



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**MISC. CRIMINAL APPLICATION NO. 453 OF 2015**

**HASSAN ABDULHAFEDH ZUBEIDI .....1<sup>ST</sup> APPLICANT**  
**ALI BASHIR SHEIKH.....2<sup>ND</sup> APPLICANT**  
**PROF. WILSON HASSAN NANDWA.....3<sup>RD</sup> APPLICANT**  
**VERSUS**  
**REPUBLIC.....RESPONDENT**

**RULING**

Before me is an application dated 21<sup>st</sup> December 2015, filed under a Certificate of Urgency on the same date under the High Court Vacation Rules. The application is grounded on **Articles 48, 49 and 50** of the Constitution and **Section 124** of the Criminal Procedure Code. The application is supported by the Affidavit of Mr. Kiplangat Charles, advocate for the Applicants herein.

The Applicants are facing charges in **Nairobi Chief Magistrates Court Criminal Case No. 1897 of 2015, Republic v. Binnay Dutta & Others**. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are charged as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> accused persons respectively alongside three others. They are charged with two counts of offences of failing to comply with the provisions of Sections 44, 45, and 46 of the Proceeds of Crime and Anti-Money Laundering Act contrary to Section 11 as read with Section 16(5) of the Act and money laundering contrary to Sections 3(a) as read with Section 16(i)(a) of the Proceeds of Crime and Anti-Money Laundering Act. The 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were charged in their capacity as directors of Dubai Bank Kenya Ltd. which has been placed under receivership.

The Applicants were arraigned in court on 21<sup>st</sup> December 2015 for the taking of plea, but before the charges could be read, the defence counsel, Mr. Kiplangat raised an objection under **Section 89(5)** of the Criminal Procedure Code on the validity of the charges. Owing to this objection, the Applicants could not plead to the charges until the objection was fully canvassed and determined by the trial court. In the meantime, the trial court admitted each of the Applicants to bond Ksh. 50 million with a surety of a similar amount or a cash bail of Ksh. 10 million in the alternative.

These orders gave rise to the instant application. It is based mainly on the ground that the terms granted by the trial court are irregular, excessive and unreasonable under the circumstances. Consequently, the

Applicants have been subjected to pre-trial detention contrary to the Constitution and the provisions of the Criminal Procedure Code.

At the hearing of the application on 23<sup>rd</sup> December 2015, Mr. Kiplangat for the Applicants submitted that the bail terms granted by the lower court were excessive and unreasonable. He faulted the trial magistrate for failing to give reasons when imposing the terms; terming the decision of the court as unreasonable and arbitrary. Counsel drew the court's attention to the provisions of **Section 123(2)** of the Criminal Procedure Code and **Article 49(1)(h)** of the Constitution as well as the Bail and Bond Policy Guidelines.

Counsel underlined that the overriding factor is to ensure that the accused persons will attend court, adding that no evidence had been presented to show that the Applicants would abscond if released on bail. He further challenged the legality of the charges against the Applicants noting that the charges were based on non-existent provisions of the law, and therefore lacked any penal consequences to justify the bail/bond terms imposed. Counsel also urged the court to consider that no monetary value was attached to the offences and that the Applicants had submitted themselves to the court on 21<sup>st</sup> December 2015. The court was also asked to consider that the 2<sup>nd</sup> Applicant is aged at 77 years and in need of medication. Recalling the Policy Guidelines, counsel urged that denial of bail should be a last resort. He submitted that the Applicants were Kenyan citizens who would not abscond. Counsel suggested a reasonable bond of Ksh. 200,000/ with an alternative of Ksh. 100,000 cash bail. He relied on the ruling of the court in **Misc. Cr. Application No. 410 of 2015 Silas Masinde Simiyu & 8 Others v Republic** where the court granted bail of Ksh. one Million in a case whose subject matter is worth Ksh. 41 million.

Mr. Warui for the prosecution while acknowledging that grant of bail is a discretionary power of the court urged the court to direct that the Applicants should deposit their travel documents with the court. He also urged the court to consider that the 1<sup>st</sup> and 2<sup>nd</sup> accused had absconded but the Applicants had submitted themselves to court. Mr. Warui also urged the court to refrain from making a determination on the issue of validity of charges which is pending before the trial court.

In response, Mr. Kiplangat submitted that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons were in India when the charges were preferred. He directed the court to consider the conditions available to granting bail as set out under the Bail/Bond Policy Guidelines. He noted that the prosecution had not offered any reasons as to why the Applicants should be made to deposit their travel documents. Counsel opined that the court has jurisdiction to determine the question of validity of the charges. He further clarified that the travel documents in respect of the 1<sup>st</sup> Applicant, then chairman of Dubai Bank were in the custody of the bank. With respect to the 3<sup>rd</sup> Applicant, counsel explained that he teaches in Zanzibar while his family is in Kenya and would therefore, require his travel documents.

I have accordingly considered the respective submissions. With regard to the issue of validity of the charges facing the Applicants, I state from the outset that this court cannot consider a matter which has not been canvassed before it, and which is not the subject of the present application. Furthermore, this issue is pending consideration by the trial court, where parties have made partial submissions. This court would only step into its arena if the issue is canvassed before it as a challenge to the trial court's finding.

