



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.43 OF 2015

REPUBLIC.....APPLICANT

VERSUS

MAKOY MADHAK DEER.....  
RESPONDENT

RULING

The Director of Public Prosecutions was aggrieved by the decision of the trial magistrate in **Makadara CMC. Criminal Case No.772 of 2015 Republic –vs- Makoy Madhak Deer** wherein the trial magistrate granted the Respondent bail pending trial. In an application predicated under **Article 165(6) & (7) of the Constitution** and **Section 362 of the Criminal Procedure Code**, the Applicant craved for revision orders from this court to have the order that was issued by the trial court granting the Respondent bail pending trial be set aside and instead be substituted by an order remanding the Respondent in custody pending the hearing and determination of the criminal case facing him. The Applicant states that the trial magistrate failed to consider factors material before making the decision to grant the Respondent bail. In particular, the Applicant was aggrieved that the trial magistrate had failed to take into consideration the fact that the Respondent was a foreigner with no fixed abode; was facing a serious offence, which if convicted, the Respondent will face life imprisonment; that the Respondent's character, antecedents, associations and community ties were unknown; that the Respondent is a flight risk because he was a foreigner and the fact that Kenya did not have an extradition treaty with South Sudan, a nation to which the Respondent is a national. The Applicant argued that if such treaty existed, the Applicant would be assured that in the event that the Respondent absconded from the jurisdiction of the court, he will be returned back to the country to face trial. In essence, it is the applicant's application that there were compelling reasons for the court to deny the Respondent bail pending trial. The application is supported by the annexed affidavit of Kennedy Panyako, the prosecuting counsel.

The application is opposed. The Respondent swore a replying affidavit in opposition to the application. He stated that the law presumed him innocent until proved guilty by a court of law. He was of the firm view that there were no compelling reasons to deny him bail pending trial. This is because the charge he is facing is bailable. The fact that he is a foreigner is not a sufficient reason for the court to deny him bail. He affirmed that he was a person of fixed and identifiable abode; he was lawfully in Kenya and in possession of a valid visa that entitled him to move freely and unhindered in the country. He stated that the fears expressed by the Applicant that he would abscond from the jurisdiction of the court was addressed by the trial court which granted him tough bond terms, including the requirement that the Respondent provides two Kenyan sureties. In short, it the Respondent's case that there were no compelling reasons for this court to deny him bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Ms Nyamosi for the Applicant and by Mr. Koech for the Respondent. The said counsel essentially reiterated the contents of the application and the replying affidavit in support and in opposition to the application. Learned counsel for the Respondent cited to the court two decisions which the court shall refer to in the course its Ruling. The issue for determination by this court is whether the Respondent is entitled to be released on bail pending trial. That the Respondent is entitled to be considered for bail pending trial as provided under **Article 49(1)(h) of the Constitution** is without doubt. However, the court must be satisfied that there exist no compelling reasons to deny him bail. Among the compelling reasons to be considered by the

court include: the nature of the offence, the strength of the evidence which supports the charge, the gravity of the punishment in the event of conviction, the previous criminal record of the Respondent, the probability the Respondent may present or surrender himself for trial, the likelihood of further charges being brought against the Respondent, the likelihood of the accused interfering with witnesses or to procure the suppression of evidence that may incriminate him, the probability of finding the Respondent guilty as charged, the detention for protection of the Respondent and the necessity to procure medical or social report pending final disposal of the case (see **Republic –vs- Milton Kabulit & Others Criminal Case No.115 of 2008 (Nakuru)** – unreported). The above reasons are not by any means exhaustive. The court hearing the case will have to determine each case based on its merits and circumstances.

