REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

MISC. CRIMINAL APPLICATION NO 16 OF 2013

FARAH MOHAMUD HIRSI

ABDIRAHMAN BILLOW FARAH

MOHAMED ABDULLAHI HASSAN……..…….…...APPLICANTS

VERSUS

REPUBLIC….……...……..RESPONDENT

RULING

Counsel for the applicants has brought this application under certificate of urgency. He is seeking to have the applicants released on bail pending hearing and determination of Criminal Case Number 709 of 2013 in the Chief Magistrate's Court Garissa. The application is dated 13th June 2013 and is anchored under Articles 22 and 49 (1) (h) of the Constitution.

Briefly, the applicants were arraigned in the lower court in Criminal Application No 18 of 2013 when the State sought, on the strength of an affidavit sworn by Inspector Francis Kieti (marked 'CPO 1'), to have them placed in custody pending investigations. From the submissions by counsel the applicants were placed in custody for 14 days. On 5th June 2013 when the matter came to court charges were read to the three applicants and on the strength of an affidavit by one Police Constable Mutinda (marked 'CPO 2'), the prosecutor asked the court not to release them on bond until their case is heard and concluded because they were a threat to Government Officials and the public at large. The defence objected to this and asked the court to release the accused persons on bond. The lower court considered the rival positions and declined to grant bail/bond and opted to direct that the matter proceed to hearing on priorty basis.

Aggrieved by the ruling of the lower court, the applicants, through their counsel, have moved this court as stated above. The High Court file refers to one applicant Mohamed Abdullahi Hassan, who is accused No three as the only applicant. The Notice of Motion however refers to the three applicants and the submissions by counsel refer to three applicants as well.

The application is opposed with the learned State Counsel submitting that this is the second application on the same issue without evidence that the circumstances have changed since the lower court decided on the matter. Counsel cited **Omba Gandu Magloire alias Bongo v. Republic [2005] eKLR** in support. He also submitted that right to bail is not absolute and can be denied on compelling reasons being advanced; that there is no evidence to support that the applicants are Kenyan citizens or to show what kind of persons the applicants are and whether they will attend court once they have been admitted to bail. Counsel further submitted that there is apprehension that the applicants are a danger to the public and this is one of the grounds relied on to deny bail.

From the outset I wish to state that there is no bar to a fresh application for bail for an applicant who has presented an earlier similar application. Courts have pronounced themselves on the applicable principles in granting or denying bail. These include probability of the accused person turning up for trial; nature of the charges he is facing; strength of the evidence and the gravity of the punishment in the event of conviction; presumption of innocence; interference with witnesses among others. Courts have placed paramount consideration on the whether an accused will turn up for trial until his/her case is concluded **(see Watoro v. Republic [1991] KLR 220 at 283**).

This matter is not coming to me on appeal but as a fresh application for bail. The prosecution is relying on the affidavit sworn by Police Constable Nicholas Mutinda on 24th June 2013. He deposes that the applicants are dangerous people facing serious charges; that the penalty upon conviction is stiff and the applicants may abscond or interfere with witnesses and that tension is high at the scene of the alleged crime, among others.

I have stated before that apprehension that an accused person will interfere with witnesses without concrete evidence to that effect is not enough to sway the court that this is a compelling reason. As regards the gravity of the charges or the stiff penalty in case of conviction, my view is that the drafters of the Constitution were aware of the fact that some criminal cases are very serious compared to others when making the law that has allowed any accused person to be admitted to bail unless compelling reasons are shown to exist. My view is that it is not enough for an officer to swear an affidavit that such and such witness is being threatened. Let that witness swear an affidavit to that effect and present facts to court establishing that allegation.

My approach in this matter, relying on the paramount consideration in granting or denying bail, is whether the applicants will attend trial until the same is concluded. While stating this I am alive to the fact that it could be true that witnesses are being threatened. However this can only be ascertained upon concrete evidence being presented to court as I have stated above. One of the considerations courts have taken into account in determining if applicants will present themselves to court until their matter is determined is the family background of the applicant.

I have considered all the material placed before me and I am afraid there is none to tell this court who the applicants are, where they live, who are their relatives, etc. In short, whether the applicants are persons with backgrounds can be ascertained. This information is missing from the submissions and the documents presented in this court.

With the above in mind, I arrive at a conclusion that this is not a good case for granting bail. This court needs to know whether the applicants are a flight risk and whether they will attend court when released on bail. Having fully and carefully considered this matter and while I find that the prosecution has not presented evidence that the applicants are threatening witnesses, it is my view that the applicants have not satisfied this court that they will attend court when released on bond. I decline to grant bail on that ground. Let the matter proceed to full hearing until the matter is concluded as the lower court had indicated. Of course the applicants can exercise their right of appeal because that is right this court cannot limit. I make orders accordingly.

S.N MUTUKU

JUDGE

Dated and delivered in open court this 24th July 2013