REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Crim Application 20, 21, 22, 23, 24 & 71 of 2005

YUSUF ALI MOHAMMED YAKUB……..……..APPLICANT

VERSUS

REPUBLIC……..……...RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPLICATION NO. 21 OF 2005

DANIEL TSOFWA MASHA…….…….APPLICANT

VERSUS

REPUBLIC…….RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPLICATION NO. 22 0F 2005

JOHNES KATHUO MWULI…….……APPLICANT

VERSUS

REPUBLIC……..……...RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPLICATION NO. 23 OF 2005

JOSHUA OMONDI OBUOR…….……..APPLICANT

VERSUS

REPUBLIC……..……..…RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPLICATION NO. 24 OF 2005

MOHAMED HATIBU DZUNGWEH……..……..APPLICANT

VERSUS

REPUBLIC…….……..RESPONDENT

CONSOLIDATED WITH

CRIMINAL APPLICATION NO. 71 OF 2005

BOAZ KILIMO …….……...…….....APPLICANT

VERSUS

REPUBLIC…….…….RESPONDENT

RULING

These six applications are for bail pending trial. All the applications emanate from the same on-going criminal case, which is No. 93/05.

At the hearing of the applications, the advocates for the applicants asked the court to hear the applications together. The respondent was in agreement with the suggestion. On my part, I found it to be the most convenient way of dealing with the applications. I therefore directed that the applications be heard together.

Before moving on to deal with the submissions by the parties, I wish to put on record the legal representations in this matter. The Applicants were represented by Messrs Nyamodi, Omoti and Ngaira advocates. At the other end of the scale, the respondent was represented by learned State Counsels, Messrs Kaigai and Makura.

When canvassing the applications, Mr. Nyamodi advocate first pointed out that the offences with which the applicants had been charged were all bailable. He then said that when considering the applications, this court should take into account the severity of the offence and of the sentences to be meted out, if the applicants were found guilty. That consideration would enable the court assess whether or not the applicants would be inclined to jump bail, in the event that the application were allowed.

There is no doubt at all that the applicants are right in spelling out the main ingredient for consideration in applications for bail pending trial.

But, the applicant also contends that the said ingredient must be weighed against the applicant's constitutional rights, pursuant to section 72(5) of the Constitution of Kenya. That section reads as follows;

"If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

Once again, there is no doubt that the applicants have correctly enunciated the law.

In seeking to apply those legal considerations to their circumstances, the applicants have pointed out

that they were unlikely to get a timely trial. The reason for so saying was that the narcotic substances, which formed the subject matter of the offences with which the applicants were charged, were recovered in Holland.

I was asked to take Judicial notice of the fact that the discovery of narcotics anywhere in the world usually attracts criminal proceedings. I am afraid, I am not able to accept the applicants invitation, to take judicial notice of the matters cited. I say so because, to my knowledge the issue is not of such common notoriety that this court can take judicial notice of it. From my general knowledge of world affairs, I believe that not all countries have a common approach to narcotic substances. If anything, I understand that there are certain substances which are illegal in some countries, but were legal in other countries. Thus the very definition of what constitutes "**narcotic substances"** is probably different from country to country. Also, some countries are known to conduct their affairs almost as if narcotic drugs were legitimate, or at least the drugs were not condemned outright.

But to bring this issue to an end, and whereas I declined to take judicial notice of the probability that criminal proceedings would be commenced in the Netherlands, in respect to the narcotic substances recovered there, Mr. Ngaira advocate informed this court that proceedings had indeed been instituted, in Netherlands.

Following that revelation, the applicants said that the narcotic substances could only be available in Kenya, after the proceedings in the Netherlands were concluded. It was therefore felt that that would result in the delay of the applicants trial.

In response to that contention, the respondent submitted that all the witnesses had been bonded to attend court and testify. Mr. Kaigai, learned State Counsel, stated quite categorically that the narcotic substances which are now in the Netherlands, will certainly be available at the trial. The trial itself has been set down for the week of 7th to 11th March 2005. Therefore, as far as the respondent was concerned the applicants rights under Section 72(5) of the Constitution will be respected.

The next issue raised by the applicants, was that the court ought to consider the strength or weakness of the prosecution case.

Thus, if the case appeared weak, the court would be more inclined to grant bail. Conversely, if the prosecution case appeared strong, the court would be inclined to deny bail.

I did ask the applicant's counsel how this court could go about assessing the strength or weakness of the prosecution case, when no evidence had yet been tendered. Counsel replied that he acknowledged that this was a difficult issue. However, in the applicants view, the court's task had been made easier, in this case, as the prosecution had already shown its hand through the particulars spelt out in the charge sheet. The particulars indicate that while the offences were committed in January to July 2004, the containers loaded with the narcotics was recovered many months later. Therefore, as far as the applicants were concerned the passage of time between the commission of the alleged offence and the discovery of evidence, greatly weakened the prosecution case. The reason for so saying was that the containers could have been in very many other hands during the period, thus weakening the charges for trafficking.

As far as this court is concerned, the applicants were right to have conceded that this is a difficult issue. They say that the prosecution case is weak. I am afraid I cannot make any decision on the strength or weakness of the prosecution case, by simply looking at the particulars set out in the charge sheet. The particulars therein do not provide the court with sufficient material to enable me determine the strength or otherwise of the prosecution case. In my view, it would be no more than idle speculation to say that simply because the substances were recovered several months after the alleged act of trafficking, the prosecution had a weak case. At present, there is no way of telling how the prosecution will explain the period in question. It is possible that the prosecution may or may not offer evidence that will explain the issue.

