REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPLICATION NO 319 OF 2002

PRISCILLA JEMUTAI KOLONGEI…….APPLICANT

VERSUS

REPUBLIC…….RESPONDENT

RULING

The applicant Priscilla Jemutai Kolongei is facing a charge in the lower court of trafficking in Narcotic drugs c/s 4(a) of the Narcotic Drugs and Psychotropic Substances(Control) Act NO.4 of 1994.

On 4th April, 2002 when the applicant first appeared in court she denied the offence and her application to be released on bail pending trial was refused on the ground that there are very high chances that she may not turn up for trial.

There is now before me an application under section 72(5) of the Constitution and Section 123(1) and (3) of the Criminal Procedure Code for an order that the applicant be admitted to bail. The application is supported by an affidavit sworn by the applicant and some annextures attached thereto. The Republic opposes the application.

Mr Ombeta appeared for the applicant while Mr. Okello appeared for the Republic. Both learned counsel have ably presented their respective positions. It is common ground that the offence with which the applicant is charged is bailable. It is also common ground that the basic consideration is whether or not the applicant shall turn up to take her trial, each case however has to be considered on its own merits.

The applicant herein having denied the offence, shall be presumed to be innocent until she is proved guilty. Her arrest and arraignment in court is however founded upon reasonable suspicion of having committed the offence charged.

The law provides that if the applicant is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against her, she shall be released either unconditionally or upon reasonable conditions to ensure that she appears for the trial(see section 72(5) of the Constitution). It would appear that, while the provisions of the constitution are couched in mandatory terms, Section 123 of the Criminal procedure Code gives some discretion to the court is such cases.

Be that as it may, both counsel have taken the court through the said provision and cited some authorities on applications of this nature. I am alive to the said provisions and cases and do not deem it necessary to recapitulate the same in this ruling. The cited cases were by the High court and, other than their persuasive nature, are not binding on me. In any case, as has been observed, each case must be considered on its own peculiar circumstances.

I consider it prejudial to address anything relating to the strength of the prosecution case at this stage as Porter J did in MISC. CR APPN. No. 358 of 1990 George Anyona & 3 Others –v- Republic.Such an approach would be relevant where a substantial part of the prosecution case has been presented by way of evidence but not in this case where trial is yet to start. 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.

An affidavit sworn by Chief Inspector John Kemboi of the Anti-Narcotics Unit, Jomo Kenyatta

International airport, and who is also the Investigating Officer in the instant case, sets out a total of 17 cases on drug related cases wherein all the accused were released on bail with Kenyan Surities and have absconded without trace.

Some criticism has been levelled at the affidavit sworn by Chief Inspector John Kemboi in that, he has not disclosed the source of his information. However, paragraphs 1 and 14 of the said affidavit place the said officer in an undoubted position to monitor and aver, based on personal knowledge, the position of each cited case. In any case, the learned counsel was at liberty to apply for the said officer to attend the court and be crossexamined on the contents of his affidavit which he never did.

The offence with which the applicant is charged attracts, on conviction, a fine of Kshs. One million or three times the market value of the subject matter, whichever is higher. In addition, there is provision for life imprisonment. Going by the value of 27.8kgs of heroin said to be Kshs. 27.8 million in the charge sheet, if the applicant were to be convicted, the fine is likely to be kshs. 83.4 million.

I note what the applicant has said in her affidavit but, with respect, the fear expressed by the republic that she may escape trial if released on bail is well founded and, when all the obtaining circumstances of the case are taken into consideration, the temptation to abscond would be overwhelming.

I called for and examined the original file. The hearing is set for 2nd May, 2002 which is 16 working days away from the date hereof. In my view, the trial has been listed to start “within a reasonable time” and no prejudice shall be occasioned to the applicant.

The end result is that this application must fail. The same is accordingly dismissed. Order accordingly Dated and delivered at Nairobi this 10th day of April, 2002

A. MBOGHOLI MSAGHA

JUDGE