

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.299 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

JACK ALEXANDER WOLF MARRIAN.....1ST RESPONDENT

ROY FRANCIS MWANTHI.....2NDRESPONDENT

RULING

The Director of Public Prosecutions (DPP) was aggrieved by the decision of the trial magistrate in **Kibera CM. Criminal Case Nos.3282 and 3287 of 2016** in which the Respondents were released on bail pending trial. The Respondents are charged with **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**. The particulars of the offence are that on 29th July 2016 at Kilindini Port in Mombasa, the Respondents, jointly with others not before court, trafficked by conveying a narcotic drug namely cocaine to wit 99721.8 grams with a street value of Kshs.598,330.800/- concealed in a container No.MEDU 3333950 in contraventions of the said **Act**. The Respondents pleaded not guilty to the charge. Pending trial, the Respondents made an application to be released on bail. After considering the application (the Prosecution opposed the application), the trial magistrate ordered the Respondents be released on bail pending trial on condition that the 1st Respondent executes a bond of Kshs.70 million with two Kenyan sureties of similar amount. The 1st Respondent was also required to deposit his passport in court and to report to the police once every week. The 2nd Respondent was released on a bond of Kshs.60 million with two Kenyan sureties of similar amount. He was also required to deposit his passport in court and report to the police once every week. It is this order that the DPP seeks to impeach in this application.

Mr. Ondimu for the DPP seeks the intervention of this court to stay the order of the trial court releasing the Respondents on bail pending trial. The grounds in support of the application can be summarized thus:

The DPP was aggrieved that the trial court had not taken into consideration the fact that the 1st Respondent was a British citizen and was likely to abscond if he is released on bail pending trial. He observed that the trial court did not take into account the gravity of the offence that the Respondents were facing particularly the fact that, if convicted, the Respondents will likely face a lengthy term of imprisonment in addition to a fine equivalent to three times the value of the narcotic drugs. He stated that the prosecution had a strong case against the Respondents which is likely to succeed. In that regard, he urged the court to take judicial notice of the fact that narcotic drugs has caused untold suffering to the people of Kenya. He explained that the charges facing the Respondents had an international character and therefore the Respondents had incentive to abscond from the jurisdiction of the court if released on bail pending trial. It is the prosecution's request that the Respondents remain in custody pending trial as the Prosecution had established compelling reasons to deny the Respondents bail pending trial.

In response, Mr. Wandabwa for the 1st Respondent and Mr. Ombija for the 2nd Respondent stated, in summary as follows:

That the Respondents were presumed innocent and therefore they are entitled to bail pending trial unless

compelling reasons are established. The Respondents have a constitutional right to be released on bail pending trial. The Respondents had cooperated with the police in their investigations. During the course of investigations, the 1st Respondent was released on police bond, and when later summoned to appear before court, he surrendered himself without any compulsion. They urged the court to take into account the fact that prior to the charge, the Respondents have no criminal records. As regard whether the prosecution has strong evidence against them, they submitted that the narcotic drugs was found in one of the containers with sugar which had been imported into the country in the ordinary course of business. The 1st Respondent was a director of the importing company while the 2nd Respondent was an import clearing agent. The Respondents therefore had a strong defence to the charge that has been brought against them. The Respondents reiterated that there were no compelling reasons to deny them bail. In respect of the 1st Respondent, although a British citizen, he has been resident in Kenya since the age of four. His father was a Kenyan citizen. His mother and siblings are resident in Kenya. The 1st Respondent is in the process of acquiring Kenyan citizenship. In the premises therefore, the fear expressed by prosecution that the 1st Respondent is likely to abscond from the court's jurisdiction is baseless. The Respondents explained that they were willing to abide by the onerous bond terms that were imposed by the trial court. They urged the court to exercise its discretion and dismiss the prosecution's application.

The issue for determination by this court is whether the prosecution made a case for the court to revise the decision of the trial court to release the Respondents on 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.* 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.

An important consideration in all cases is that the persons accused will attend court without fail during trial. This consideration, in most cases, overrides the other considerations. 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.”

In the present application, the compelling reasons that the prosecution advanced in opposition to the Respondents being released on bail pending trial is essentially that the Respondents are flight risk. The prosecution is of the view that the 1st Respondent, being a British citizen and facing a hefty fine or a long term in prison is likely to abscond if he is released on bail pending trial. The 1st Respondent countered this argument by stating that his father is a Kenyan citizen. He was also in the process of acquiring Kenyan citizenship. Other than that, his mother and siblings are long term residents of Kenya. The 1st

Respondent was emphatic that he had all intentions of attending court and clearing his name. The prosecution further asked the court to take into consideration the nature of the charge facing the Respondents is of public interest and has an international criminal element to it. On the other hand, the Respondents argued that the law presumed them innocent until proven guilty by a court of law. They were willing to abide by the onerous terms that the trial court had issued in order to secure their attendance before court.

This court has carefully assessed the facts of this application. While the court takes judicial notice of the fact that the drug menace has caused untold suffering to the people of Kenya, and especially the youth, this court is not oblivious that in an application such as the present one for bail pending trial, the guilt or otherwise of the Respondents is yet to be established. Under **Article 50(2)(a)** of the **Constitution**, the Respondents are presumed innocent until the contrary is proved. The prosecution argued that it has a strong case which will like establish the guilt of the Respondents. At this stage of the proceedings, this cannot speculate on the evidence that the prosecution will adduce against the Respondents. Suffice for this court to note is the fact that the Respondents are facing a charge which potentially, if convicted, result to a long term in prison. This court has been persuaded by the submission of the Respondents that taking into consideration their cooperation with the police when they were investigating the case, and the fact that even after they had recorded their statements, and had been released on police bond, they still obeyed the summons to appear before the trial court to take plea. The position taken by the prosecution to the effect that the Respondents are a flight risk is therefore not supported by evidence. To the contrary, the evidence before the court supports the position put forward by the Respondents that they will attend court and abide by the bond terms issued by the trial court.

In the premises therefore, this court finds no merit with the prosecution's application before this court for the staying of the order of the trial court for the Respondents to be released on bail pending trial. The application is hereby dismissed. The Respondents shall be released on bail pending trial on the terms proposed by the trial magistrate. It is so ordered.

DATED AT NAIROBI THIS 12TH DAY OF AUGUST 2016

L. KIMARU

JUDGE