



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MILIMANI**

**CRIMINAL DIVISION**

**CRIMINAL REVISION NO.1 OF 2019**

**LYDIA NYAWIRA MBURU.....APPLICANT**

**VERSES**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Lydia Nyawira Mburu is facing three charges before the Chief Magistrate's Court. The first count is **conspiracy to commit a terrorist act** contrary to **Section 23(2)** as read with **Section 23(4)** of the **Prevention of Terrorism Act, 2012**. The particulars of the offence were that on or before 15<sup>th</sup> February 2018 at unknown place within and outside the Republic of Kenya, jointly with others not before court, conspired to carry out a terrorist act inside Kenya by embedding explosives in motor vehicle Registration Number KBM 200D thereby making the said vehicle be **Vehicle Borne Improvised Explosives Device (VBIED)**. She was also charged with **giving support to a terrorist group** contrary to **Section 9(1)** of the **Prevention of Terrorism Act, 2012**. The particulars of the offence were that on or before the 15<sup>th</sup> February 2018 in Nairobi Central Business District within Nairobi County, Republic of Kenya, jointly with others not before court supported a Gazetted terrorist group namely Al Shabaab, by making a forged Kenyan National Identity Card No.XX bearing the names JIRMA HUKA GALGALO (deceased) who was a member of a Gazetted terrorist group namely Al-Shabaab. She was further charged with **forgery of an official document** contrary to **Section 351 of the Penal Code**. The particulars of the offence were that on or before the 15<sup>th</sup> February 2018 in Nairobi Central Business District, within Nairobi county, Republic of Kenya, jointly with others not before court, forged a certain document to wit a Kenyan National Identity Card No.XX bearing the names JIRMA HUKA GALGALO (deceased) who was a member of a Gazetted terrorist group, namely Al Shabaab, purporting it to be genuine and valid identity card issued by the Registrar of Persons.

When the Applicant was arraigned before the Chief Magistrate's Court, she pleaded not guilty to the charge. Her application to be released on bail pending trial was denied. The trial court held that:

**“Some learned counsels for the defence urged the court to consider the personal circumstances of each accused person and the number of counts facing them in determining whether or not to allow the application. I note that all the accused persons are charged with a joint charge of conspiracy to commit a terrorist act and thereafter some are charged jointly or on separate individual counts. The individual circumstances of each accused person as indicated in the pre bail reports would therefore not be of much assistance in determining whether or not to have them released on bond.”**

Aggrieved by this decision, the Applicant applied to this court for reconsideration of the decision of the trial court denying her bail pending trial under **Article 49(1) (h)** of the **Constitution** alleging that the prosecution had failed to establish compelling reasons. The Applicant argued that the grounds relied on by the trial court to deny her bail pending trial were untenable. The Applicant denied the assertion by the prosecution that she was a danger to national security or that she would abscond from the jurisdiction of the court if she is released on bail pending trial.

During the hearing of the application, Learned Counsel for the Applicant Mr. Chacha submitted that the Applicant is presumed innocent until proven guilty. He stated that the prosecution's objection to the Applicant's application for bail in the trial court was allowed despite not having demonstrated the existence of compelling reasons. He further submitted that the affidavit sworn by the Investigating Officer indicated that the Applicant was an employee of the 4<sup>th</sup> accused in the trial court and that the Applicant was acting under the instructions of her employer. He further stated that this court had granted the Applicant's employer bond with two sureties in the High Court Case No. **John Maina Kiarie and Another vs Republic [2018] eKLR**. The Applicant was aggrieved by the fact that the trial court did not give regard to the pre-bail report. It had brought out a picture of who the Applicant really is. Mr. Chacha urged this court to review the decision made by the trial court in denying the Applicant bail pending trial. He urged the court to also take into consideration the fact that the Applicant is a

person of limited means.

