REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO.619 OF 2003

SYLVESTER MWINGA TSUMA……..…….. APPLICANT

VERSUS

REPUBLIC…….....…….. RESPONDENT

RULING

The applicant herein has applied to this court to be admitted to bail pending the hearing and determination of Kibera Chief Magistrate's Court Criminal Case No.4279 of 2003. He was charged in that case on 26.05.03 jointly with one Bernard Mutinda Munuve with the offence of trafficking in narcotic drugs, contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, No.4 of 1994.

Learned counsel for the applicant, Mr. Wandugi sought to rely on the grounds stated in his notice of motion and affidavit of 08.08.03 filed on 11.08.03 and his oral submissions made before me on 08.09.03.

Basically, the applicants grounds are that the offence is bailable. That although the applicant applied to the trial court for release on bail, the court denied him bail vide its ruling delivered on 09.06.03 on grounds that the offence is serious and that there is likelihood of him absconding if released on bail. That the court's ruling that the offence is serious is unjustified as there is no evidence to show that there is likelihood of the applicant absconding. That the court has shown bias and prejudice and that this makes the applicant fear that he may not get a fair trial in that court. That the anti-narcotics personnel registered the matter at Kibera with ulterior motives since the offence was allegedly committed around Jommo Kenyatta International Airport and the court vested with jurisdiction is Makadara. That the applicant is a Kenyan by birth, married with children who have been living with him in Nairobi. That the primary purpose of bond is to ensure that the accused will present himself to court for trial, which he undertakes to do, and also provide adequate securities for his release pending the hearing of his case. That his case is fixed for hearing on 02.10.03 which is some three weeks away but there is no guarantee that the hearing will start and be completed that day and that this means he will not be tried within a reasonable time as stipulated by the Constitution of Kenya [section 72 (5)]. That this court should exercise the power vested in it by section 1 2 3 (3) of the Criminal Procedure Code (Cap.75) and direct that the applicant be admitted to bail on terms similar to, or lighter than, those on which his co-accused was released.

Applicant's counsel referred this Court to consider the applicant's plea for bail in the light of the High Court decisions in: **George Anyona and 3 others vs Republic, Misc. Criminal Application No.358 of 1990** (unreported); **Criminal Application No.427 of 1998, Chechukwu Juventus vs Republic** (unreported); **plus Misc. Criminal Application No.449 of 2003, Bernard Mutinda Muneve vs Republic** (unreported) and allow the applicant's application for bail pending his trial.

Learned counsel for the respondent, Mr. Monda opposed the applicant's application. In his view, the trial magistrate's ruling against bail for the applicant was proper as the magistrate addressed the issues canvassed by the applicant's counsel before this court. That the magistrate appreciated that bail is a constitutional right but noted that since the applicant's case had been fixed for hearing on 26.06.03, which was only three weeks away, the hearing was going to take place within a reasonable time and that, therefore, section 72 (5) of the Constitution was inapplicable. In any case, counsel added, section 72 (5) is a proviso to section 72 (3) of the same Constitution and that the grant of bail is not absolute but discretionary. That the issue of the applicant's trial coming up on 26.06.03 was not canvassed before the Judge in Misc. Criminal Application No.449 of 2003 whose ruling against the magistrate's refusal of bail was delivered on 11.06.03 (it was actually on 02.07.03). That the judge was informed that the trial had been fixed for 02.10.03 and that had the issue of the hearing coming up on 26.06.03 been drawn to the attention of the Judge, he would have come to the conclusion that the magistrate acted in accordance with the law in view of the offence the applicant was charged with. That each case should be considered on its individual merits. That O2.10.03 when the applicant's trial is scheduled to begin is some three weeks away and that this means the applicant would be tried within a reasonable time as envisaged by section 72 (5) of the Constitution. That evidence to be given is basically by police officers and that the trial should not take long to conclude once it starts on 02.10.03. That the decision in Misc. Criminal Application No.449 of 2003 by another High Court Judge, while being persuasive, is not binding on this Court.

Respondent's counsel concluded his submissions by reiterating that each case must be considered on its own merits; that the applicant's application lacked merit and should be dismissed.

In reply, applicant's counsel said the ruling in Misc. Criminal Application No.449 of 2003 was clear that the hearing of the application of the applicant therein would not take place within a reasonable time. That as more time has elapsed since the trial magistrate refused bail to the applicant herein and he has remained in custody, his case has become even more deserving of bail. That although the case against the applicant and his co-accused who secured bail through High Court Miscellaneous Criminal Application No.449 of 2003 was scheduled for hearing on 26.06.03, it could not be heard as the magistrate was sitting on court-martial. That the magistrate has been sitting on court –martials except for Fridays since June, 2003, possibly even before, and that there is no certainty that the trial will commence on 02.10.03 or how long it will take. Counsel reiterated his prayer for the applicant's application to be allowed.

The issue for the determination of this Court is whether the applicant should or should not be granted bail pending his trial.

I have considered what both counsel submitted before me and the authorities drawn to my attention alongside the subject ruling of the learned trial magistrate, plus other authorities as well.