On the merit of this application, I am minded that bail is a constitutional right granted to arrested or accused persons pending charges or trial. **Article 49(1)(h)** of the Constitution provides that:

**‘An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons.’**

The Applicants enjoy this right. The only qualifying factor is whether compelling reasons have been demonstrated to justify denial of bail. This was not an issue in this case; thus, the question is simply whether the terms granted by the trial court were reasonable in the circumstances. **Section 123(2)** of the Criminal Procedure Code requires that in determining bail terms, the circumstances of the case should be given due regard and the terms ought not to be excessive.

In determining what is reasonable, the court is guided by the circumstances surrounding the particular case. Several factors guide the court in this respect, the paramount consideration being whether the accused will attend court when so required. The grant of bail should therefore be aligned to this purpose, bearing in mind that a person accused of an offence enjoys the presumption of innocence guaranteed under **Article 50(2)(a)** of the Constitution. In setting out the bail terms, courts are enjoined to ensure that they remain true to the purpose of securing attendance to court by accused persons and not curtail their liberty which they are still entitled to.

In reaching a determination on this main issue, the court is guided by several factors. **Section 123A (1)** of the **Criminal Procedure Code** gives some guidance on factors to be considered in this respect as follows:

- ‘(a) the nature or seriousness of the offence;**
- (b) the character, antecedents, associations and community ties of the accused person;**
- (c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;**
- (d) the strength of the evidence of his having committed the offence.’**

In addition courts have been guided by other factors, which include, the public interest, victim protection, gravity of the offence, gravity of the punishment in the event of a conviction, the security of the accused person upon his release, that is to say, the detention of the accused for his protection, personal reasons such as health of an accused and interference of witnesses.

The Bail and Policy Guidelines were developed to give guidance in making decisions on bail in line with the constitutional provisions. The Guidelines recognise the need for a balanced approach in preserving the public interest and the right of an accused person to fair trial. On guiding courts in determining reasonable bail terms, the Guidelines provide as follows:

**‘..bail or bond amounts should not be excessive, that is, they should not be far greater than is necessary to guarantee that the accused person will appear for his or her trial...amounts should not be so low that the accused person would be enticed into forfeiting the bail or bond amount and fleeing. Secondly, bail or bond conditions should be appropriate to the offence committed and take into account the personal circumstances of the accused person. In the circumstances, what is reasonable will be determined by reference to the facts and circumstances prevailing in each case.’**

The contention in this case was the prescription of bond of Ksh. 50 million with a surety of a similar amount or a cash bail of Ksh. 10 million in the alternative. This has been faulted for being excessive and unreasonable. The charges in the case before the trial court, relate to alleged illegal activities involving Dubai Bank Limited. It is immaterial, in determining the bail terms, whether the offence in question has a monetary value attached to it.

The granting of bail and setting out terms is a discretionary power of the court. This power ought to be exercised judiciously. Part of the duty of the court in this respect is to ensure that its decisions are supported by concrete reasons. Failure to do so creates a perception of arbitrariness in the exercise of judicial powers. A reading of the trial court's ruling offers no indication whatsoever on the basis of which the bail terms were set. This lack of clarity contributes to unwarranted disparities in bail decisions that have in the past resulted in the undesirable imposition of terms that are either unreasonably high or too low in light of the offences committed.

The circumstances of the accused also ought have a bearing in the setting of bail terms. It serves no purpose to recognise, in the first place, the right of an accused person to be released on bail, and in the same breath impose terms that are beyond the ability of the accused; which would in effect amounts to

taking away that right. That is why it is within the liberty of the court to seek information to assist in making informed decisions. While this court is not afforded the benefit of the circumstances of the accused, I find that the prescribed terms are manifestly excessive and not commensurate to the charges. The terms go against the practice of granting bail and have the effect of denying the Applicants their right to liberty. In my view, these terms were unreasonably high, yet the objective is not to punish the Applicants who are yet to be tried and therefore, enjoy the presumption of innocence.

The obligation to attend court is attached to the individual Applicants. The fact that the 1<sup>st</sup> and 2<sup>nd</sup> accused persons have absconded attending court should not be unfairly visited on the Applicants herein. The 1<sup>st</sup> and 2<sup>nd</sup> accused persons are not the subject of the application before me and remain duty-bound to submit themselves to the jurisdiction of the trial court following the issuance of warrants for their arrest.

I am persuaded that the circumstances before me demand a review of the bail terms as set by the court. I hereby set aside the terms and substitute the same with a cash bail of Ksh. 3 Million each and in the alternative a bond of Ksh. 5 Million with a surety of equal amount. In addition I order that the each of the Applicants deposits his travel documents, specifically their Passports with the court. By this order, the Dubai Bank Ltd. is directed to release to the court the travel documents in respect of the 1<sup>st</sup> Applicant. The 3<sup>rd</sup> Applicant has not demonstrated in any way the assertion that he teaches in Zanzibar and therefore, in need of travel for the said purpose in any case, nothing stops the 3<sup>rd</sup> Applicant from seeking the permission of the court to so travel.

**DATED, AND DELIVERED THIS 24<sup>TH</sup> DAY OF DECEMBER, 2015.**

**G.W.NGENYE -MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Moses Kurgat, Mr. Nzioka and Mr. Kiplagat for the Applicant*
2. *Mr. Warui for the Respondent*