



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**MISC CRIMINAL APPLICATION NO.138 OF 2018**

**JESEE KOOME KANAKE.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The Applicant herein 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. The applicant was granted bail on terms; a cash bail of Kshs. 15 Million and a bond of Kshs. 30 Million with Two (2) personal sureties of similar amount.

2. He was aggrieved by the Bail/bond terms and has sought its review on the following grounds:-

- a. That; the bail/bond terms are excessive as to amount to a denial of bail.
- b. That the trial Court took into consideration extraneous matters in granting the bail despite a positive pre-bail report.
- c. That the charge cannot be a proper basis to deny the applicant basic fundamental freedoms and
- d. That the Bail and Policy Guidelines requires any trial court to lean towards granting bail to accused persons unless there are compelling reasons to deny the same.

[3] The Respondent filed Grounds of Opposition on 27<sup>th</sup> December 2018. They argued that the application offends the laid down judicial principles on stay of criminal proceedings. They also stated that the reasons advanced do not in any way disclose exceptional or extraordinary circumstances to warrant the orders sought. And that the application is premature and lacks merits as the Orders sought can be canvassed in the subordinate court.

[4] The application was also canvassed through Oral Submission on 16.1.2019. Mr. Kiogora, learned legal counsel for the Applicant submitted that the Court had jurisdiction to entertain the application. The Respondent submitted that the Bail and Policy Guidelines provides that the serious nature of offence should attract heavy penalties. Mr. Namiti also argued that the Pre-bail report was considered hence the trial Court properly imposed terms of the bond.

**ANALYSIS AND DETERMINATION**

[5] It is now beyond peradventure that bail or bond is a constitutional right which should be granted upon reasonable condition unless there are compelling reasons not to release the person on bail or bond. See Article 49(1)(h) of the Constitution. Needless to state; compelling reasons are reasons that are strong and cogent as to bring conviction upon the court that the person should not be released on bail.

[6] The subject of this application is that the terms or conditions of bail are so excessive as to amount to denial of bail. The applicant therefore seeks a review of the terms of bail and bond herein. The prosecution filed quite generalized grounds of opposition some of which are not relevant to this case. Nonetheless, I find one which stares at the court for resolution; that this application is premature. It does not require high wit to see that this application is properly before court and is mature for consideration. My reason is that review of decision on bond is the unfettered right of the accused under the Constitution. Again, Section 123 (3) of the Criminal Procedure Code:-

**“....The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate Court or Police Officer be reduced.”** [Underlining mine for emphasis]

[6] I am aware that in granting conditions and or terms of bail or bond, the trial court exercises discretion. However, the discretion is not

exercised whimsically, but with great care and circumspection and upon well formulated principles of law. See also **Republic v James Kiarie Mutungei [2017] eKLR** and **Patrick Irungu Maina V Republic [2006] eKLR**. What is the constitutional test?

[7] The wording of the Constitution is that the accused:-

**to be released on bond or bail, on reasonable conditions,...[art. 49(1) (h) of Constitution]**

But the question is: what is ‘‘reasonable conditions’’?

[8] This will vary from case to case. But, the conditions should not detract from or take away the core of the right to bail. I take cognizance of the severity of the offence herein and that it carries a penalty of 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.

[9] From the record the Applicant is said not to be a flight risk and has a fixed abode at Kirwiro Village. It was alleged that he assisted the prosecution in the course of their investigations. The prosecution did not oppose him being granted the bail/ bond terms. In light thereof, I find the following decisions to be useful;

[10] In **George Chibuzor & 2 others v Republic [2013] eKLR** the trial court had granted bond terms of Kshs. 2 Million with two sureties with an additional Cash bail of Kshs. 5 Million. It took cognizance of the fact that the nature of the charges were grave and punishment in the event of conviction was Kshs.1 million or three times the market value of the drug trafficked being Kshs. 35 Million. The Court in revision was satisfied with the bond terms granted and held it was commensurate with the gravity of the offence.

[11] In **Joseph Muta Kimeu Vrs Republic [2017] eKLR** the Judge reviewed the decision of the trial Magistrate which had set the bond terms at Kshs. 5 Million with three (3) sureties of the same amount with the bond of Kshs 1 million with one surety or an alternative cash bail of Kshs. 5000,000/=

[12] Lastly in **Arton Esitambale Opumbi v Republic [2017] eKLR** It was alleged that the applicant had trafficked 24.9 kilograms of heroin with a market value of Kshs.74,912,010/- and was granted a bond of Kshs 20 million with five sureties by the trial Court. On revision the Learned Judge held;

**“.....Although he is facing a serious a charge, no evidence was presented before the trial court to the effect that he would abscond from court if he is released on bail pending trial. The allegation that he would interfere with witnesses was not established. In any event, the Applicant is aware that should he breach the terms of his release on bail pending trial, he shall have the said bail cancelled.....”**

The learned Judge then revised the decision of the trial Court, set aside the bond terms imposed by the trial court and substituted thereof with a bond of Kshs.10 million with one surety of the same amount. In the alternative, a cash bail of Kshs.2million.

[13] The street value of the bhang was estimated at Kshs.24,430,000. This is important in cases of this kind. Similarly, penalties are high; yet another important consideration. Accordingly, in the circumstances of this case, the terms are not outside reasonable boundary. Except, co-joining cash bail and bond as one makes the amount of bond excessive and may impinge on the right to bail. This does not accord with the Constitutional requirement of reasonable conditions. In the upshot, I set aside the bond terms imposed by the trial Court. Instead, I order the Applicant shall be released on bail pending trial on condition that he posts a bond of Kshs.30 million with one surety of the same amount, or in the alternative, he pays cash bail of Kshs.15million. It is so ordered.

Dated, signed and delivered in open court this 5<sup>th</sup> day of March 2019

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F. GIKONYO

JUDGE

In presence of

Ngugi for accused

Namiti for state.

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F. GIKONYO

JUDGE