

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS CRIMINAL APPLICATION NO.7 OF 2002

DISMAS ONYANGO ODERO.....APPLICANT

=V E R S U S=

REPUBLIC.....RESPONENT

R U L I N G

The accused is charged with the offences under Narcotic Drugs and Psychotropic Substances (Control) Act No.4 of 1994. The value of the drugs is given as Kshs.900/=. The charges include possession and trafficking. He applied for bail/bond at the lower court at Malindi. The lower court upon a lengthy proceedings and Ruling, refused bond/bail. The applicant then came to this court under S.123(1) proviso, seeking that this court, despite the refusal of bail/bond in the lower court, does grant same. The lower court took into account:-

- a) An affidavit sworn by Inspector Shindo Kigato which appears in the court record in a different file.
- b) A general letter written by Imams and Preachers to the D.C. Malindi naming applicant as among drugs pushers and seeking strong preventive actions from the Administration and the Judiciary. The letter is dated 17.5.2002.
- c) The safety of applicant to the effect that he would be safer if in remand than if he is outside.
- d) The case is fixed for a hearing in a near date – 1.8.2002.

The applicant through his advocate Mr. Mouko submitted that the said lower court erred in taking into account and strongly relying on most of the above grounds which he argued, were extraneous. The applicant had been charged in a different case earlier in which he was convicted. It is stated that the case was also related to drug trafficking. However, Mr. Mouko argued that although the case was as stated, the applicant who was in that released on bond/bail, did not break the terms of the bond. He further argued that even in the pending case, the applicant was on bond but he has strictly obeyed the terms thereof. In respect of the grounds upon which the lower court refused bail, which the State Counsel, Miss Mwaniki, submitted were good and proper, Mr. Mouko said, most of the said grounds were extraneous and should not have been relied on by the lower court.

I have carefully considered the application, the grounds upon which it is brought and the grounds of objection. To be granted bail by accused is a discretion of the court considering the application thereof. However, the discretion has to be exercised judicially and not at the whims or as they call it sometimes, the idiosyncrasy of the Judge or Magistrate. The Judge or Magistrate therefore where he refuses bail, has to give reasons for it. The reasons have to be reasonable under the circumstances. The reasons given for refusal, have to be relevant. They cannot be called relevant if they are extraneous. In this case, it was the right of the accused to be granted bail if there were no relevant reasons for the lower court to refuse it. That the accused was earlier charged with a similar offence, is in my opinion an extraneous reason. It is so extraneous that it would indeed extend to interfere even with the trial itself. That the court considered a letter written by a third party, i.e. Imams and Preachers without availing them to be questioned as to the authenticity of the contents stood unfair to the applicant. Nor can it be said that the affidavit of an

Inspector of Police who showed no connection with the matter before court, was fair. I do agree that the matter considered may amount to extraneous matters.

The record put in or referred to of the applicant of obeying bails or bonds granted before to him, was not challenged. It stood as the single main ground why the application should not have been refused bail. That a hearing date was fixed near or soon is not a good ground to take away the right of a citizen to bail. It is my view therefore, and I so hold, that the applicant should not have been refused bail as there were no good reasons for refusal. Having said so, and having concluded that bail should be granted, I must nevertheless note that the offence charged is serious and the community is fraught with anger. While the court notes that applicant is entitled to bail, it cannot fail to consider, as the Magistrate did, the question as to whether releasing accused freely may not deter him from continuing to practice his trade since he had earlier been convicted of a similar offence. Accordingly, the applicant will be released on stringent terms as follows:-

- a) Applicant to deposit land a Title Deed worth not less than 300,000/- Kenya Shillings, plus
- b) A surety of similar amount.

Dated and delivered at Mombasa this 15th day of July, 2002.

D. A. ONYANCHA
J U D G E