REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL REVISION NO. 31 OF 2013

GEORGE CHIBUZOR .....1ST APPLICANT

MICHAEL EZE …….....2ND APPLICANT

PERIS AYUMA …….....3RD APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

R U L I N G

1. This is a revision application by the three applicants, which originated by way of a letter dated 25th April 2013, and in which they seek revision of bail terms given to them by the subordinate court.

2. The three applicants were charged with the offence of trafficking in Narcotic drugs contrary to **section 4(a)** of the **Narcotic Drugs** and **Psychotropic Substance Control Act No. 4 of 1944**. On 6th February 2013 Mrs. Mbugua, Senior Principal Magistrate ordered the release of each of the applicants on bond of Kshs. 2 million with two Kenyan sureties, with an additional cash bail of Kshs.5 million. The 1st and 2nd appellants were also ordered to deposit their passports in court and were to periodically report to the Investigations Officer until the date of their release.

3. An application to review the bond terms was canvassed before Mr. Omondi, Principal Magistrate who did not interfere with any of the bond terms except to review the terms in regard to the 3rd Applicant from two sureties to one. The application for review was revisited before M/s. T. Mururigi, and Mr. Karanja, Principal Magistrates respectively, without success.

4. Mr. Wamuti Njagi, learned counsel for the three applicants prayed on their behalf that the cash bail of Kshs.5 million be reduced and secondly that there be an alternative to the cash bail instead of the sureties being required additionally.

5. Mr. Wamuti contended that the conditions of bond granted by the lower court are so excessive as to amount to denial of bail. He cited the cases of **Jane Wambui Wanjiru v Republic** as consolidated with **Joseph Wanjohi v Republic Cr. Appeal No. 461/2009** and **Cr. App. No. 462/2009,** and **Cr. App. No. 13/2013 v Republic Thomas Muthui Nzili**, wherein it was stated that bail conditions must be reasonable so that the accused is able to meet them.

6. It was argued that although the 1st and 2nd applicants are Nigerians they are in Kenya lawfully. That the 1st applicant is the widow of a Kenyan National now deceased, and has a child at Moi Educational Centre. The 2nd applicant resides in Kenya with her Nigerian husband and three children, two of whom are of school going age, while the 3rd is an infant of six months. The 3rd applicant has two children. By this submission, Mr. Njagi intended to convince the court that his clients have bonds in Kenya and would not abscond if their bond terms were reviewed.

7. The application was opposed by learned state counsel Mr. Kabaka on behalf of the respondent. Mr. Kabaka called the attention of the court to the severity of the sentence, which in this case is Kshs. 1 million or three times the market value of the drug trafficked being Kshs.35 million, whichever is greater, together with life imprisonment should the appellants be convicted.

8. Mr. Kabaka argued that the primary condition in granting bail, is whether the applicants shall be available at the trial, and the nature of the offence charged is critical in determining this.

9. Mr. Kabaka contended that the 1st and 2nd applicants are foreigners whose visas have expired, while the 3rd applicant had faced a similar charge in **Cm Cr. 4212/2013**, in which she absconded while out on bond.

10. Mr. Kabaka also pointed out that no material had been submitted in court to confirm that any of the applicants have families in Kenya.

11. I began by considering the question as to whether the applicants are properly before me, or have brought themselves prematurely before this court. I am of the view that **Section 362 Criminal Procedure Code** applies in the matter before me since final orders have been issued in a subordinate court. The application is properly before the court because orders of bail are final and are therefore subject to Revision.

12. The applicants' letter dated 25th April 2013, which set this application in motion, did not disclose the section under which the applicants had approached the court. The prayers sought however, which in essence, are that this court do call for the lower court record to satisfy itself regarding the propriety of the orders of bond therein and that the court be pleased to revise the said orders, falls squarely in the purview of **Section 362** of the **Criminal Procedure Code**.

