

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.379 OF 2017

REPUBLIC.....APPLICANT

VERSUS

ODINGO ODAK.....RESPONDENT

RULING

The Government of the United States of America sought mutual legal assistance to have the Respondent extradited to the United States of America to be sentenced on tax fraud charges. According to the application presented before the Chief Magistrate's Court Nairobi, the Respondent was convicted by the United States District Court for the Northern District of Texas Fort Worth Division on twenty-one (21) counts of tax fraud. The Applicant averred that the Respondent absconded from the jurisdiction of that court when he was out on bail as he was awaiting sentence. The Respondent fled to Kenya. His presence in Kenya was discovered leading to his arrest and presentation before the Chief Magistrate's Court Nairobi for the purpose of the hearing of the extradition request made by the Director of Public Prosecutions on behalf of the Government of the United States of America. That application is pending determination before that court.

The Applicant was aggrieved by an interlocutory decision rendered by the trial court which ordered that the Respondent be released on bail pending the determination of the extradition proceedings. The Applicant sought the setting aside of that decision. Mr. Odimu for the State submitted that the Respondent's antecedent conduct precluded the court from granting the Respondent bail pending the determination of the extradition proceedings. The Respondent escaped from the United States of America when he was due to be sentenced having been found guilty of committing several offences of tax fraud. He urged the court to take into consideration that the Respondent had escaped from the United States of America while he was out on bond pending sentencing. This previous conduct militated against the Respondent being released on bail because he was obviously a flight risk. He urged the court to set aside the decision of the trial court that granted the Respondent bail pending the determination of the extradition proceedings and substitute it by an order of this court directing the Respondent to remain in custody until determination of the said extradition proceedings.

Mr. Ayuo for the Respondent opposed the application. He submitted that the Applicant had not placed any cogent ground to have the decision rendered by the trial court granting the Respondent bail set aside. He explained that the Respondent had the constitutional right to be released on bail pending the conclusion of extradition proceedings. He was ready to deposit his passport before court. He was not a flight risk because he would not leave the jurisdiction of the court without his passport. He urged the court not to be influenced by what happened in the United States of America but consider the Respondent's right to bail as pertains the extradition process in Kenya. In essence, learned counsel was saying that there were no compelling reasons for the Respondent not to be released on bail pending the determination of the extradition proceedings.

This court has carefully considered the rival submission made by counsel. The issue for determination by this court is whether the Applicant laid sufficient basis for the court to set aside the order that was granted by the trial court that denied the Respondent bail pending trial. Whereas this court concedes that the Respondent has the constitutional right to be granted bail in accordance with **Article 49(1)(h)** of the **Constitution**, that right is subject to the court determining whether there are compelling reasons for the

Respondent not to be granted that bail. Mr. Odimu urged the court to take into consideration the character and antecedents of the Respondent in determining whether or not the Respondent should be released on bail pending the determination of the extradition proceedings. In particular, Mr. Odimu submitted that the Respondent was a fugitive from justice after he absconded and fled from the United States of America where he was due to be sentenced after being found guilty of several counts of tax fraud. It is this past conduct that Mr. Odimu submitted should guide the court in determining whether the trial court properly exercised its discretion in granting the Respondent bail. On the other hand, Mr. Ayuo for the Respondent urged the court to consider the Respondent's circumstances while in Kenya and the fact that he is facing the extradition proceedings and no other criminal proceedings. The Respondent's conduct should be judged in accordance with the proceedings in Kenya and not in the United States of America. The Respondent was willing to comply with any conditions that the court may impose in order to secure his release on bail pending the hearing and determination of the extradition proceedings.

This court's view of the matter is that indeed the Applicant established to the satisfaction of this court that the incentive for the Respondent to take flight is high taking into consideration the fact that he has already been convicted by the court in the United States of America. The Respondent's position is similar to that of a convict in Kenya applying to be released on bail pending the hearing of an appeal. He cannot invoke the constitutional injunction that he should be presumed innocent until the conclusion of his trial. That is not to say that the court has already formed an opinion that the Respondent is guilty. Far from it. His position is more precarious than that of an accused person who is facing trial and his guilt or innocence has not been determined. The Respondent's previous conduct is key in this application. The Respondent absconded from jurisdiction of the court in the United States of America while he was out on bail as he was awaiting sentencing. This court agrees with the submission made by the Applicant that the Respondent may likely abscond from this court's jurisdiction while awaiting determination of the extradition proceedings. The Respondent's offer to surrender his passport to the court may not be deterrent because a citizen of the East African Community can travel to any East African country using his national identity card and not necessarily his passport. The risk that the Respondent would flee from the jurisdiction of the court is real and not merely speculative.

In the premises therefore, the Applicant established sufficient grounds for this court to set aside the decision of the trial court to release the Respondent on bail pending the determination of the extradition proceedings. The Respondent shall remain in remand custody pending the hearing and determination of the extradition proceedings. It is so ordered.

DATED AT NAIROBI THIS 20TH DAY OF DECEMBER 2017

L. KIMARU

JUDGE