Ms. Aluda for the State opposed the application. She submitted that the circumstances under which bail or bond are granted were different for each Applicant. The charges facing the Applicant are serious. The Applicant provided a fake Identity card to a terrorist suspect hence making this matter of public interest. She stated that the fact that the other accused persons were granted bail was not sufficient ground for this court to allow the Applicant's application for bail. Learned State Counsel further submitted that the trial will not take long to conclude because the prosecution was ready to prosecute the case. She further stated that the Pre-bail report was clear as it stated that the Applicant had no economic means to provide reasonable security. Learned State Counsel cited several authorities in support of her contention that the Applicant should not be released on bail pending trial because she was facing serious charges that attract severe penalties that may provide an incentive to the Applicant to abscond. She urged the court to uphold the trial court's refusal to release the Applicant on bail pending trial.

**Article 49(1)(h)** of the **Constitution** 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 to reach a contrary finding. The **Bail and Bond Policy Guidelines** published by the National Council on Administration of Justice requires the court to lean towards granting bail to accused persons unless the prosecution proves that there are compelling reasons to deny the accused persons bail pending trial. In the case of **Watoro vs Republic [1991] KLR 220 at Page 283 Porter J** (as he then was) stated *"... I think I have made it clear over a number of rulings in bail application that I take the view on authority that the paramount consideration in bail application is whether the Accused will turn up for trial..."*. This point was emphasized in **Mgunya & Another [2010] eKLR** where M.K. Ibrahim J (as he then was) held that:

**"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 greater the 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 issue for determination is whether the Applicant made a case for the court to reconsider the decision of the trial court that denied her bail pending trial. The **Constitution** under **Article 49(1)(h)** grants any person bond or bail or reasonable conditions, pending a charge or a trial unless there are compelling reasons not to be so released. The **Constitution** does not define what constitutes *"compelling reasons"*, hence courts are faced with the challenge of determining the existence of compelling reasons for denying an accused person bail. Courts are required to evaluate whether or not the Applicant will attend trial, this aids in determining whether there are compelling reasons that can justify the denial of bail. The courts consider, *inter alia*, the following factors; *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 persons gainfully employed, public order, peace and security imperatives.*

In the present application, the prosecution objected to the Applicant being released on bail pending trial on the following four grounds; that the matter was of public interest, the seriousness of the offence and the severity of the offence, whose consequences, if the Applicant is convicted, would likely be a long period of incarceration in prison, that the Applicant would interfere with the prosecution witnesses and lastly, the past conduct of the Applicant. On the other hand, the Applicant urged the court to look at the Pre-bail report which stated that the Applicant will faithfully attend court if released on bail pending trial. She was not a threat to public safety. That the Applicant's father, mother, boyfriend and friends in general are ready and willing to deposit a cash bail of Ksh.100,000/= or to deposit a fairly reasonable security taking into consideration their humble background.

On evaluation of the rival arguments made before this court, this court is of the view that it has a duty to consider the suitability of each accused where more than one accused persons are charged in one case. Despite the 4<sup>th</sup> and 6<sup>th</sup> accused having been granted bail pending trial by this court, it is not a guarantee that the Applicant herein will be granted bail pending trial. The Applicant is required to put forth her circumstances for this court to determine whether she will attend court if she is granted bail pending trial. But the burden of establishing whether there are compelling reasons for denial of bail is upon the prosecution. In the present application, the prosecution did not give any evidence before this court to establish that the Applicant was a flight risk if she is released on bail pending trial. This court holds that the chances that the Applicant will abscond from the jurisdiction of court are minimal as is evident from the Pre-bail report. This court is also not persuaded that there is any risk of interference of the witnesses by the Applicant as asserted by the prosecution. The reasons advanced by the prosecution are not sufficient to make this court reach the finding that there are compelling reasons to deny the Applicant bail pending trial.

In the premises therefore, this court will allow the Applicant's application. The decision of the trial court denying them bail pending trial is hereby set aside and substituted by a decision of this court granting the Applicant bail pending trial on the following conditions:

- I. The Applicant is released on bond of Ksh. 1,000,000/= with two sureties of the same amount. In the alternative, the Applicant may post cash bail of Ksh. 500,000/=.
- II. The Applicant shall attend court without fail on the dates scheduled for trial in default of which the bail pending trial granted shall be cancelled.

It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE 2019**

**L. KIMARU**

JUDGE