Another issue raised by the applicants relates to the Replying Affidavit sworn by Inspector Francis

Wambua of the Anti- Narcotics Unit, at the Criminal Investigations Department (CID) Headquarters, Nairobi. The main issue in contention, in that affidavit is the list of persons cited by the deponent, as having absconded. It is a list of 21 persons, all of whom had been charged with drugs - related offences. As far as the applicants were concerned, the list was of absolutely no probative value. It was contended by the applicants that the state should have provided the court with a list that contained all persons who had been granted bail after being charged with drugs related offences.

I find some merit in that submission because it is only when the court has all the relevant information that it can use it to make an informed decision. At the moment, the court does not know how many of the accused persons who were granted bail did attend court later. Therefore, the court would not be in a position to ascertain the probability of persons absconding, if granted bail.

But then again, is the decision on whether or not to grant someone bail to be governed by records which bring about the mathematical assessment of such persons attending their trial or absconding? The answer to that question was provided by the applicants herein. They said that applications for bail should not be determined on the basis of generalizations.

In Criminal Application No. 302 of 2004 Elphas Marienga Muhando V Republic (unreported), the court expressed itself thus, at page 13 to 14;

"However, all said and done, this court is required to exercise its discretion in a judicial manner. When doing so, I must consider this case on its own peculiar circumstances. Therefore, whilst trends may be displayed from the records of other cases, the bottom line is that trends should not by themselves be the basis for deciding the application in any case."

In that same case, the court held as follows, at page 9;

"it is therefore well settled that in this country, persons who are charged with drug related offences may not be denied bail simply because of the nature of the offence in itself. Courts have the discretion to decide whether or not to grant bail. However, when exercising the said discretion, the courts must consider the seriousness of the offence, amongst other factors."

A similar position was taken by the Hon. A. Mbogholi Msagha J **in Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge: V Republic** (unreported) at page 3, wherein he held as follows:

"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."

In this case, the applicants have all been charged with trafficking in narcotic drugs contrary to section 4(a) of the Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994. The penalty for the offence of trafficking is imprisonment for life, and a fine of a sum of Kshs 1,000,000/= or 3 times the value of the subject matter, whichever is greater.

The estimated value of the drugs in this case is Kshs 1.65 billion. Therefore, three times that value is Kshs 4.95 billion.

There can be no doubt that the sum of Kshs 4.95 billion is colossal, by any standards. Bearing that fact in mind, and applying it to the words of the Hon. A. Mbogholi Msagha J., cited above, I hold that the offence of trafficking, with which the applicants have been charged, is so serious and the sentence so high that there is a real incentive for the applicants herein to abscond, rather than face trial.

In that regard, I have given due consideration to the Ruling of the Hon. A.O. Muchelule, Chief Magistrate, and find myself fully in agreement with it, on the twin issues of the seriousness of the offences and severity of the penalty for the said offences.

Mr. Omoti, Advocate for Mr. Yusuf Ali Mohammed Yakub, submitted that his client was 50 years old. He has three children,

and has lived in Kenya throughout his life. His occupation is that of a clearing agent. He was not arrested with any of the exhibits.

Thereafter, Mr. Ngaira, advocate for Mr. Boaz Kilimo, informed the court that his client was a young man, with a family residing at Otiende Estate, Langata, Nairobi. This applicant was an employee of the Kenya Revenue Authority.

Both Mr. Omoti and Mr Ngaira urged the court to consider their respective client's circumstances, favourably. By these submissions, I understood the applicants to be making out a case of exceptional circumstances, with a view to having the court grant them bail.

In Mwaura V Republic [1986}KLR 600, Bosire J. (as he then was) held that:

"in exercising its discretion the court should consider if certain exceptional circumstances, personal to the applicant exists, which if weighed against the risk of the applicant absconding, the balance will tilt them in favour of granting bail."

I have considered all the applicants personal circumstances, as set out in their affidavits. Each one of them is a citizen of Kenya, and each has a family. By virtue of their being behind bars, their respective families are being deprived of their companionship and help. That is sad, especially when the Constitution of this country clearly states that they are innocent until and unless the prosecution were to prove them to be guilty. But that notwithstanding, none of the applicants has demonstrated any exceptional or unusual circumstances, which if weighed against the risk of their absconding, tilts in favour of granting them bail. The fact that the applicants all have families, and that their families are suffering is not an exceptional circumstance.

I remind myself that the primary consideration by the court, in applications for bail pending trial, is to ensure that the applicant will appear at his trial, if he was granted bail. If the court is able to impose conditions which were deemed sufficient to ensure that the applicant did attend his trial, the court will grant bail. But if the court comes to the conclusion that the risk of absconding far outweighed any conditions which the court considers to be reasonable and necessary, the applicant would be denied bail.

In this case I have reached the conclusion that the penalty to be imposed on the applicants, if they were convicted, is so severe that it amounts to a real incentive to the applicants absconding. Also, the applicants did consent to the trial dates, of 7th to 11th March 2005. In the circumstances, having given due consideration to these applications, I find that the applicants have not made out a case for the grant of bail, at this moment in time.

I emphasize this fact, because circumstances may or may not change as the time goes by. But in the meantime, I decline to grant bail to the applicants. Their applications are dismissed.

Dated at Nairobi this 2nd day of March 2005

FRED A. OCHIENG

JUDGE

Delivered in the presence of

Kaigai for State

Nyamodi & Ngaira for Applicants

Mr. Odero court clerk