



**REPUBLIC OF KENYA**

**High Court at Nairobi (Milimani Law Courts)**

**Miscellaneous Criminal Application 7 of 2013**

ESTHER WANJIKU NGANGA ..... APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

**RULING**

The applicant herein has been charged with the offence of trafficking in narcotic drugs contrary to Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. She has denied the offence. The record before me shows that she applied for bail, through counsel, before the lower court wherein the learned trial magistrate delivered a ruling dated 7<sup>th</sup> February, 2013 rejecting the application.

There is now before me an application by way of Notice of Motion under Article 49 (1) (h) of the Constitution as read with Section 123 of the Criminal Procedure Code, for orders that the applicant be admitted to bail pending the hearing and determination of criminal case No. 383 of 2013 pending before the Chief Magistrate at Kibera.

The reasons given on the face of the application are that, bail is a constitutional right and that the offence is bailable. The applicant also will attend court as and when required to do so, and that her family is suffering. She is also said to be suffering from ulcers. The learned trial magistrate having refused to release the applicant on bail the applicant should have moved this court by way of review or appeal.

There are no hard or fast rules about this statement but I draw a synonym from the rules under Section 357 (3) of the Criminal Procedure Code which appear in the Schedule to the Criminal Procedure Code known as the Criminal Procedure (Appeal from Refusal of Bail) Rules. Under those rules, the appeal against refusal of bail by one who has been convicted shall be made in the form of a petition in writing presented by the applicant or his advocate.

The petition shall set out clearly and fully the grounds upon which the application for bail to the subordinate court was made and the grounds of appeal, and shall be lodged with the Registrar of High Court. A copy of the petition shall at least 3 days before the date fixed for the hearing be served by the applicant or his advocate on the Director of Public Prosecutions unless the Judge for special reasons dispenses with that service.

An affidavit maybe filed on behalf of the Director of Public Prosecutions, in reply to the petition. The Judge may require either the applicant or the respondent to file an affidavit or an additional affidavit. I adopt and recommend the same procedure in cases of this nature. In this case, the applicant has not been tried and convicted but the fact is that she has been denied bail by the lower court.

If that be the case, then the application before me is misplaced and I say so because the learned trial

magistrate made a comprehensive ruling in which he gave reasons for refusing the applicant bail pending trial. The foregoing notwithstanding, I have elected to address the application on merit because this is not prejudicial to the Republic. The offence with which the applicant has been charged is no doubt serious, and if she were to be convicted she will be sentenced to pay a fine of Kshs. 15 Million and above and in addition thereto, serve life imprisonment.

There is an affidavit on record sworn by Chief Inspector Tobias Abondo, the Deputy Officer In-charge, Anti Narcotics Unit at Jomo Kenyatta International Airport deponing that, the applicant was intercepted while trying to board a plane to Accra, Ghana. She was interrogated and a search that followed led to the finding of the concealed narcotic drugs on the false bottom of her suitcase. On that ground, this officer depones there is sufficient evidence upon which a conviction may be founded.

If released on bail, she may abscond and it is in the interest of justice, security and protection of community social order that bail be refused. I have considered the application, the submissions by counsel, both for the applicant and the Republic. The most important consideration in an application of this nature is, whether or not the applicant will honour the date of her trial. The right for her release on bail or bond is expressly reserved in Article 49 (1) (h) of the Constitution unless there are compelling reasons to withhold that right. One may ask what these compelling reasons are. The rights of arrested persons do not fall under Article 25 of the Constitution which provides for rights and freedoms that may not be limited. What this means is that, such rights are limited and therefore each case must be considered on its own merits.

I consider compelling reasons to be those related to the seriousness of the offence, the circumstances under which the offence is alleged to have been committed, the probability of a conviction and the punishment that may be meted out on conviction. All these considerations may be compelling enough to deny the applicant that right. I have already set out the sentence that may be imposed if the applicant were to be convicted. The officer who swore an affidavit to oppose the application in the lower court has alluded to the evidence to be adduced in the trial. I know the applicant is presumed innocent unless proven guilty. However, the sentence for this offence is severe enough to tempt the applicant to abscond. In my judgment, that temptation is overwhelming and therefore the applicant is a flight risk.

To mitigate the denial of bail, the prosecution should be ready to fulfill their mandate and the courts should endeavour to hear such cases expeditiously. The prosecution has undertaken to expedite the hearing of this matter. Indeed, before the applicant came to this court, a hearing date was set for 22<sup>nd</sup> of April, 2013 which date has unfortunately passed due to this application.

In view of the foregoing, this application must fail. It is therefore dismissed. The original file shall be returned to the trial court for hearing without delay.

Orders accordingly.

**SIGNED DATED and DELIVERED in open court this 28<sup>th</sup> day of May, 2013.**

**A. MBOGHOLI MSAGHA**

**JUDGE**