Liberty is one of the fundamental rights and freedoms of the individual protected under the Constitution of Kenya [section 70 (a)], subject to such right not prejudicing the rights and freedoms of others or the public interest. The constitution provides that no person shall be deprived of his personal liberty save as may be authorized by law [section 72 (1)]. One of the situations where the Constitution allows the taking away of a person's liberty is "upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of Kenya "[section 72 (1) (e)]. **A person who is arrested or detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence, and who is not released must be brought before court for trial as soon as is reasonably practicable [section 72 (3) (b)]. The Constitution also provides that if a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, he must, "unless he is charged with an offence punishable by death, be released either 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** [section 72 (5)]. Further, the Constitution provides that if a person is charged with a criminal offence, then unless the charge is withdrawn, the case must be afforded a fair hearing within a reasonable time and that **every person who is charged with a criminal offence must be presumed to be innocent until he is proved or has pleaded guilty** [section 77 (2) (a)]. Finally, the Constitution provides that it must have the force of law throughout Kenya and, subject to section 47 (relating to its alteration), "if any other law is inconsistent

with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void,"

In my view, when a court is considering whether or not bail should be granted before trial, the court must, first and foremost, be guided by the presumption of innocence on the part of the accused.

The charge facing the applicant is one of trafficking in narcotic drugs, i.e. 5.2756 Kgs of heroin with a street value of Kshs,5,275,600/= in contravention of the law. Section 4 (a) of the Narcotic Drugs and Psychotropic Substances (Control) Act, 1994 under which the applicant is charged is in the following terms:

> **"4. Any person who traffics in any narcotic drug or psychotropic substance or any substance represented or held out by him to be a narcotic drug or psychotropic substance shall be guilty of an offence and liable –**
>
> **(a) in respect of any narcotic drug or psychotropic substance to a fine of one million shillings or three times the market value of the narcotic drug or psychotropic substance, whichever is the greater, and in addition, to imprisonment for life".**

The seriousness of the offence charged cannot be gainsaid but this alone is not enough to warrant denial of bail pending trial in view of the presumption of innocence alluded to earlier.

In **Nganga vs Republic** [1985] KLR 451, Chesoni, J (as he then was) held, inter alia, that the primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. He added that in doing so, the court, inter alia, must consider the nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty, plus the strength of the prosecution case. I respectfully agree. However, at this stage the court does not know anything about the strength of the case against the present applicant but only its seriousness which, as pointed out earlier, is not enough.

In **Mazrui vs Republic** [1985] KLR279, Abdullah, J (as he then was), inter alia, held that in principle, generally and because of the presumption of innocence, an accused person should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:

> a) the accused will fail to turn up at his trial or to surrender to custody; or
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> b) the accused may commit further offences; or
>
> c) he will obstruct the course of justice.

Again, I respectfully agree and hasten to add that no evidence has been availed to court to establish the existence of such grounds.

In her ruling on 09.06.03 against the grant of bail to the applicant herein and his co-accused, the learned trial magistrate said:

"The court in this case having weighed the seriousness of the charge and the penalty that would follow if the accused are found guilty felt inclined to deny bail for it can't be ruled out their temptation (sic) to abscond. The hearing date is on 26.06.03 which is less than 3 weeks from the date of this ruling. That is not considered as unreasonable time. I so rule." The trial did not take off on 26.06.03 and is not expected to start until 02.10.03.

Following the trial magistrate's aforesaid ruling, the applicant's co-accused Bernard Mutinda Munuve filed High Court Miscellaneous Criminal Application No.449 of 2003. The matter went before my brother Onyancha, J who granted Bernard Mutinda Munuve bail pending trial. The applicant herein has remained in remand. The charge sheet shows that he had been in custody since his arrest on 26.05.03, i.e. about four

months now, and, as noted earlier, his trial is not expected to start until 02.10.03.

The applicant now urges that there is no good reason why he should be in custody pending trial while his co-accused whose circumstances are not any different awaits the same trial while out of custody. The applicant alleged bias and prejudice on the part of the trial magistrate and ill-motive on the part of the anti-narcotic personnel. There is no evidence of these and I ignore the allegations.

Of course each case should be considered on it's own merits. In my opinion, there is no distinction between the applicant's situation and that of his co-accused. I have had the benefit of reading the ruling of my learned brother Onyancha, J in Miscellaneous Criminal Application No.449 of 2003. The issues and circumstances well considered there in respect of the applicant's co-accused, Bernard Mutinda Munuve are in my view similar to those in respect of the applicant herein. I respectfully agree with Onyancha, J in his findings in favour of granting bail to the applicant's co-accused and do think that the applicant herein should be treated similarly. I, with respect, reject the respondent's submissions against the granting of bail to the applicant.

The application of the applicant, Sylvester Mwinga Tsuma for bail pending trial is hereby granted with conditions similar to those imposed on his –co-accused. The applicant may be released on bail on the following conditions:-

a) His personal bond of Ksh.5,000,000/=.

b) Two Kenyan sureties in the like sum of Kshs.5,000,000/= each.

c) Applicant to surrender his passport or other external travel document to court for safe custody before being released, to be held until the trial is over.

d) Applicant to report once every fortnight to the senior – most officer in charge of anti-narcotic section at the Headquarters of the Criminal Investigation Department, Nairobi.

Orders accordingly.

Delivered at Nairobi this 12th day of September, 2003.

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B.P. KUBO

JUDGE