

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APP. NO. 320 OF 2016

EMMANUEL CHINEDU OKEKE.....APPLICANT

VERSU

REPUBLIC.....RESPONDENT

RULING

1. The Applicant is undergoing criminal trial at Kibera Chief Magistrate's Court in Criminal Case No. 3349 of 2014. He is facing a charge of trafficking in Narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances (Control) Act No. 4 of 1994**. On 19th November 2014, Hon. Ong'injo (CM) ordered that he be released on a bond of Kshs. 1,000,000/= plus one Kenyan surety of similar amount. In the present application dated 30th August 2016, the Applicant seeks for revision of the bond terms and/or release on reasonable cash bail. The Application is based on two major grounds. First, that the Applicant has been unable to obtain the bond and surety ordered. Second, that he is ready to comply with any reasonable condition that this court may attach to his release if granted bail. The application was supported by an affidavit sworn by the Applicant's Counsel Mr. Kennedy O. Arum.

2. Learned counsel for the Applicant, Ms. Otieno submitted that although the Applicant is a Nigerian national, he is not a flight risk since his passport was confiscated by the investigating officer. She claimed that she has also instructed the Nigerian Embassy not to allow him to travel in case he is released. Further, she submitted that the prosecution and the trial court have continuously delayed the conclusion of the trial by failing to avail witnesses. She also stated that the Applicant could not afford the bond terms as granted by the trial court since his pockets have been drained by his previous advocates.

3. The application was opposed. The investigating officer PC Fred Makokha swore a Replying Affidavit on 27th February 2019 to that effect stating that the bond terms were very lenient in view of the gravity of the offence.

4. Learned State Counsel Miss. Nyauncho for the Respondent submitted that the Applicant being a Nigerian national was a flight risk. She urged the court to consider that since the offence in question involve trafficking cocaine worth Kshs. 5,549,340/=, he was likely to abscond if released on cash bail pending trial. In her view therefore, it was necessary to submit a surety bond who would ensure his attendance in court. Further, she submitted that the delay in the conclusion of the trial was solely caused by the Applicant who keeps changing advocates. The new advocates on record then insist on recalling witnesses for cross examination. Finally, counsel submitted that only one witness is remaining for the prosecution to close its case. She therefore urged that the Application be dismissed.

5. There is no doubt that bail is a constitutional right which should not be derogated unless there are compelling reasons. However, it is a well settled principle that bail or bond granted must be commensurate with the offence charged. The nature of the offence which the Applicant faces is obviously serious. This is in view of the sentence prescribed for the offence in the event of a conviction. That is, a fine of Kshs. 1,000,000/= or three times the market value of the drug trafficked whichever is greater, together with life imprisonment. It is therefore not far-fetched that the Applicant is more likely to abscond if released on lenient terms.

6. Further, the fact that the Applicant is a foreigner is a factor that cannot be overlooked by this court when considering whether or not to revise the bond terms or grant him cash bail pending trial. That on its own *prima facie* renders him a flight risk. Further, the fact that the investigating officer confiscated his passport cannot deter him from fleeing from the jurisdiction of the court if released on cash bail considering the gravity of the offence. His attendance in court, as and when required, must therefore be secured by a Kenyan surety. In the circumstances, it will be inappropriate to release the Applicant on cash bail. I will not therefore revise the bond terms granted by the trial court as prayed.

7. Further to the foregoing, I have noted from the trial court's record that the delay in concluding the trial has solely been occasioned by the Applicant and not the prosecution or the court as alleged. He has attributed this to the advocates he instructed to represent him who have on several occasions failed to appear in court during trial. However, that cannot be used as an excuse since it is his duty to facilitate the wheels of justice by putting his house in order if he expects an expeditious determination of the case. Further and in any event, I have noted that majority of the prosecution witnesses have already testified. As such, it is clear that the trial is almost coming to a conclusion which further makes it unnecessary to revise the bond terms granted earlier.

8. The Application is hereby dismissed. The Applicant shall remain in custody unless he meets the condition attached to his release on bond.

9. It is so ordered.

DATED and DELIVERED this 13th day of March, 2019

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *M.s Otieno for the Applicant.*
2. *M/s Kimaru h/b for Nyauncho for the Respondent.*