

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.160 OF 2017

COLLINS NNAMDI OKOLI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Collins Nnamdi Okoli is facing a charge of **trafficking in Narcotic Drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act**. The particulars of the charge were that he was found trafficking 2,974.8 grams of heroin with a market value of Kshs.8,924,400/-. When he 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 denied essentially on the basis that he was a foreigner and would likely abscond if he was so released. The Applicant was aggrieved by this decision. He has filed an application before this court seeking the intervention of the court to vary or set aside that decision.

The Applicant, through his counsel Mr. Swaka contends that the **Constitution** presumes him innocent until proven guilty. He had been in remand custody for over a year while awaiting trial while his co-accused were out on bail. The Applicant took issue with the discriminatory manner that he was treated when he was denied bail. He stated that he is a long time resident of Kenya and was married in Kenya, ran a business in Kenya and would not abscond if he was released on bail pending trial. He was willing to provide Kenyan sureties to secure his attendance in court. The Applicant reiterated that the trial court could not have reached the finding that he was a flight risk for the sole reason that he is a foreigner. He stated that his past conduct in the country precluded the court from making such findings. He urged the court to allow his application and release him on bond on reasonable terms.

The Application was opposed. The prosecution through Ms. Kimiri stated that despite the right to bail being available to all accused persons, in the Applicant's case, there were compelling reasons to militate against the Applicant being granted bail. The Applicant was a foreigner and had not sufficiently established any permanent links to the country. The Applicant had no fixed place of abode. He had not provided any evidence that he had a family in Kenya. He had not supplied any evidence that he operated any business in Kenya. She submitted that the trial court did not err when it made the finding that the Applicant, being a foreigner, was a flight risk if he was released on bail pending trial. She urged the court to dismiss the application.

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, the main concern of this court is whether the Applicant will attend court if he is released on bail pending trial. That the Applicant is innocent until proven guilty by a court of competent jurisdiction is without doubt. That the Applicant is a foreigner is a material factor when this court’s determining whether or not he should be released on bail pending trial. The Applicant told the court that he had a family in Kenya. He also runs a business in Kenya. However, he did not supply cogent and credible evidence to support his contention that he has such connections in Kenya that would persuade this court to overlook the *prima facie* fact that being a foreigner the chances that he would abscond from the jurisdiction of the court is high.

Having evaluated the facts of this case, this court does not agree with the Applicant that he has placed sufficient material before the court to enable the court make determination in his favour. It was clear to the court that the Applicant does not have any place of fixed abode in Kenya. Neither does he have any connection with the country that would persuade this court to reach determination that he is not a flight risk. Being a foreigner, and taking into consideration the serious nature of the charges that he is facing that will, if convicted, result in a sentence of a long time in prison, the Applicant may be tempted to abscond from the jurisdiction of the court. The fear expressed by the prosecution that the Applicant is a flight risk is not without foundation.

The application lacks merit and is hereby dismissed. The Applicant shall remain in remand custody until the conclusion of his trial. It is so ordered.

DATED AT NAIROBI THIS 26TH DAY OF JULY 2017

L. KIMARU

JUDGE