



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.254 OF 2017**

**GILBERT JUMA DEYA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Gilbert Juma Deya is facing five (5) counts of **child stealing** contrary to **Section 174(1)(b)** of the **Penal Code**. The Applicant was charged in 2005 but was not present to answer the charges because he was not within the jurisdiction of the court. The Applicant has been a resident in the United Kingdom until he was extradited to Kenya pursuant to a request for such extradition in accordance with an international warrant of arrest that was issued by the Government of Kenya. The Applicant has already pleaded not guilty to the charges. He is awaiting trial before the Chief Magistrate's Court Nairobi. Pending trial, the Applicant applied to be released on bail. However, his application was rejected by the trial court. He has made an application before this court pursuant to **Article 49** of the **Constitution** and **Sections 123, 362 – 367** of the **Criminal Procedure Code** seeking to have the said decision denying him bail reviewed, varied or set aside and in its place this court makes an appropriate order admitting the Applicant to bail. The application is supported by the annexed affidavit of the Applicant.

According to the Applicant, the trial court erred when it made a finding that he had used all means to frustrate the trial and would, given the slightest opportunity, fail to surrender to court for trial. The Applicant was perturbed that the trial magistrate had made a finding that if he was released on bail he would be a flight risk and would not attend court on the appointed date for trial. It is the Applicant's case that there was no basis at all for the trial court to reach this finding in view of the fact that he has property in Kenya and was always ready and willing to appear in court and confront his accusers. In the submission made in court by his counsel Mr. Ngatia, the Applicant states that he is an old man of 66 years of age and will not be in a position to return to the United Kingdom or any European Country following his extradition to Kenya. He is on the Interpol watch-list and could not therefore, even if he was minded to, travel out of the country. Learned counsel urged the court not to make adverse finding on the fact that the Applicant resisted, through legal process, his extradition to Kenya. He insisted that the Applicant was misadvised and was infact misled into relying on a forged order of this court to obtain certain orders from the High Court of Justices in United Kingdom. It is the Applicant's case that he did not participate in the forgery but rather relied on his then advocate who gave him the impugned court order. He pleaded with the court not to deprive him of his liberty on the basis of action of his erstwhile advocate. In essence, the Applicant is saying that there was no basis at all upon which the trial magistrate could have made the finding denying him his constitutional right to bail pending trial. He urged the court to grant his application.

The prosecution is opposed to the application. Hellen Mutellah, one of the prosecuting counsel, swore an affidavit in response to the application. Mr. Mule made submission on behalf of the Director of Public Prosecutions. He stated that there were three compelling reasons why the Applicant should not be released on bail pending trial. The first reason was the Applicant's past conduct. He stated that the Applicant used a forged judicial document to frustrate the extradition process that ultimately resulted in the Applicant's return to the country. Secondly, the Applicant was a flight risk. He urged the court to take into consideration the fact that since the charges were presented before court in September 2005, the Applicant made no effort to voluntarily present himself to court and instead chose to remain in the United

Kingdom where he settled. The Applicant had not presented any evidence that he had a physical address in Kenya or that he would abide by the terms that may be imposed to secure his attendance to court on the date scheduled for trial. The third reason was that the prosecution is likely to present more charges before court against the Applicant. The investigations were still ongoing and therefore chances were that the Applicant would face more charges. Mr. Mule submitted that the Director of Public Prosecutions was willing to expedite the hearing of the case.

In response, Mr. Ngatia stated that the past conduct was not that of the Applicant but his advocate. In regard to the submission that the Applicant is a flight risk, he stated that there was nowhere the Applicant would run to because he was on the Interpol's watch-list. On the issue whether new charges may be preferred against the Applicant, Mr. Ngatia submitted that that was not an issue that would prevent this court from granting the Applicant his constitutional right to bail.

This court has carefully considered the facts of this case. 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.”***

From the foregoing decision, it is clear that the paramount consideration that the court must take into account in determining whether or not to release an accused person on bail pending trial is whether the accused will attend court if so released on bail pending trial. Whereas, the court may take into consideration other factors, such as the serious nature of the charges facing the accused, and antecedents of the accused's arrest and subsequent arraignment in court, such considerations will not overwhelm the primary and main consideration of ensuring that the accused person will attend court during trial.

The issue for determination is whether the Applicant made a case for the court to revise the decision of the trial court that denied him 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. 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 Applicant contends that there are no compelling reasons that the prosecution has put forward for this court to deny him bail pending trial. On the other hand, the

prosecution contends that there are compelling reasons that militates against this court granting the Applicant bail pending trial. Having evaluated the facts of this case in light of the applicable law, it is clear to this court that indeed the prosecution established compelling reasons for this court to deny the Applicant bail pending trial. The Applicant is a Kenyan citizen. He was charged in September 2005. He chose not to voluntarily present himself before the court. The court issued a warrant for his arrest. The Government of Kenya requested the United Kingdom to extradite the Applicant to Kenya. This court agrees with the trial magistrate that the Applicant was within his right to challenge his extradition to face trial in Kenya before the courts in United Kingdom. However, this court noted with concern the lengths in which the Applicant went to frustrate his extradition to face justice in Kenya. He was prepared to use a forged court order obtained from the Kenyan courts to support his case before the courts in United Kingdom. Although the Applicant argued that he had relied on the forged court order in honest belief that it was genuine, and further that there was no evidence that he had participated in the procurement of the same, this court is not persuaded by the argument. Taken in the context that the Applicant was prepared to use all means at his disposal, including illegal ones, to avoid facing justice, this court is persuaded that his past conduct is indeed material in determining whether or not he should be released on bail pending trial. That the Applicant was a fugitive from justice for twelve (12) years is compelling reason for this court to deny him bail pending trial.

Further, this court is convinced, as asserted by the prosecution, that if the Applicant is released on bail pending trial, he is likely to abscond from the jurisdiction of the court. The court reached this conclusion on the basis of the Applicant's previous conduct and the fact that he has the means to execute such flight. The submission by the Applicant that it would be impossible for him to leave this court's jurisdiction since he is on the Interpol watch-list is not persuasive. This is because there are countries within this region that the Applicant can flee to, like he previously did, that do not have extradition treaties with Kenya. This court is not prepared to take such risk by releasing the Applicant on bail pending trial. This is a compelling reason because there is no guarantee that the Applicant will attend court on the date appointed for his trial.

For the above reasons, the Applicant's application lacks merit and is hereby dismissed. The decision of the trial court is upheld subject only to the condition that the trial of the Applicant must be expedited. The trial court noted that ***“the prosecution must prepare to present its witnesses and prosecute its case on the first date fixed and thereafter on the day to day basis until conclusion unless otherwise prevented by circumstances that have to be determined by the court to be compelling.”*** This court reiterates this directive by the trial court and adds that the prosecution must present its entire case within 120 days of the date of delivery of this Ruling since they have indicated that they are ready to present their witnesses and prosecute the case. The Applicant must co-operate with the trial court to secure expedition of the trial. If the prosecution shall not have closed its case within the days specified above, the Applicant shall be at liberty to renew his application for bail pending trial. It is so ordered.

**DATED AT NAIROBI THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2017**

**L. KIMARU**

**JUDGE**