In the present application, the Applicant opposes the release of the Respondent on bail pending trial essentially on the ground that the Respondent is a foreigner, with no fixed abode, and therefore likely to be a flight risk. For added measure, the Applicant argued that the Respondent is facing a serious charge and therefore may be tempted to abscond from the jurisdiction of the court. The Respondent is of the contrary view. He argues that there were no compelling reasons for this court to deny the Respondent bail pending trial. The Respondent cited two decisions where the court granted foreigners bail pending trial. The two cases are **Republic –vs- Kokonya Muhssin [2013] eKLR** and **Republic –vs- Dwight Sagaray & 4 Others [2013] eKLR**. In the first case, the court released the Accused on bail pending trial even though he was a Ugandan. The court held that the Accused being a businessman with business ventures in Kenya, Uganda and the Democratic Republic of Congo, and who frequently travelled between the three countries in the course of his business, was unlikely to abscond from the jurisdiction of the court if he was released on bail pending trial. The court gave stringent conditions for the release of the Accused on bail pending trial. It is not clear from the decision of that court what offence the Accused in the case was charged with. What is clear, however, is that the charge that the Accused faced in that case appeared not to be a factor in the determination by the court in regard to whether or not to release the Accused on bail pending trial. The court also took into consideration the fact that the Accused in the case was a Ugandan citizen, a country member of the East African Community.

In the second decision (**Dwight Sagaray case**), apart from the assertion by the prosecution that the Accused would likely abscond by virtue of the fact that he was a foreigner, the prosecution submitted that the Accused would likely interfere with prosecution witnesses. After considering the arguments made, the court held that the prosecution had not established that the Accused persons, if released on bail pending trial, would likely interfere with prosecution witnesses. As regard whether the fact that one of the Accused persons was a foreigner is a factor in determining whether or not to release him on bail pending trial, the court held that it would address the concerns of the prosecution by issuing stringent bail terms. The foreigner in the case was a Venezuelan diplomat whose diplomatic immunity had been waived by his country to enable him to be tried in Kenya. It was therefore clear that the home country of the Accused was willing to facilitate the trial of its citizen in Kenya.

In the present case, it is not clear under what circumstances the Respondent is residing in Kenya. The court tried to make an inquiry from the Respondent regarding his status in Kenya. The Respondent was not forthcoming. It was not clear under what visa regime the Respondent is in Kenya. The Applicant argued that the Respondent was in Kenya on the basis of a visitor's pass. If that is the case, then it means that the Respondent is temporarily in the country and may be required to leave the country after a short period. The Respondent stated that he had a fixed abode. He specifically stated that he was a resident in Embakasi Estate together with his wife and three weeks old child. However, he did not state how he earns his living or how he will be able to support himself during the pendency of the trial facing him. The fact that Kenya has no extradition treaty with South Sudan, his country of origin, persuaded this court that if the Respondent absconds from the jurisdiction of the court, this country will not likely secure the cooperation of the Respondent's home country to bring back the Respondent to face justice in Kenya.

Further, this court is of the view that the temptation for the Respondent to flee from the jurisdiction of the court is high taking into consideration that he is facing the serious charge of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. If convicted, the Respondent will face a mandatory life imprisonment. Although the Respondent is presumed innocent by the law, however, this court is of the view that the trial court did not take into consideration all factors before arriving at the

decision to release the Respondent on bail pending trial. There are compelling reasons for the court not to release the Respondent on bail pending trial.

For the above reasons, the decision of the trial magistrate to release the Respondent on bail pending trial is hereby revised and set aside. It is substituted by an order of this court denying the Respondent bail pending trial. The Respondent shall remain in custody pending the hearing and determination of the case. The Applicant indicated that it was ready with its ten witnesses to proceed with the hearing of the case commencing from 31<sup>st</sup> March 2015. This court directs that the case shall be heard and concluded within three (3) months from 31<sup>st</sup> March 2015. If not concluded within the period, the Respondent shall be at liberty to renew his application before this court to be released on bail pending trial. This direction is given on the assumption that the Respondent will not frustrate the hearing of the case by seeking unnecessary adjournments. It is so ordered.

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF MARCH 2015**

**L. KIMARU**

**JUDGE**