

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

CRIMINAL CASE NO 25 OF 2012

SADIQ AHMED HASSAN.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant, who is the second accused person in the main case, has brought this application seeking admission to bail pending the hearing and determination of this case. The application dated 9th May 2013 is anchored on Article 49 (1) (h) of the Constitution 2010. It is supported by the affidavit sworn by Mr. C.P Onono, the defence counsel on 9th May 2013. I must state that the affidavit, though sworn before a magistrate as shown, does not bear any stamp to that effect. This is rather unusual and may have escaped the attention of counsel as well as the State Counsel. This court will however consider this application on its merits, especially after confirming that court filing fees has been paid in respect of the swearing of the affidavit.

From the deponed facts contained in the supporting affidavit, the applicant is a refugee at Ifo Refugee Camp where he lives with his wife, four children, mother and other relatives. He holds Ration Card No [particulars withheld]. It is further deponed that the applicant operates a *boda boda* business at Ifo Refugee Camp where he is based.

In addition to the supporting affidavit counsel made oral submissions to the effect that the applicant is not a flight risk and will abide by the conditions set by the court.

The application is opposed. The state relied on the affidavit sworn by Chief Inspector William Ekasi who is the Investigating Officer in this case. In the affidavit sworn on 2nd July 2013 it is deponed that the applicant is also charged in Chief Magistrate’s Court Criminal Case No 1085 of 2012 on charges of being in possession of a firearm where the witnesses are the same as in this case and it is feared that the applicant will interfere with witnesses. It is also deponed that the applicant is charged with others and it is prejudicial to the prosecution case to give “preferential treatment” to the applicant.

From the outset I wish to state that bail is a constitutional right that cannot be denied an applicant unless compelling reasons are advanced. Without belabouring the point it is not enough to state that the prosecution is apprehensive that an applicant will interfere with witnesses if released on bond. It is also not enough to state that a witness broke down when testifying without evidence that such witness had been threatened. This court takes the view that the State ought to seriously advance compelling reasons in opposition to bail applications. The principles for granting bail are well established and these are the principles both applicant and respondent ought to address the court on. The paramount consideration has always been whether the applicant will attend court sessions until the conclusion of his case. Other considerations include interference with witnesses; safety of the applicant himself and the seriousness of the sentence.

I have noted that the State Counsel did not address the court on the alleged criminal case the applicant is said to be facing in the lower court. The file in Criminal Case No 1085 of 2012 was placed before the court and it was noted that the accused person in that file is totally different from the applicant. I am not able to state whether the Officer got his facts wrong or it is an error in citing the case. Whatever the case may be, each case ought to be treated on its own peculiar facts and it is not in order to state that an

applicant charged jointly with others cannot be released on bail because this is prejudicial to the prosecution. It is this court's view that granting bail to an accused person who has been charged with others is not treating such an applicant preferentially!

While I do not downplay the issue of interfering with witnesses by an accused person who has been released on bail, it is my view that the State has not advanced compelling reasons to persuade this court that this will be the case in this matter. Further, if this were to happen, this court is open to evidence of such interference to the detriment of the one interfering. All the four accused persons are represented by the same counsel and in his discretion he has decided to bring this application for the applicant and not all of the accused persons. It is the view of this court that there is no legal requirement that an applicant who is jointly charged with others cannot be released on bond. The State is at liberty to bring to the attention of this court any act by the applicant that is prejudicial to their case by presenting concrete evidence to that effect.

After my careful consideration of this application and the applicable law, I find no reason to deny the applicant bail. His family can be traced easily at the Ifo Refugee Camp and the applicant is said to have his firm basis at the same Camp. I therefore allow this application and order release of the applicant on bail pending hearing and conclusion of this matter. He will be released on bond on the following terms:

- i. Cash bail of one million Kenya shillings (Kshs 1,000,000).
- ii. Alternatively, he will execute a bond of two millions Kenya shillings (Kshs 2,000,000) with two Kenyan sureties of the same amount.
- iii. In addition the applicant will report once every month to the Officer in Charge, Crime (OC Crime) at Dadaab Police Station until this case is heard and concluded.

I make orders accordingly.

S. N MUTUKU

JUDGE

Dated and delivered this 17th July 2013.