistrate Mombasa. That they made an application to be released on bail before the subordinate Court but the same was denied with no valid grounds at all.

3. The Applicants aver that there is nothing to warrant the breach of their right to bail since the Respondent has not even demonstrated that the Applicants are unwilling to attend trial or that there are exceptional circumstances. The Applicants also aver that the hearing of the matter before the subordinate Court may or may not commence on 19th and 20th May, 2021.

4. In response thereto, the Respondent filed grounds of opposition dated 22nd March, 2021. The Respondent aver that the application is frivolous, vexatious, an abuse of the Court process and is meant to circumvent the proper discretion of the Trial Court. It also averred that the application failed to demonstrate that the trial Court acted in bad faith in denying the Applicants bond application.

5. The Respondent contended that by failing to disclose the compelling reasons for the denial of bond, the application does not enjoy the provisions under the Constitution of Kenya. The Respondent relied on the replying affidavit sworn by PC. Bernard Langat in opposition to the Applicants being admitted to bond. Accordingly, the Respondent prayed that the application dated 10th March, 2021, be dismissed. The application was argued orally in Court on 23rd March, 2021

Submissions.

6. **Mr Magolo** submitted on behalf of the Applicants, that the application has been brought under the provisions of Section 123 (3) of the Criminal Procedure Code which gives the High Court authority to interfere with bond terms given by subordinate Courts or even give bond. Counsel submitted that the Applicants are charged with offence of trafficking which is bailable.

7. Counsel submitted that initially, the Applicants were brought to Court under a Miscellaneous Application where the Police sought for 3 days to complete their investigations. When arraigned in Court, an affidavit objecting to release on bond was filed. Counsel further submitted

that the said affidavit does not raise compelling reasons neither does it give reason that the Applicants who are husband and wife will flee from jurisdiction of the Court.

8. **Mr. Magolo** submitted that the trial Magistrate dismissed all the reasons but went ahead to deny bond on grounds that investigations are pending. He further submitted that there is no affidavit by the respondent giving factual reasons why the Applicants should not be granted bond. He urged the Court to exercise jurisdiction and find that there is no reason to deny the Applicants bond. **Mr. Magolo** submitted that since the Applicants are husband and wife therefore, the Court should consider that this is a situation where a family is held in custody and the only document shown to the Court is a charge sheet.

9. It was submitted by Mr. Magolo that no overwhelming evidence has been availed before the Court and that Article 49 and 50 do not envisage a situation where bond is denied without demonstration of overwhelming evidence. He further submitted that precautions can be taken to ensure Applicants don't abscond, he therefore urged this Court to give conditions that will ensure that the Applicants attend Court since they are ready to comply with any conditions and terms given by the Court.

10. **Ms. Karanja** on the other hand submitted that it is impossible not to make reference of what has happened in the lower Court and that the lower Court is in a better position to handle the issue of bond. She also submitted that they can't tell if the prosecution evidence reveals a serious issue therefore the Court should not micromanage the trial Court's affairs.

11. Counsel further submitted that the respondent relies on the affidavit filed in the lower Court which presented compelling reasons to warrant denial of bond. It was submitted by **Ms. Karanja** that the respondent is apprehensive that if the Applicants are released on bond, they may interfere with collection of evidence and obstruct justice. She urged this Court to dismiss the application herein.

12. **Mr. Magolo** in response to the respondent's submissions submitted that granting bond cannot be termed as micro managing or interfering with exercise of discretion. He submitted that if at all any evidence has been supplied, the respondent should have stated so in an affidavit which has not been done. He further submitted that the trial Court's finding does not pinpoint what the compelling reasons are neither does it state how ongoing investigations will be interfered with if the Applicants are released on bond.

Analysis and Determination.

