



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.198 OF 2017**

**ARTON ESITAMBALE OPUMBI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Arton Esitambale Opumbi is facing the charge of **trafficking in Narcotic Drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act**. It is alleged that the Applicant trafficked 24.9 kilograms of heroin with a market value of Kshs.74,912,010/- which were concealed in 21 packets of Dorman Coffee in contravention of the provisions of the said Act. When the Applicant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. His application to be released on bail pending trial was granted but on condition that he posts a bond of Kshs.20 million with five sureties. The Applicant states that he is unable to raise these bond terms and has therefore applied to this court for the said terms to be revised.

During the hearing of the application, the prosecution indicated to the court that the Applicant was facing a serious charge and there were chances that he would abscond if tough bond are not imposed. The prosecution was apprehensive that the Applicant may interfere with witnesses. In fact, the prosecution asserted that one of the witnesses had made a report to the police that he had already been threatened. The matter was still under investigations. The police were still investigating the case with a view to apprehending the Applicant's accomplices. The prosecution insisted that there was no basis upon which this court would exercise its supervisory jurisdiction and revise the bond terms that were imposed by the trial magistrate. It urged the court not to interfere with the same.

On his part, the Applicant argued that the bond terms imposed were onerous to the extent that it amounted to denial of his constitutional right to be released on bail pending trial. The Applicant argued that he was a Kenyan citizen and was unlikely to abscond if he is granted reasonable bond terms. He stated that he was ready to abide by any terms that may be imposed by the court to secure his release on bail pending trial. He denied the prosecution's assertion that he was interfering with witnesses. During the period in issue, he was in remand custody and could not therefore interfere with witnesses. He urged the court to allow his application and revise the terms that were imposed by the trial court so that he could secure his release on bail pending trial.

This court has carefully considered the rival submission made by the parties to this application. 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.”*

This court is further guided by **Article 49(1)(h)** of the **Constitution**, the Bail/Bond Policy by the Judiciary and decided cases. In the present application, it was clear to the court that the trial court imposed terms that were onerous that it amounted to denying the Applicant his constitutional right to be granted bail while awaiting trial. The Applicant is a Kenyan. Although he is facing a serious charge, no evidence was presented before the trial court to the effect that he would abscond from court if he is released on bail pending trial. The allegation that he would interfere with witnesses was not established. In any event, the Applicant is aware that should he breach the terms of his release on bail pending trial, he shall have the said bail cancelled.

It is clear from the foregoing that the application shall be allowed. It is hereby allowed. The bond terms imposed by the trial court is hereby set aside and substituted by the order of this court releasing the Applicant on bail pending trial on condition that he posts a bond of Kshs.10 million with one surety of the same amount. In the alternative, he may be released on a cash bail of Kshs.2million. It is so ordered.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JULY 2017**

**L. KIMARU**

**JUDGE**