13. **Section 362** of the **Criminal Procedure Code** mandates the High court to call for and examine the record of any criminal proceedings before any subordinate court:

> ***"for the purpose of satisfying itself as to the correctness, legality or propriety of any funding, sentence or order recorded or passed ..."***

The High court is also required to satisfy itself as to the regularity of any proceedings in the subordinate court.

14. The paramount issue for determination, in considering an application of this nature is whether the applicants will avail themselves for trial if they are admitted to bail. It cannot be denied that the constitutional right to bail applies to all persons who come before our courts whether they are citizens or foreigners. **Article 49(1)(h)** of the **Constitution** in which the right to bail is enshrined however, is not coached in absolute terms. The Article states as follows:

> ***"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 not to be released."***

Clearly the right to be released on bail or bond is constitutionally circumscribed by the presence of compelling reasons not to be released. **Article 49(1)(h)** of the **Constitution** vests discretion in the court to

consider whether the reasons advanced amount to compelling reasons upon which an applicant may be denied bail.

15. Mr. Kabaka the learned state counsel set forth the compelling reasons, upon which this court ought to deny the applicants herein bail, leaning heavily on their being a flight risk. To emphasize this ground the learned state counsel submitted that the 1st and 2nd applicants were foreigners whose visas had already expired, while the 3rd applicant had absconded once before when she was released on bond for similar charges. Mr. Kabaka also urged the court to bear in mind the seriousness of the charge and the severity of the sentence in the event that the applicants are found guilty and convicted.

16. **Article 49(1)(h)** of the **Constitution** grants bail for all offences, the gravity of the offences with which the applicants are charged, and the severity of the sentences which might be imposed should they be convicted, notwithstanding. The right to the presumption of innocence on their part, is enshrined in **Article 50(2)** of the **Constitution** and if the right to bail is unjustly denied, it cannot be assured that a fair trial would ensue.

17. For the foregoing reasons revision of bail had been denied four times in the subordinate court, before this application was filed in the High Court.

18. **Section 123(3) Criminal Procedure Code,** allows the accused persons to request for bail, and the court to grant it and vests in the High court the jurisdiction to interfere with the decision of the trial court on matters of bail, emanating from a trial court. That intervention by the High Court however, ought to be exercised with great circumspection, and in reliance of principles which have been developed by the courts. It is not to be exercised capriciously.

19. In **Republic v Danson Mgunya & Ano. HCCR NO. 26 OF 2008**, Ibrahim J as he then was, comprehensively considered the issues to be taken into account in determining "**compelling reasons**" not to release an accused person on bail. I have guided myself by the criteria set out in the stated case in considering the grounds which Mr. Kabaka has raised before this court, being the nature of the charges, and the gravity of the punishment in the event of conviction.

20. Ordinarily, where the charges against the accused person are serious, and punishment prescribed is heavy, there is more probability and incentive to abscond, whereas there may be no such incentive in cases of minor offences. The nature of the charges herein is grave and the punishment in the event of conviction which in this case is Kshs. 1 million or three times the market value of the drug trafficked being Kshs.35 million, whichever is greater, together with life imprisonment should the applicants be convicted is severe indeed.

21. In **Aboud Rogo Mohamed & another v Republic [2011] eKLR,** Ochien'g, J. stated that whilst security considerations, make the granting of bail most unattractive, unlikely and unfavourable, nevertheless the courts must be allowed to fulfil their traditional function of balancing the interest of State and those of individual. In the case before me the question of security is not in issue but the seriousness of the charges calls for equal consideration.

22. Guided by the relevant provisions of the law, and the principles in the cited authorities together with all attendant circumstances of this case I am satisfied that the terms of bond granted to the applicants are commensurate with the gravity of the charges.

For the foregoing reasons therefore I find that the application is lacking in merit and is dismissed.

SIGNED DATED and **DELIVERED** in open court this ***19th day*** of ***September 2013.***

L. A. ACHODE

JUDGE