

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.351 OF 2016

REPUBLIC.....APPLICANT

VERSUS

SALIM SAID NASSORO.....1ST RESPONDENT

UMMY SALIM.....2ND RESPONDENT

ELIZABETH NJOKI WANJIRU.....3RD RESPONDENT

RULING

The Respondents have been charged before the trial magistrate's court with **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic Drugs & Psychotropic Substances (Control) Act**. They pleaded not guilty to the charge. They applied to be released on bail pending trial. The application was vigorously opposed by the prosecution. On 21st September 2016, the trial magistrate granted the Respondents' application to be released on bail pending trial. The 1st and 2nd Respondents were granted bond of Kshs.5 million and Kshs.1 million cash bail while the 3rd Respondent was granted a bond of Kshs.5 million or in the alternative Kshs.1 million cash bail. The prosecution was aggrieved by this decision. They have moved this court pursuant to **Section 362** of the **Criminal Procedure Code** seeking to have that decision of the trial magistrate set aside. The prosecution contends that the trial magistrate failed to take into account several factors, which, if considered, would have resulted in the said court denying the Respondent bail pending trial. In particular, the prosecution stated that the Respondents are facing a very serious charge which will attract stiff sentence if convicted. In that regard, it is the prosecution's contention that it has gathered strong culpatory evidence which implicates the Respondents in the commission of the offence. The prosecution was of the view that these two factors, taken together, meant that the Respondents had the incentive to abscond if they are released on bail. They were flight risk. The application is supported by the annexed affidavit of Celestine Oluoch, a prosecutor in the office of Director of Public Prosecutions.

The application was opposed. Barbara M. Munguti, an advocate for the Respondents, swore a replying affidavit on behalf of the Respondents. She asserted that the Respondents had the constitutional right to be released on bail pending trial unless there were compelling reasons. She deponed that the assertion by the prosecution that the Respondents were flight risk was not supported by evidence. She gave the example of the 3rd Respondent who had earlier been granted a cash bail of Kshs.100,000/- pending her being charged with the present offence. In the period that the 3rd Respondent was out on bail, she attended court when she was required to. She deponed that the prosecution did not have a strong case against the Respondents. The evidence that the prosecution will adduce against the Respondents will be subjected to cross-examination to establish its veracity. In any event, she argued that the Respondents were entitled to the constitutional protection of being presumed innocent until proven guilty by a duly constituted court of law. In essence, it was the Respondents' case that the prosecution had not placed any compelling reasons before this court for the court to exercise its discretion to deny the Respondents bail pending trial.

During the hearing of the application, Ms. Akunja for the State presented to the court written submission

in support of the application. Mr. Kang'ahi for the Respondents made oral submission in opposition to the application. Both counsel, other than citing relevant authorities, essentially reiterated the contents of the application and the supporting affidavits. The issue for determination by this court is whether the prosecution placed evidence before this court that proves compelling reasons that would persuade this court to deny the Respondents bail pending trial. This court shall be guided by **Articles 49(1)(h) of the Constitution** in determining whether the prosecution established compelling reasons to deny the Respondents their constitutional right to be released on bail pending trial. This court shall further be guided by the **Bail and Bond Policy Guidelines** published by the **National Council of Administration of Justice**.

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 person 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 the 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 on circumstances and merits.

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.

In the present application, the prosecution contends that the Respondents will in most probability abscond and fail to attend court during the appointed date of trial. It is the prosecution's case that the Respondents face a serious charge which will likely attract a stiff sentence in the event that they will be convicted. On their part, the Respondents argued that they have a constitutional right to be released on bail pending trial because the prosecution failed to establish any compelling reasons to persuade the court to deny them bail pending trial. They further argued that the law presumes them innocent and therefore the prosecution cannot argue that they have strong evidence against them yet that evidence has not been tested by cross-examination during trial. This court has carefully evaluated the facts of this application in light of the applicable law. It is clear to this court that the prosecution failed to establish compelling reasons to enable this court upset the decision of the trial magistrate's court which granted the Respondents bail pending

trial. The fact that the Respondents face a serious charge, cannot, *per se*, be a ground to deny them bail pending trial. The prosecution did not put forward evidence to persuade this court that the Respondents are likely to be a flight risk and would not attend court if released on bail pending trial. The fact that the 1st Respondent is a foreigner, is not sufficient ground to deny him bail. His attendance to court can be secured by the court granting an order for appropriate Kenyan sureties.

In the premises therefore, this court finds no merit with the prosecution's application. The same is dismissed. The 1st and 3rd Respondents shall be released on bond terms that were ordered by the trial magistrate's court save that the 1st Respondent shall only be released on bond of Kshs.5 million with two Kenyan sureties of the same amount. The order staying the release of the Respondents on bail pending trial is hereby vacated. The court was informed that the 2nd Respondent has since the filing of the application died. The charge against her is abated. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2016

L. KIMARU

JUDGE