



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
HIGH COURT CRIMINAL REVISION NO. 373 OF 2012

REPUBLICAPPLICANT

VERSUS

AHMAD ABOLAFATHI MOHAMMAD.....1ST RESPONDENT

SAYED MANSOUR MOUSAVI.....2ND RESPONDENT

R U L I N G

1. The application before me was brought by way of a letter dated 19th July 2012 by the state, hereinafter called the applicant. In that letter the applicant is requesting this court to call for and examine the proceedings in **Nairobi CM Cr. Case No. 881 of 2012**, to satisfy itself and pronounce on the **legality**, and **propriety** of the findings, and orders, which granted bail to the respondents on 16th July 2012, as well as the **regularity** of the proceedings giving rise thereto. That the court be pleased to revise and set aside the said orders.
2. The learned state counsel Mr. Okello urging the application on behalf of the state, relied on the supporting affidavit sworn on 23rd July 2012, which had been filed together with the Chamber Summons dated 23rd July 2012, and a further affidavit sworn on 31st July 2012. Both affidavits were sworn by No. 232737, Chief Inspector Charles Ogeto of Anti-Terrorism Police Unit, (ATPU), in Nairobi.
3. The learned state counsel, submitted that the respondents applied for, and were denied bail on the 25th and 27th June 2012, for the reasons that the two respondents had no fixed abode, had no known hosts in Kenya and were a flight risk. He urged that when bail was sought for a third time and granted, nothing had changed in the circumstances of the respondent. That, whereas the respondent's constitutional right to bail cannot be denied, under **Article 49(1)(h)** of the **Constitution**, the court can deny bail where compelling reasons are supplied, to the court.
4. The learned counsel Mr. Wandugi urging for the respondents, relied on the replying affidavit sworn by himself on 1st August 2012. In the said affidavit he deposed that the depositions in the supporting affidavits consisted of mere allegations yet to be established at the trial. That the respondents arrived in the country through JKIA and had not been connected in any way with the arrival by ship through the Mombasa Port.
5. The learned counsel also urged that the offences with which the respondents are charged are

bailable, the stated possible sentences notwithstanding, and the respondents are presumed innocent as at this point. That the affidavits in support have not disclosed any illegality, error or irregularity on the record, to warrant the exercise of the court's revisionary jurisdiction, and have been presented merely to defeat the respondents' right to bail.

6. I began by considering the question as to whether the applicants are properly before me, or have brought themselves prematurely before this court. The learned counsel Mr. Wandugi referred me to the case of **Kubwa Mohammed Seif H.C.C. Misc. App. No. 36 of 2004** and urged that the Hon. Lady Justice Lesiit had no hesitation therein, in holding that **Section 362 Criminal Procedure Code** only applies where final orders have been issued in a subordinate court, and that it was impractical to apply it in ongoing matters. He urged that **Section 362 Criminal Procedure Code** cannot apply in the matter now under consideration which is still ongoing in the trial court, and that the state is therefore improperly before this court. Learned state counsel Mr. Okello responded that the state was properly before the court because orders of bail are final and are therefore subject to Revision.
7. The applicant's letter dated 23rd July 2012, which set this application in motion, did not disclose the section under which the applicant had approached the court. The prayers sought however, which are that this court do call for the lower court record, to satisfy itself regarding the legality and propriety of the orders therein and also ascertain the regularity of the proceedings, and that the court be pleased to revise the said orders, falls squarely in the purview of Section 362 of the Criminal Procedure Code.
8. **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. **Section 123(3) of the Criminal Procedure Code**, vests in the High court, the jurisdiction to interfere with the decision of the subordinate court on matters of bail.

9. I agree unreservedly with the findings of Lesiit, J in **Kubwa Mohammed Seif**, and hasten to distinguish the said case from that which is before me now. The issue for determination before the Hon. Judge in the aforementioned case was one of the admissibility of a confession, which is interlocutory in nature, as opposed to the application for bail wherein the orders given, by the subordinate court, determined the application with finality. I do find therefore, that the applicant is properly before this court.
10. On the question of bail itself, the paramount issue for determination, in considering an application of this nature is whether the respondents 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.

