

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.452 OF 2014

CHAN CHI WEI & 36 OTHERS.....APPLICANTS

VERSUS

DIRECTORATE OF CRIMINAL INVESTIGATIONS.....1ST RESPONDENT

DIDRECOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT

RULING

The Applicants have been charged with offences under the **Kenya Communication Authority Act** and the **Kenya Citizenship and Immigration Act**. At the time the present application was filed, the Applicants had not yet taken plea. The Applicants have applied to be released on bail pending trial pursuant **Article 49(1)(h)** of the **Constitution**. In their application, they stated that the charges which were brought against them are bailable offences. Although the Applicants are foreigners, the police had impounded their travel and identification documents. There was therefore no possibility that they would abscond from the jurisdiction of the court. The Applicants stated that they had a fixed abode in Kenya and were ready to abide by any terms and conditions that the court may impose for their release on bail pending trial. The Applicants emphasized that there were no compelling reasons put forward by the prosecution to deny them bail. The application is supported by the annexed affidavit of Chan Chi Wei, the 1st Applicant.

The application is opposed. Nicholas Kisavi, the investigating officer of the case, swore a replying affidavit in opposition to the application. He swore that the Applicants were arrested after the police were called to their residence within Runda Estate to investigate a fire incident in which a Chinese citizen died. While investigating the case, the police found powerful communication equipment and drugs of assorted colours in the Applicants' possession. On examination of their passports, the police discovered that most of the Applicants had arrived in Kenya on tourist visas. The said visas had expired. He further deponed that the police were at the time still conducting investigations; there was a possibility that more serious charges will be brought against the Applicants after forensic investigators had completed their task. He further swore that, being foreigners, the chances that the Applicants would be a flight risk was high. The Applicants were not ordinarily resident in Kenya and if released on bond they may be tempted to abscond. He stated that there were compelling reasons why the court should not release the accused persons on bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Mr. Wachakana for the Applicants and by Mr. Kabaka for the State. This court has carefully considered the said submission. That the Applicants are 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 them 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 applicant, the probability the accused may present or surrender himself for trial, the likelihood of further charges being brought against the accused, the likelihood of the accused interfering with witnesses or to procure the suppression of evidence that may incriminate him, the probability of finding the accused guilty as charged, the detention for protection of the accused 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 complete. The court hearing the case will have to determine each case based on its merits and circumstances.

In the present application, this court will not, at this stage determine the merit or otherwise of the application brought by the Applicants. This is because, as stated earlier in this Ruling, the Applicants had not taken plea before the trial court. Their application for bail pending trial has not been considered on its merits by the trial court. The Applicants moved to this court when the trial court granted the prosecution's request for the Applicants to be detained for a few more days at Gigiri Police Station pending the conclusion of the investigations. Mr. Wachakana for the Applicants passionately submitted that the Applicants' right to freedom was being unduly infringed at the behest of the police who were using the fact of non-completion of investigations to continue to detain the Applicants. Mr. Kabaka for the State urged the court to take into consideration the unique circumstances of this case *i.e.* the fact that the Applicants are foreigners and the fact that they have been charged with, inter alia, the offence of being unlawfully present in Kenya.

This court appreciates the position that the police find themselves in. **Article 49(1)(f)(i)** of the **Constitution** requires the police to bring to court any person charged with an offence within 24 hours of his arrest. In the present case, the police complied with this constitutional imperative. However, due to the nature of the offences that the Applicants have been charged with, it was only reasonable that the court gave the police more time to conclude their investigations. As stated earlier in this Ruling, the unique circumstance of this case is that the Applicants are foreigners. They have inter alia, being charged with the offence of being unlawfully present in Kenya contrary to **Section 53(1)(j)** of the **Kenya Citizenship and Immigration Act**. Although the Applicants are presumed to be innocent that charge will obviously have to be taken into account when determining whether or not to release the Applicants on bail pending trial.

This court is an appellate court. It is only fair that the trial court be given an opportunity to consider the merits or otherwise of the application for bail pending trial before this court can render its opinion on the matter. This court is of the view that the Applicants prematurely brought the application before this court. The court therefore is of the view that the Applicants should first canvass their application for bail pending trial before the trial court, and if an adverse order is made against them, then they shall be at liberty to make an appropriate application before this court. In the premises therefore, the court declares that the Applicants' application was prematurely filed before this court. It is hereby dismissed but with the proviso that the Applicants can file an appropriate application before this court should the need arise. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF DECEMBER 2014.

L. KIMARU

JUDGE