

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NOS.162 & 163 OF 2019

MUKTAR IBRAHIM ALI.....1ST APPLICANT

AUGUSTINE MULWA MUSEMBI.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, Muktar Ibrahim Ali and Augustine Mulwa Musembi are facing terrorism related charges brought under the **Prevention of Terrorism Act** before the Chief Magistrate’s Court. The charges, in essence relate to conspiracy and aiding the commission of terrorist acts. When the Applicants were arraigned before the trial magistrate’s court, they pleaded not guilty to the charges. They applied to be released on bail pending trial. Their application was disallowed. In his ruling, the trial magistrate (Hon. K. Cheruiyot – Principal Magistrate) held that there was proof that the accused persons will not avail themselves when required if released on bail or bond owing to the serious charges facing them. He further held that there was proof that the accused persons may interfere with witnesses or any investigations if granted bail or bond. The trial magistrate ruled that these reasons constituted compelling reasons to deny the Applicants bail pending trial. Aggrieved by the decision, the Applicants have applied to this court for a reconsideration of their application to be released on bail pending trial.

The Applicants put forth more or less similar grounds for seeking to have the order rejecting their application to be granted bail pending trial set aside. The Applicants averred that they had a constitutional right to be released on bail pending trial. They further stated that they had been in pre-trial detention for more than three months and their right to enjoy their freedom had unreasonably been infringed. The prosecution had placed no compelling reasons before the court for the court to deny them bail pending trial. They contended that there was no basis for the trial court to have reached the finding that they would not attend court or that they would interfere with witnesses should they be released on bail pending trial. They were willing to abide by any reasonable conditions that this court may impose to enable them to be released on bail pending trial. The application was opposed. Cpl. Bernard Munga attached to the Anti-Terror Police Unit swore a replying affidavit in which he reiterated that due to the serious nature of the charges facing the Applicants, they would abscond from the jurisdiction of the court if released on bail pending trial. In particular, he contended that the 1st Applicant being a resident of Mandera County, a border County, was a flight risk and would abscond from the jurisdiction of the court if granted bail pending trial. He urged the court to consider the public interest in the case.

During the hearing of the application, this court heard oral rival submission made by Mr. Imanyara for the 1st Applicant and by Mr. Okatch for the 2nd Applicant and by Ms. Sigei for the State. This court has carefully considered the said rival arguments. In all cases where the court is called upon to exercise its discretion in regard to whether or not it should grant bail pending trial, the most important consideration is whether the accused will attend court during trial. This point was re-emphasized by the court in **Republic –Vs- Danson Mgunya & Another [2010] eKLR** when M.K. Ibrahim J (as he then was) held thus:

“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 misdemeanour, 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.”

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. The **Constitution** does not define what constitutes “**compelling reasons**”. However, courts have rendered decisions that articulate what constitutes compelling reasons and include the following: *the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with witnesses, the need to protect the victim of crime and the accused person, the relationship between the accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives.* (See **ALHAJI MUJAHID DUKUBO-ASARIN Vs. FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006**). In addition, the **Bail and Bond Policy** recently published by the **National Council on Administration of Justice** requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail.

In the present application, the Applicants contend that they ought to be presumed innocent until proven guilty by a court of law. In that

regard, they have called upon this court to grant them their constitutionally guaranteed right to bail pending trial. They have argued that there are no compelling reasons why they should be denied bail pending trial. On the other hand, the prosecution has argued that the Applicants are facing serious charges which will attract a long term in prison. This, in their view, constitutes compelling reasons to deny the Applicants bail pending trial. They further contend that the Applicants were likely to interfere with witnesses or flee from the jurisdiction of the court if they are granted bail pending trial. In particular, the prosecution contends that the public interest generated by the terrorist attack that led to the Applicants' arrest precluded this court from releasing the Applicants on bail pending trial.

Having read the rival affidavits filed by the parties to this application, and also having considered the submission made before this court and the applicable law, this court formed the view that the prosecution did not establish compelling reasons to deny the Applicants bail pending trial. The Applicants have been charged with peripheral offences related to terrorism. From the affidavits of the investigator, it was apparent that by the time the Applicants were charged, investigations were still ongoing to establish the actual connection between one of the terrorist who was killed in the DUSIT attack and the 1st Applicant. As regard the 2nd Applicant, investigations have been completed. The Applicants are Kenyan citizens. There was no evidence which was placed before the trial magistrate or before this court to suggest that the Applicants will flee from the country if they are released on bail pending trial. There was no evidence placed before this court that the Applicants will likely interfere with prosecution witnesses. Indeed, some of the evidence deemed to be sensitive and which impacts on national security has been withheld from the Applicants. The likelihood that the Applicants will interfere with prosecution witnesses is therefore remote. The concerns raised by the prosecution can be addressed by this court imposing appropriate conditions for the grant of bail pending trial.

In the premises therefore, the Applicants' application for bail pending trial is hereby granted. The Applicants are hereby released on bail of Kshs.5 million with two (2) sureties of the same amount. The Applicants shall be required to report to the Anti-terror Police Unit in Mandera (in respect of the 1st Applicant) and in Nairobi (in respect of the 2nd Applicant) every alternate Monday of the month (two Mondays a month) pending the trial or pending further orders of this court. The parties shall be at liberty to apply. The Applicants shall attend court on the dates that they shall be required failing which the bond granted shall be cancelled. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF APRIL 2019

L. KIMARU

JUDGE