11. The learned state counsel set forth the compelling reasons, upon which this court ought to deny

the respondents herein bail, as follows:

- The respondents are a flight risk.** To fortify this ground the learned state counsel submitted that the respondents were foreigners with neither fixed abode, hosts in this country, and were, in fact, arrested having checked out of Laico Hotel, and on their way to the airport to exit the country. He urged that the respondents were not candid or straight forward about their identities, as was evinced from the lower court record which showed that, upon their arrival at Jomo Kenyatta International Airport, the respondents presented themselves as tourists and were granted tourist visas. During the proceedings in the lower court, they presented themselves as businessmen out to invest in this country. They had provided yet a different and unrelated profile to the police at the time of arrest.
12. The learned state counsel also urged that since Kenya has not signed an extradition treaty with Iran, it would be impossible to prevail upon Iran, to return the respondents to the country to stand trial, should they be released on bail and they choose to jump bail and flee to Iran. He urged that the flight risk is all the more real given the gravity of the offences with which they are charged, and the severity of the sentences, in the event that the respondents are found guilty and convicted. If convicted the respondents are liable to life imprisonment in count I and to 15 years imprisonment in the other two counts.
 13. For the foregoing reasons bail had been denied twice in the subordinate court, before it was granted on the third application. To drive the point home, the learned state counsel pointed to paragraph 4 of the further affidavit, which gave several instances of foreigners who were admitted to bail, only to jump bail never to be rearrested.
 14. In response learned counsel Mr. Wandugi urged for the respondents that the state had not demonstrated what the irregularity, illegality, impropriety or the incorrectness was, in the lower court proceedings to warrant this court invoking its powers under **Section 362** of the **Criminal Procedure Code**, to revise the orders issued by the lower court in granting the respondents bail on 16th July 2012. That the applicants should have moved the High court by way of appeal and not Revision, if they were dissatisfied with the decision of the subordinate court.
 15. Learned counsel Mr. Wandugi, urged further that **Article 49(1)(h)** of the **Constitution** grants bail for all offences, the gravity of the offences with which the respondents are charged and the severity of the sentences which might be imposed should they be convicted, notwithstanding. That 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. That **Section 123** of the **Criminal Procedure Code** allows the accused persons to request for bail, and the court to grant it.
 16. The learned counsel urged also that none of these provisions **Article 49(1)(h)** of the **Constitution** or **Section 123** of the **Criminal Procedure Code**, limits the number of times an applicant may request for bail, and there is no requirement that there be change in the circumstances of the applicant, before a bail application can be revisited, that, notwithstanding, the respondents' medical records were availed to show the changed circumstances. The fact that the respondents were admitted to bail on the third application should therefore, not be used against them, and that the risk of flight when bail is granted is a risk and our justice system can take.
 17. Learned counsel further urged that neither **Article 49(1)(h)** of the **Constitution** nor **Section 123** of the **Criminal Procedure Code** limited bail to Kenyan citizens, and the fact that the respondents were foreigners, or that they were dishonest about their identities was not a bar to their being admitted to bail. That neither are absence of flight risk or having a fixed abode pre-conditions stipulated in **Section 123** and **124** of the **Criminal Procedure Code** or in **Article 49(1)(h)** of the **Constitution**. The learned counsel pointed out that these are issues which belong to the **Bail Act of England** and have no legal basis in Kenya.
 18. In dismissing the list provided at paragraph 4 of the applicants' further affidavit, by which the

applicants sought to prove that foreigners admitted to bail in our courts are a flight risk, learned counsel urged that the state should not expect the court to take up the duties of the police, nor to punish the two respondents for the misdeeds of those who jumped bail unless a nexus could be established between them.

19. The second compelling reason upon which this court ought to deny bail was stated to be with regard to national security, public security and public interest. The learned state counsel Mr. Okello urged, that the recovery of the 15kg of explosive material was made possible by the respondent and their arrest was as a result of intelligence reports which showed that a 100kg of dangerous explosive material had been shipped into the country from Iran through the Port of Mombasa.
20. The intelligence reports indicate that there is still a consignment of 85 kg of explosives which remains unrecovered, and may be accessed and used by the respondents to harm the 42 million citizens of this country if they are released on bail. Learned counsel urged that bail ought to be denied if the granting thereof would expose even one individual to the risk of harm, even if that individual is the accused person himself.
21. Learned counsel Mr. Wandugi countered these arguments by stating that these were mere allegations which were yet to be proved at the trial, and that even if the state intends to amend or substitute the charges, those are not sufficient grounds for the court to deny bail.
22. **Section 123(3) Criminal Procedure Code**, 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.
23. In **Republic v Danson Mgunya & Ano. HCCR NO. 26 OF 2008**, Hon. 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. He set out the criteria and I have considered it as here under, in respect to this case:
 24. ***The nature of the charges, and the gravity of the punishment in the event of conviction:*** 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 is life imprisonment in count I and 15 years on other counts is severe indeed.
 25. ***The strength of the evidence which supports the charge, and the likelihood of the accused interfering with witnesses or suppressing evidence that may incriminate him:*** The courts are usually, not willing to remand an accused person in custody where the evidence against him/her is tenuous, even if the charges are serious. On the other hand, where the evidence against the accused person is strong the court may consider it justifiable to remand him/her in custody.
26. In **Republic vs Muneer Harron Ismail & 4 others, H.C. Criminal Revision No. 51 of 2009**, Warsame J. stated as follows:

“In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances; and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public.”

