

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.21 & 35 OF 2016

OSMAN IBRAHIM BAKO.....1ST APPLICANT

MOHAMMED SANI alias DR. MUSTAFA.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, Osman Ibrahim Bako and Mohammed Sani alias Dr. Mustafa were charged with three counts of **possessing papers of forgery** contrary to **Section 367(a)** of the **Criminal Code**. According to the particulars of the charges, it is alleged that the Applicants, jointly with others not before court, were found in possession of pieces of papers intended to resemble or pass off as US Dollar currency notes, Euro currency notes and scanners used for production of the said fake currency. When the Applicants were arraigned before the trial magistrate's court, they pleaded not guilty to the charges. However, when they requested to be released on bail pending trial, the trial court upheld the objection by the prosecution not release the Applicants on bail pending trial. The Applicants were aggrieved by this decision. They separately moved to this court seeking to have the decision overturned on the basis that the prosecution had not established any compelling reasons for the Applicants not to be released on bail pending trial. The application was opposed by the prosecution. It reiterated that there were compelling reasons to deny the Applicants bail pending trial essentially on two grounds: that the Applicants were foreigners and may likely abscond from the jurisdiction of the court if released on bail pending trial, and secondly, that the Applicants faced serious charges which may give them an incentive to jump bail should the court release them on bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Mr. Kimathi for the 1st Applicant, by Ms. Kethi for the 2nd Applicant and by Ms. Aluda for the State. In summary, it was the Applicants' case that they had the constitutional right to be released on bail pending trial; that the charges they are facing are bailable; that they are presumed innocent by the law until proven guilty by a court of law; that they were legitimately conducting business in Kenya, and have done so for the past five years; that they had been issued with work permits by the government of Kenya to work in Kenya; that they were married to Kenyan citizens and had young children with them; that they were not a flight risk and were willing to abide by any terms that the court may impose in order to secure their release on bail pending trial; that the prosecution had not established any compelling reasons to deny them bail pending trial; that their passports had been detained by the police and therefore it was unlikely that they would abscond from the jurisdiction of the court without such vital travel documents; that from the conduct of the prosecution, it was unlikely that their case would be heard and concluded within a short period of time; that they had suffered in the period of over one month that they had been in pre-trial detention. They finally urged the court to look at the entire circumstance of the case and determine that the objection raised by the prosecution were mere allegations which should not result in the Applicants being denied bail pending trial.

In response, Ms. Aluda for the prosecution opposed the application for the release of the Applicants on

bail pending trial on the following grounds: that there was no evidence that the Applicants were married to Kenyan wives or that they had children in Kenya; that there was no document to establish that the Applicants had work permits or were conducting legitimate business in Kenya; that the Applicants were being investigated by Interpol and police forces of various countries including Singapore and Comoros; that the Applicants were arrested red-handed with fake foreign currencies, which if circulated, would have caused havoc to public order, peace and security of the country; that the Applicants were flight risk in view of the fact that they were facing serious charges, and further, that they were foreigners; that in view of the complex nature of the case, the police were still investigating the case and would in due course supply the Applicants with witness statements. The prosecution was not opposed to the court giving directions as to the expeditious disposal of the case in light of the fact that the majority of the prosecution witnesses will be police officers and forensic experts.

This court has carefully considered the rival submission made by counsel for the Applicants and for the State. The issue for determination by this court is whether the Applicants establish a case for this court to release them on bail pending trial. The opposing counsel cited the **Bail and Bond Policy Guidelines** published by the **National Council of Administration of Justice** in support of their respective opposing arguments. The **Bail and Bond Policy Guidelines** recognizes as a matter of principle and constitutional imperative, that an accused person should be released on bond pending trial unless there are compelling reasons. What constitutes compelling reasons must be established by the prosecution. The **Bail and Bond Policy Guidelines** acknowledges that every accused person is presumed innocent until proven guilty by a court of law and further that every accused person is entitled to his constitutional right to liberty unless there are legitimate reasons for that right to be curtailed. Some of the considerations that the court is required to take into account in determining whether or not to release an accused on bail pending trial are: whether the accused is likely to abscond from attending trial; whether the accused is likely to commit or abet the commission of a serious offence; whether the accused is likely to endanger safety of the victims, individuals or the public; whether the accused is likely to interfere with witnesses or tamper with evidence; whether the accused is likely to endanger national security or the public interest. The above considerations are not exhaustive. Each case will be determined on its own circumstances and merits.

In the present application, it was evident that the prosecution's objection to the Applicants being released on bail pending trial is essentially on two grounds: that the Applicants, being foreigners, would likely abscond from the jurisdiction of the court if they were released on bail pending trial. The Applicants countered this argument by stating that they were legitimate businessmen who have been in the country for the past five years. For added measure, they argued that they had been issued with work permits which allowed them to conduct business in Kenya. They also had Kenyan families and would not abscond if released on bail pending trial. They were ready to abide by any term that the court may impose to secure their release on bail pending trial. Secondly, the prosecution argued that the Applicants were facing serious charges which had a transnational element that has attracted the attention of Interpol and various police agencies. On their part, the Applicants argue that the charges they are facing are bailable and the nature of the offences facing them should not be used as a basis to deny them bail.

Having carefully evaluated the facts of this application, it is clear to this court that the serious nature of the charges facing the Applicants militates against this court granting them bail pending trial. This court agrees with the prosecution that the effect of the charges facing the Applicants is such that from its very nature it would have resulted in the economic sabotage of this country. Whereas this court presumes the Applicants innocent until proven guilty by a court of law, it cannot ignore the fact that the Applicant may face a multiplicity of charges in several countries of a similar nature. Further, the possibility that the Applicants may abscond from the jurisdiction of the court is real taking into consideration that the Applicants have the financial wherewithal to flee from the country if they are released on bail pending trial. The fact that the police have detained their passport cannot deter them from fleeing from the jurisdiction of the court taking into consideration the type of charges that they are facing. This court has particularly taken into consideration that the charges facing the Applicants have transnational implication that not only affects this country but affects international trade. This court therefore holds that the prosecution established compelling reasons to deny the Applicants bail pending trial. The fact the Applicants have families in Kenya is not sufficient reason for this court to risk to release the Applicants on bail pending trial. In this court's assessment, it more likely than not that the Applicants will be a flight

risk.

In the premises therefore, this court finds no merit with the Applicants' application to be released on bail pending trial. Their application is dismissed. However, the prosecution is directed to expeditiously present their case before the trial court so that the same may be heard and concluded within six (6) months from today's date. The Applicants shall be at liberty to apply. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF FEBRUARY 2016

L. KIMARU

JUDGE