



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.61 OF 2020

ERICK RAMAZANI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Erick Ramazani is facing a raft of charges related to **counterfeiting of currency and forgery of travel documents**. In total, the Applicant is facing seven (7) counts under the **Penal Code**. When he was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. His application to be released on bail pending appeal was disallowed. The trial court ruled that the Applicant would be a flight risk if he is released on bail pending trial, firstly because he is a foreigner, and secondly, because he had no known acquaintances in Kenya.

The Applicant was aggrieved by this decision. He filed an application for revision under **Section 362** of the **Criminal Procedure Code** and **Articles 49(1)(h) & 50(2)(a)** of the **Constitution** seeking to have the decision of the trial court denying him bail revised. The Applicant further pleads with the court to grant him bail pending trial because, in his view, despite being a foreigner, he had relations in Kenya and was not a flight risk. The application was opposed. Chief Inspector Walter Marunga, the investigating officer in the case, swore a replying affidavit in opposition to the application. He reiterated that the Applicant was a foreigner with no fixed abode in Kenya. He had used fictitious names and was therefore a serious flight risk. He urged the court to decline the Applicant's application to be released on bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Ms. Kinuthia for the Applicant and Ms. Nyauncho for the State. Ms. Kinuthia submitted that the law presumed the Applicant innocent until otherwise proven guilty by a court of law. Despite the Applicant being a foreigner, he was entitled to be granted bail pending trial. The Applicant is a Congolese who had sought refugee status in Kenya. She disputes the finding by the trial court to the effect that the Applicant had no fixed abode in Kenya or lacked familial ties in Kenya. She pointed out that the Applicant was related to one of his Kenyan co-accused. They were blessed with a child. She asserted that the fact that the Applicant was a foreigner did not automatically translate to conclusion that he would abscond from the jurisdiction of the court if released on bail pending trial. She cited decided cases where foreigners have been granted bail but on appropriate stringent conditions to secure their attendance in court. She urged the court to allow the Applicant's application for revision and grant him bail pending trial.

Ms. Nyauncho for the State opposed the application. She submitted that the Applicant had been charged with serious offences related to counterfeiting of currency. His country of origin was unknown. The Applicant did not have a fixed place of abode. He was a flight risk. The Applicant had attempted to fraudulently acquire refugee status in Kenya by using someone else's particulars. He could not therefore be trusted to be released on bail pending trial because he was an obvious flight risk. She urged the court to ignore the Applicant's assertion that he had familial relationship in Kenya because he had not provided any proof that he was married to a Kenyan or that he had a child with a Kenyan. In the learned counsel's assessment, the Applicant was dishonest and could not be trusted to attend court should he be released on bail pending trial. In her view, the above facts constituted compelling reasons for this court to deny the Applicant bail pending trial.

The **Constitution** under **Article 49(1)(h)** grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. It provides thus:

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released.”

The **Constitution** does not define what constitutes “**compelling reasons**”. However, **Section 123A** of the **Criminal Procedure Code** provides thus:

“(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding Section 123, in making a decision on bail and bond, the

Court shall have regard to all the relevant circumstances and in particular –

- (a) the nature or seriousness of the offences;
- (b) the character, antecedents, associations and community ties of the accused persons;
- (c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and
- (d) the strength of the evidence of his having committed the offence.

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person-

- (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;
- (b) should be kept in custody for his own protection.”

In Grace Kananu Namulo –vs- Republic [2018] eKLR Odunga, J held thus:

“17. I associate myself with the view expressed by Muriithi, J in Kelly Kases Bunjika vs Republic (supra) that:

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

18. From the constitutional point of view, however an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. The right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in Republic vs William Mwangi Wa Mwangi [2014] eKLR where Muriithi, J held that:

“It is now settled that in the event that the State is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the constitutional right to bail... It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.”

In Republic vs Richard David Alden [2016] eKLR, Lesiit, J held thus in relation to an application for bail which had been made by a foreigner:

“28. I agree that a paramount issue for determination, in considering an application for bail is whether the accused person will avail himself for trial if admitted to bail. I also agree that an accused not being a citizen poses a special challenge to the court, but that is not to say that non-citizens cannot enjoy the rights to be released on bail as enshrined in our Constitution. Art.49(1)(h) is not of limited application and the only condition set there under is a proof of compelling reasons to deny bail. The mere fact the accused is not a Kenyan is not per se a ground to deny bail.

29. In the case of Ahmad Abolafathi Mohammed [2013] eKLR, Achode, J considered the issue of accused persons being a flight risk and having been dishonest about their identities and observed as follows:

“The probability that the respondents may not surrender themselves for trial:

In Daniel Dela Amega vs Republic [2006] eKLR, to which I was referred by learned counsel, Mr. Wandugi, Makhandia J, held that if there is merited fear, that the respondents may abscond if granted bail, then the court would ordinarily refuse to admit such an accused person to bail. In the matter before me it is observed that the respondents are Iranian nationals. While there can be no discrimination against them on grounds of their being foreigners it is a matter of fact that Kenya has not signed an extradition treaty with Iran, and it would therefore, be impossible to prevail upon Iran, to return to its nationals to Kenya to be prosecuted should they abscond and return to Iran.”

In the present application, it was the prosecution's contention that the fact that the Applicant is a foreigner, had no fixed abode, had no familial relationship in Kenya and the fact that he had engaged in fraudulent activities in order to attempt to procure refugee status determination in his favour militated against this court granting him bail pending trial. In essence, the prosecution contends that the Applicant is a flight risk. This, in the prosecution's view, constitutes compelling reason to deny the Applicant bail pending trial. On his part, the Applicant denies the assertion that he is a flight risk. He insists that he has a fixed abode in Kenya. Other than that, he is engaged to a Kenyan who has a child with him. He urged the court not to discriminate against him by the mere fact that he is a foreigner.

This court upon evaluation of the facts of this application formed the view that indeed the Applicant is a flight risk. This court agrees with the Applicant that the mere fact that he is a foreigner should not form a basis for his denial of bail pending trial. However, in his case, the Applicant appears not to have any means to earn a living. Unlike the cases of **Republic –vs- Dwight Sagaray & 4 Others [2013] eKLR** and **Republic –vs- Richard David Alden [2016] eKLR**, the Applicant does not have ties in Kenya that would persuade this court to grant him bail pending trial. This court agrees with the prosecution that taking into consideration the fact that the Applicant's immigration status cannot at the moment be determined, it would be a risk for this court to release him on bail pending trial.

Further, there is anecdotal evidence that the Applicant's actual identity cannot be verified. This court therefore finds no basis to interfere with the finding by the trial court to the effect that to release the Applicant on bail pending trial would be a risky venture. Even if stringent bond terms were imposed, there is no guarantee that the Applicant will attend court when he will be so required to do when the trial will be scheduled for hearing.

For the above reasons, the application lacks merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 5TH DAY OF MARCH 2020

L. KIMARU

JUDGE