This was reiterated in **Aboud Rogo Mohamed & another v Republic [2011] eKLR**, by Ochien’g, J. Whilst security considerations, make the granting of bail most unattractive, unlikely and

unfavourable, nevertheless the courts must be allowed to fulfil its traditional function of balancing the interest of State and those of individual.

27. At this point the presumption of innocence enshrined in **Article 50(2)** of the **Constitution** operates in favour of the respondents, and such evidence as the prosecution may have is yet to be tendered and tested at the trial. On the other hand the state has a duty to keep its citizens and visitors within its territory safe from threats within and from outside its borders. The respondents have a right to enjoy their fundamental rights and freedoms, but it is my humble view that Kenyans and aliens of good will also have a right to the quiet enjoyment of their rights, and to go about their daily business without threat to life or limb, and without being placed in harm's way.

28. I have looked at other jurisdictions on the issue of public interest. In South Africa, **Section 60(4)** of the **Criminal Procedure Act** lists the grounds on which it would not be in the 'interests of justice' to grant an accused person bail. These are that the accused person, if released on bail, would:

- a. Endanger the safety of the public, or any person, or will commit a certain specified offence;
- b. Attempt to evade trial;
- c. Attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- d. Undermine or jeopardise the objectives or the proper functioning of the criminal justice system, or,
- e. Where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security.

29. I take judicial notice of the circumstances prevailing at the time of the arrest of the respondents, when there were explosions going off in various parts of the country injuring, maiming and even killing people. I also note that the recovery of the 15kg of explosive material was made possible by the respondents, and their arrest was as a result of intelligence reports which showed that 100kg of dangerous explosive material had been shipped into the country from Iran through the Port of Mombasa. This lends credence to the intelligence report which indicates that a consignment of 85 kg of explosives remains unrecovered and may be accessed and used by the respondents to harm innocent Kenyans.

30. ***The previous criminal record of the accused if any:*** No evidence was tendered before me on the antecedents of the respondents to indicate that they have previous criminal record.

31. ***The probability that the respondents may not surrender themselves for trial:*** In **Daniel Dela Amega vs Republic [2006] eKLR**, to which I was referred by learned counsel, Mr. Wandugi, Makhandia J, held that if there is merited fear, that the respondents may abscond if granted bail, then the court would ordinarily refuse to admit such an accused person to bail. In the matter before me it is observed that the respondents are Iranian nationals. While there can be no discrimination against them on grounds of their being foreigners it is a matter of fact that Kenya has not signed an extradition treaty with Iran, and it would therefore, be impossible to prevail upon Iran, to return to its nationals to Kenya to be prosecuted should they abscond and return to Iran.

32. ***The likelihood of further charges being brought against the respondents, and the probability of guilt:*** I will not speculate on the likelihood of further charges being brought against the respondents or on the probability of guilt of the respondents, since the law presumes them innocent until proved guilty. The applicant is not barred from preferring other charges against the respondents.

30. ***Detention for the protection of the accused:*** I did not consider this issue since it was not submitted before me that the lives of the respondents were in danger, or that they needed protection.

33. ***The necessity to procure medical or social report pending final disposal of the case:*** It was

urged for the respondents that they were seriously ill and required medical attention, and that the state had considered this and they were receiving medical attention. It is not evident when they fell ill. I was not told whether they travelled from Iran as very sick people, or they developed these ailments in Kenya at the time of arrest. At any rate they are receiving medical attention.

34. I must hasten to add that the attempts by the applicant to liken this case to others, where foreigners who were admitted to bail failed to avail themselves at the trial, and those of the respondents to liken it to cases where bail was granted were not helpful. For the applicants attempts I agree with the learned counsel, Mr. Wandugi, that we cannot punish the respondents for the misdeeds of other foreigners who have been released on bail and absconded. For the respondents, it is my observation that most of the cases referred to were of relatively minor gravity compared to the case at hand. Furthermore each application must be determined on its own facts and merit.

In my ruling, guided by all the relevant provisions of the law, and the cited authorities together with all attendant circumstances, I have reached the conclusion that the scales of justice tilt in favour of the applicants.

For the foregoing reasons therefore I find that the application is meritorious and I grant it.

SIGNED DATED and DELIVERED in open court this *16th day of August 2012*

L. A. ACHODE

JUDGE