13. I have considered the notice of motion, the grounds of opposition together with the affidavit by PC Bernard Langat and the oral arguments by counsel in this matter. The issue for determination is whether the application dated 10th March, 2021 is merited. This Court has powers to grant bail pending trial, as provided for under Section 123(3) of the Criminal Procedure Code as follows;

“The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”

14. It is trite law that in determining whether or not to grant bail pending trial, the main issue for consideration is whether the accused will attend Court during the pendency of the trial. This position was set out in the case of **Republic –Vs- Danson Mgunya & Another [2010] eKLR** when M.K. Ibrahim J (as he then was) held as follows:

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanor, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”

15. It is noteworthy that Article 49(1)(h) of the Constitution of Kenya 2010 provides that an arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not be released. One of the compelling reasons that may warrant a denial of bail found under Section 123(2) of the Criminal Procedure Code, is the character and antecedent of an accused person.

16. In light of the above, it is my understanding that most importantly, the court must consider whether or not the accused will attend court if so released on bail pending trial, though the court may take into consideration other factors, such as the serious nature of the charges facing the accused, and antecedents of the accused's arrest and subsequent arraignment in court, such considerations should not outweigh the primary consideration of ensuring that the accused person will attend court during trial.

17. In the present case, the prosecution's position is that the Applicants have been charged with a very serious offence and in the event of conviction attracts a severe and hefty sentence, that the Applicants are a flight risk and that they don't have a fixed abode and lastly that investigations are still ongoing. On the other hand, the Applicants contend that the prosecution has not raised any compelling reasons to warrant this Court to deny them bond pending trial neither has it suggested that the Applicants will flee from the jurisdiction of the Court if they are released on bond pending trial. The Applicants urged this Court to release them on bond pending trial and that they are ready to comply with any conditions given by the Court.

18. I have looked at the trial Magistrate's Ruling and I agree with her to the extent that denying the Applicants' bond on account that they are facing a very serious charge which attracts a hefty sentence in the event of conviction amounts to inferring guilt yet the Constitution under Article 50 (2) (a) provides that an accused person has the right to be presumed innocent until the contrary is proven. The trial Magistrate also at page 7 of her ruling correctly observed that the Applicants who are husband and wife, have a fixed abode within the jurisdiction of the

Court since they were arrested in their house, a receipt was even produced showing that the 2nd accused person pays rent for the said house.

19. It is my finding that from the material presented by the prosecution, the prosecution failed to prove that the Applicants are a flight risk. The allegation that the Applicants are a flight risk as can be seen in the affidavit by PC Bernard Langat is not supported by any documentation therefore these Court will treat it as mere averments. The Trial Magistrate denied the Applicants bond on ground that there are still ongoing investigations therefore releasing the Applicants on bond at this time will result in interference and obstruction of justice.

20. The prosecution stated that they had recovered some things from the Applicant's house including identification documents and phones for analysis and that they are yet to receive the reports which might lead to further arrests and findings. I note that despite the fact that the prosecution is still conducting further investigations, it is clear that they have recovered what they need from the Applicants with regards to their investigation and are even ready to begin trial on 19th May, 2021. The prosecution has not disclosed and/or explained how the Applicants will interfere with their investigations and/or hinder them from arresting other suspects who are still at large if released on bond. In any event these investigations and or examination of documents are carried out by Government controlled agencies and the prosecution has not brought forth any evidence establishing a link or connection between the Applicants and the said agencies.

21. It is my finding that the trial Magistrate erred in law and principle in finding that the release of the Applicants on bond at this time shall result in interference and obstruction of justice.

22. In the premises therefore, the Court finds that the application dated 10th March, 2021 is merited. The Applicants may be released on a bond of Kshs.2 million with one surety each of a similar amount or in the alternative cash bail Kshs.1 million. with a contact person to undertake in writing that they will ensure Applicants' attendance in Court as and when required. The Applicants also to deposit their original passports in Court. The Applicants shall also be required to seek the trial Court's permission before travelling out of the Court's jurisdiction. Bond approval shall be done by the Trial Magistrate, there shall be no order as to costs.

It is so ordered.

Dated, signed and delivered through e-mail this 25th day of March, 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE