



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APPLICATION NO. 373 OF 2019

ALFRIC ODHIAMBO OTIENO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant was charged alongside four (4) others with two counts. The first count was trafficking in narcotics contrary to **Section 4(a) of the Narcotics Drugs and Psychotropic Substances Control Act, No. 4 of 1994**. The particulars were that on 9th of March, 2019 at Donholm Area within Nairobi County, along with Urbanus Mutunga Kioko, Alloyse Onyango, Peter Okoth Odongo and Festus Chibueze Elemu jointly with others not before court, trafficked in a narcotic drug namely Heroin weighing 25 kilograms with a market value of Ksh. 75, 000, 000/- by conveying it in contravention of the said provisions of law.

2. The second count was **conspiracy to commit a felony contrary to Section 393 of the Penal Code**. The particulars of the offence were that on 9th of March, 2019 at Donholm Area within Nairobi County, the Applicant along with Urbanus Mutunga Kioko, Alloyse Onyango, Peter Okoth Odongo and Festus Chibueze Elemu conspired together to commit a felony, namely trafficking by conveying a narcotic drug namely Heroin weighing 25 kilograms with a market value of Ksh. 75, 000, 000/- .

3. On taking plea, the Applicant was granted bonds terms of Ksh. 7, 000, 000/- with two (2) sureties of a similar amount, in the alternative a cash bail of Ksh 5, 000 000/-. Aggrieved by this decision, he sought a review of the terms vide application filed on 19th July, 2019. He cited the following grounds as reasons for this consideration to be made:

- a) That he could not afford the bail and bond terms set ;
- b) That he has been in custody for at least four (4) months and is unable to raise the terms set; and
- c) That he is a family man and his continued incarceration is causing family anxiety and duress.

4. The duty of this court in exercising its revisionary jurisdiction is to ascertain the correctness, propriety, legality and regularity of the same **(see Section 362 of the Criminal Procedure Code**. This prayer must be looked at on two angles: discretion of the trial court in granting bail terms and correspondence of the terms to the charges facing the Applicant.

5. It cannot be gainsaid that the discretion of the trial courts in granting bail/bond is elemental in dispensing justice. It is only on satisfaction of the criterion set under **Section 362 of the Criminal Procedure Code** that the discretion can be interfered with.

6. **Section 123A of the Criminal Procedure Code** is informative. It implores the court to consider amongst others, the following factors:

- a) Nature of the Offence;
- b) The antecedents of the Accused;
- c) The ability of the terms to secure an Accused's attendance; and
- d) The Accused's previous record of court attendance while on bail.

7. The Applicant's antecedents demonstrate that he is a man of meager means. However, it also shows that he was out on bail in Criminal case 119 of 2017, a narcotic substances related case, when he was arrested in this matter. Again, the subject matter of the offence in count I is worth Ksh 75 000 000/- which, if convicted attracts a fine of Ksh 225, 000, 000/- and imprisonment for life. This fact points to likelihood of recidivism if released on bond.

8. It is also clear that the last known place of abode of the Applicant was vacated by his girlfriend who paid the rent to the house. Hence, the Applicant may now not have a place of fixed abode. There is therefore reasonable apprehension of the ability to locate the Applicant.

9. I therefore find that value of the subject matter and penalty attendant upon conviction, as well as the absence of a known place of fixed abode are significant considerations that deter this court in ruling in favour of the Applicant. These factors too are an inducement to the Applicant's temptation to jump bail. They tilt against the paramount consideration in setting bond terms which is to secure the attendance of an accused person to court.

10. All factors considered in their totality drive me to conclude that the learned trial magistrate properly and judiciously exercised her discretion in setting the bond terms granted to the Applicant. The bail terms are sufficient and not exorbitant and I see no reason to vary them. This Application therefore is without merit and I dismiss it. It is so ordered.

Dated and delivered at Nairobi This 4th Day of March, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Applicant in person.

2. Momanyi for the Respondent.