REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Criminal Application 321 of 2012

PATRICIA BIRUNGI NAZZIWA……..….1ST APPLICANT

NATHANIEL OKOROUDO…….……2ND APPLICANT

CATHERINE ACHIENG…….…….....3RD APPLLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appllicants have filed a Chamber Summons application dated 18th June 2012 pursuant to **Article 49 (1)(h)** of the **Constitution** of Kenya, 2010 and **Section 123 (3)** of the **Criminal Procedure Code, CAP 75 Laws** of **Kenya**.

2. In the said application which was brought under certificate of urgency, the applicants prayed to be admitted to bail, pending hearing of the appeal herein.

3. During the hearing of the application, learned Counsel Dr. Khaminwa, appearing for the applicants, relied on the grounds on the face of the Chamber Summons and his own sworn affidavit. The applicants **Patricia Birungi Nazziwa, Nathaniel Okoroudo** and **Catherine Achieng** who were charged in **Kibera CM Criminal Case No. 2472 of 2012**, for Trafficking in narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs** and **Psychotropic Substances (Control) Act, No. 4** of **1994,** applied to be released on bond or bail on reasonable conditions pending the trial.

4. The learned Counsel is now invoking the original Jurisdiction of the High Court under **Section 123 Criminal Procedure Code,** challenging the refusal of bail to the applicants by the lower court.

5. The grounds as advanced by the learned counsel on behalf of the applicants may be summarised as follows:

(i) Bail is a constitutional right and the offence with which the applicants changed is bailable under **Article 49(i) (h)** of the **Constitution** of **Kenya 2010**.

(ii) There is no compelling reason not to release the applicants on bail pending the hearing and determination of this matter and they are willing to abide by conditions imposed by the court.

6. To persuade the court, the learned counsel referred to the case of **REPUBLIC V MUSILI DEWROCK KITHOME & Anor Cm Cr. No. 91 of 2011**, in which bail was granted with clear terms which if violated could cause the bail to be cancelled. He also relied on **DANSON MGUNYA & Anor VS REPUBLIC, Criminal No. 26** of **2008**, in which it was held that **Article 49(1) (h)** of the **Constitution** was overriding and superseded the provisions of **Section 123** of the **Criminal Procedure Code**.

7. The Learned counsel for the applicants submitted that the 1st appellant, Patricia Birungi, was expecting a baby in three months' time and was also suffering from cancer. That in the circumstances she could only receive proper medical attention outside prison. According to the learned counsel, this amounted to unusual and exceptional circumstances warranting the applicant to be released on bail pending trial. Further that the 3rd applicant Catherine Achieng was HIV positive and would also be in need of medical attention. He submitted that though the 1st Appellant and 2nd Appellants were foreign nationals, this was not an issue warranting denial of bail to them as the same could be taken care of by the terms and conditions of bail to be imposed. The court, he submitted, could also make orders that they deposit their passports in court and make periodic reports to the police station, besides having Kenyan sureties, and that therefore there were no compelling reasons to deny them bail.

8. Miss Wangele, learned counsel for the State, opposed the application on behalf of the Respondent and relies wholly on the replying affidavit sworn on 13th July 2012, by the Investigating Officer, Chief Inspector Raha Raymond Ngao, in which he deponed that there were compelling reasons to warrant the courts rejection of the application.

9. The learned State Counsel urged the court not to grant bail to the applicants, referring to paragraph 14 of the replying affidavit which cited nine previous and similar drug related cases of bail applications involving foreigners who were released on bond with sureties only to jump bail and abscond never to be found. In the circumstances, she deemed the applicants to be a flight risk who were likely to flee from the Jurisdiction of the court and consequently stall the proceedings. But as submitted by both Counsels, each case must be looked at on its own merits. None of the applicants should be condemned on the strength of what another accused person did or failed to do unless a nexus can be drawn between them.

10. On the question of bail, 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. 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.

12. In **Republic v Danson Mgunya & Ano. HCCR NO. 26 OF 2008**, to which I have been referred by the learned counsel for the applicant, 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 cretaria and it includes the reasons advanced by the learned state counsel Miss Wang'ele in respect of this case.

13. The learned state counsel set out the compelling reasons, upon which this court ought to deny the respondents herein bail, as follows:

The gravity of the charge and the severity of the sentence 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 charge is grave being under **Section 4** of the **Narcotic Drugs and Psychotropic Substance Act No. 4** of **2003**. The sentence involved, which is life imprisonment together with a fine three times Kshs. 18,136,260 which is the market value of the substance if convicted, is severe indeed.

The learned state counsel also submitted that no reasonable ground had been advanced to assist the court in determining whether the appellants are likely to attend trial if released on bail, and the court should not exercise its discretion to facilitate evasion of justice.

14. It is important that the court strikes a balance between this reality and the presumption of innocence that operates in favour of the applicants at this juncture.

15. From the record the applicants had applied for bond terms pending trial which application the prosecution was not opposed to, save for the fact that the accused persons were required to deposit their passports in court until the case was determined.

16. I note that no evidentiary proof has been tendered in court in respect to the first and third applicants, whom the court was informed, were suffering from cancer and HIV respectively. In **Dominic Karanja vs Republic [1986] K.L.R. 612,** the Court of Appeal held *inter alia,* that ill health per se would not constitute exceptional circumstances where there existed medical facilities for prisoners.

17. In my view the three issues raised in the replying affidavit are weighty and amount to compelling reasons not to release the applicants on bail at this point in the trial. There is however nothing to stop the applicants from re-visiting their applications before the trial court, as soon as the evidence of some of the witnesses has been taken, since then the court will be in a better position to re-evaluate the compelling reasons advanced.

Reasons upon which the application is dismissed.

SIGNED DATED and DELIVERED in open court this *21st* day of *September* 2012.

L. A. ACHODE
JUDGE