



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION 216 OF 2016.

TWAYBA HASHIM MTANDI.....1ST APPLICANT

TINA MARTIN KWAY.....2ND APPLICANT

OMARY SAID SELEMANI.....3RD APPLICANT

REHEMA RAMADHAN RASHID DEGE.....4TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, by way of Notice of Motion applied to this court to review its decision meted out by Mbogholi J. denying them bail. They pray to be admitted to bail pending trial. They submitted that they were charged with the offence of trafficking narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 in Criminal Case No. 1029 of 2014. They averred that the 1st Applicant was currently remanded at Industrial area remand and allocation prison while the rest of the Applicants were held at the Langata Women's prison which was violating their right to liberty pending the conclusion and determination of the case. They were now in custody for two years since their arrest during which period only two witnesses had been heard. They state that the reason why their original application for bail was denied was due to the fact that they were deemed flight risks. They submitted that they have since found Kenyan contact persons who were willing and ready to stand surety for them. They submitted that no prejudice would be suffered by the Respondent if the orders were granted.

The Notice of Motion was supported by an affidavit sworn by the 1st Applicant who also swore a further affidavit to which he annexed a bundle of the Applicants' passport copies to indicate that they had traveled to and from Kenya numerous times and as such did not pose a flight risk.

Learned counsel for the Applicants, Mr. Swaka submitted that the Applicants had been in custody for two years and that the orders by Mbogholi J. that the matter proceeds expeditiously was not adhered to. He submitted that the Applicants were still innocent unless proved otherwise. He stated that the Applicants were ready and willing to submit to whatever terms of bail that the court may grant. He cited **Misc. Criminal application No. 299 of 2016, Republic v. Jack Alexander Wolf Marrian & Another[2016] eKLR** to buttress their case.

Learned State Counsel, Ms. Atina for the Respondent opposed the application. She submitted that the issues raised by the Applicants were canvassed before Mbogholi J. and thus no new issue had been raised to support a review. She submitted that Mbogholi, J had in fact dealt with the matter twice. First, when he was asked to review the orders of the trial magistrate, at which instance he denied the Applicants bail, and subsequently when he was asked to review his own orders. She submitted that during the subsequent hearing the Applicants had submitted documents to confirm their Kenyan sureties. When the court investigated the documents, they appeared tampered with and the court ordered an investigation regarding the same. She urged the Applicants do file an appeal before the Court of Appeal. She submitted that it was the Applicants who were delaying the trial. She informed the court that the Applicants were Tanzanians and since the Kenya-Tanzania border was porous, there existed a high chance that the Applicant would flee the country if bail was granted. She urged that the application be dismissed.

Mr. Swaka, in reply, submitted that this court had the discretion to entertain the application before it and also to examine any sureties that are presented before it by the Applicants. He submitted that the lower court would attest that the trial has delayed due to circumstances beyond the Applicants control; for instance, being sick or the failure by the prosecution to furnish them with necessary documents.

I have considered the respective submissions. The issues raised by the Applicants were well canvassed before Hon. Mbogholi, J in his two rulings in Misc. Cr. Application No. 118 of 2014. But prior to that, the Applicants had filed Misc. Cr. Application No. 94 Of 2014 seeking similar orders for release on bail. Nothing seems to have taken place in that file save that directions were given that that hearing dates do issue in the normal manner in the registry. Back to Misc. Cr. Application No. 118/2014, the first ruling by Hon. Mbogholi, J dated 21st May, 2014 declined to admit the Applicants to bail as they were a flight risk. The court noted that they had no fixed abode in Kenya and owing to the seriousness of the offences, if they were granted bail, they were likely to abscond. The Applicants thereafter sought a review of that ruling by the judge. They presented a case that they had since found Kenya sureties who were willing to secure their attendance in court. The sureties were ready to deposit their title deeds. The judge accordingly requested for a scrutiny of the title documents. It was discovered that by the time the report of scrutiny was presented to court, the documents filed in court were interfered with. Search Certificates showed that the persons on the titles were not the actual registered owners. As such, bail was not only denied, but the Applicants were denied audience with the court on account of their dishonesty.

I am now being asked to review the orders of my brother Mbogholi, J and admit the Applicant to bail pending trial. From outset, the procedural way to go is to appeal the ruling of the judge, more particularly because all the issues raised were well canvassed before the judge. But since this court has powers to grant bail pending trial, I would still reconsider the request. See Section ***“123(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”***

It is trite that the main purpose of bail pending trial is to ensure the attendance of the accused to court. As was set out in **Republic v. Dansin Mgunya & Another [2010] eKLR**, to wit:

“The main function of bail is to ensure the presence of the accused at the trial ... Accordingly, this criteria is regarded as not only the omnibus one but also the most important.”

Under Article 49(1)(h) of the Constitution bail to an arrested accused person is a right which cannot be derogated unless there are compelling reasons. Under Section 123(2) of the Criminal Procedure Code, one of the compelling reasons that may warrant a denial of bail is the character and antecedent of an accused person. In the present case, the Applicants have already presented themselves as dishonest persons when they presented title documents that were deemed a forgery. That presentation meant that, had the documents passed as genuine securities, the Applicants would have absconded the trial. The position that they have no fixed abode in Kenya has not changed which means that they are a flight risk. In the ruling of 21st May, 2014 Hon. Mbogholi J directed that the trial be first tracked. On the part of the Applicants, they indicate that the trial has not progressed on account of circumstances beyond their control. They have cited that they have either been sick or the prosecution failed to furnish them with crucial documents. As at the time of hearing this application, the Applicants did not cite that the

prosecution had failed to furnish them with any crucial document. As a result, they ought to cooperate with the court and the prosecution to ensure that the trial is fast tracked.

In the end, I find that this is an unmerited application and I hereby dismiss it. The matter shall be mentioned before the trial court on 21st October, 2016 for purposes of fixing a hearing date. The trial magistrate is urged to ensure a quick disposal of the same. It is ordered.

Dated and Delivered at Nairobi this 18th October, 2016.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Kamonjo h/b for Swaka for the Applicants.
2. Ms. Atina for the **Respondent**.