

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.601 OF 2018

JACKLINE AHIMIDIWE SWAI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Jackline Ahimidiwe Swai is facing a charge of **trafficking in narcotic drugs** contrary to **Section 4(a)** of the **Narcotic and Psychotropic Substances Control Act**. The particulars of the offence are that on 12th August 2018 at Jomo Kenyatta International Airport within Nairobi County, the Applicant, jointly with others not before court, unlawfully trafficked by conveying in her rectum 50 pellets concealed in a clear polythene bag a narcotic drug namely heroin to wit 815.81 grams with a market value of Kshs.2,447,430/- in contravention of the provisions of the said **Act**. The Applicant pleaded not guilty to the charge. The trial is ongoing. Her attempt to be released on bail pending trial was denied. The trial court (L.O. Onyina – CM) held thus:

“In this case, the prosecution submits that the accused person is a flight risk. The submission made in that regard by both sides requires no repetition. In each of the three authorities relied on in the submissions made by both sides, the accused persons in each of the three cases aforesaid had a place of abode in Kenya. In this case, there is no indication at all whether the accused person has any known place of abode – leave alone a fixed abode – in Kenya. That is a key consideration in every application for bail/bond pending trial (See Twayba Hashim Mtandi case (supra) and Panju v Republic (1973) EA 284). The submission that she was merely on transit on her way to Italy remains uncontroverted. Based on the facts presented before me I find that the prosecution has established a compelling reason as to why the accused should not be released on bond/bail pending trial.”

The Applicant was aggrieved by this decision. He has applied to this court pursuant to **Articles 49(1)(h), 20,21,22,23,24,25,26,27,28** and **29** of the **Constitution** seeking to have the decision revised. In particular, the Applicant was irked by the decision of the trial court that she was a flight risk and had no place of abode in Kenya. The Applicant annexed an affidavit sworn by her Kenyan brother which indicated that although the Applicant was Tanzanian, her mother was Kenyan and had previously sired her Kenyan step-brother before she relocated to Tanzania where she was married by the Applicant’s father. Her brother, who is a mason and a contractor in Mombasa County, was willing to stand surety for the Applicant. The Applicant reiterated that she was not a flight risk and lamented the fact that she was being denied bail by virtue of only the fact that she was a foreigner. She stated that there was no reason for the trial court, at any rate this court, to make a finding that the fact that she was a Tanzanian citizen made her to be a flight risk irrespective of any other factors such as the fact that she ought to be considered innocent until she is proven guilty by a court of law. The Applicant’s grounds in her application for revision were reiterated by her advocate Mr. Swaka during the hearing of the application.

Ms. Nyauncho for the State opposed the application. She was of the firm view that as a foreigner with no place of abode in Kenya, the Applicant was a flight risk. She urged this court to take into consideration the nature of the charge that the Applicant was facing and the fact that the trial was substantially part-heard. She reiterated that the fact that the Applicant had a Kenyan step-brother who was willing to stand surety for the Applicant, was not guarantee that the Applicant would not abscond from the jurisdiction of the court if he was released on bail pending trial. She urged the court to disallow the application.

In all cases where the court is called upon to exercise its discretion in regard to whether or not it should grant bail pending trial, the most important consideration is whether the accused will attend court during trial. This point was re-emphasized by the court in **Republic –Vs- Danson Mgunya & Another [2010] eKLR** when M.K. Ibrahim J (as he then was) held thus:

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanour, like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”

From the foregoing decision, it is clear that the paramount consideration that the court must take into account in determining whether or not to release an accused person on bail pending trial is whether the accused will attend court if so released on bail pending trial. Whereas, the court may take into consideration other factors, such as the serious nature of the charges facing the accused, and antecedents of the accused’s arrest and subsequent arraignment in court, such considerations will not overwhelm the primary and main consideration of ensuring that the accused person will attend court during trial.

In cases where the accused is a foreigner, the courts have come up with certain principles to be taken into further consideration in

determining whether or not to release the accused on bail/bond pending trial. The cases this court has considered include: **Republic v Kokonya Muhssin [2013] eKLR**, **Republic v Dwight Sagaray & 4 Others [2013] eKLR**, **Republic v Makoy Madhak Deer [2015] eKLR** and **Republic v Richard David Alden [2016] eKLR**. It is apparent that being a foreigner *per se* is not an inhibiting consideration in determining whether or not the accused should be released on bail pending trial. Another factor is whether the accused has a fixed abode in Kenya and whether he has property or familial connection in Kenya. Another factor is the nature of the charge that the accused is facing and whether the likely sentence to be meted out may serve as an incentive or impetus for the accused to abscond from the jurisdiction of the court. Also to be taken into consideration is the antecedent and subsequent conduct of the accused prior and after being charged. The factors listed above are by no means exhaustive. Each case will depend on its facts and circumstances.

In the present application, it was clear from the submission made that the Applicant has no fixed abode in Kenya. She was on transit to Italy when she was arrested at Jomo Kenyatta International Airport and charged with the offence that she is currently facing. Although the Applicant claims that she has a Kenyan relative who is willing to stand her surety, this court is not convinced that the Applicant may not be tempted to abscond from the jurisdiction of the court if she is released on bail pending trial. Her connection to Kenya is tenuous to say the least. She has no property in Kenya. She has no roots in Kenya. The charge she is facing is a serious one. If convicted, she will be sentenced to serve a long period in prison. Weighing the risk of serving a long term of imprisonment and absconding from the jurisdiction of the court, this court formed the opinion that the temptation would just be too great. This court agrees with the trial court that the likelihood that the Applicant would abscond from the jurisdiction of the court is so high that this court is not prepared to take the risk. The trial court reached the correct decision.

The upshot of the above reasons is that the Applicant's application lacks merit and is hereby dismissed. The Applicant shall remain in remand custody until the conclusion of her trial. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF APRIL 2019

L. KIMARU

JUDGE