



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CRIMINAL DIVISION

**CRIMINAL REVISION NO. 96 OF 2019**

**OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT**

**VERSUS**

**SAKINA MARIAM ABDALLA.....RESPONDENT**

**RULING**

1. The prosecution approached this court by way of a Notice of Motion filed under a Certificate of Urgency on 20<sup>th</sup> March, 2019. The application was brought under **Articles 165 (6) and (7), 157 (6)(c),(9)(11) 159(1) and 50(1)** of the Constitution and **Sections 362 and 364** of the Criminal Procedure Code and all enabling provisions of the law.

2. The orders sought are for revision by setting aside the order in the **Chief Magistrate's Court, Milimani, in Cr. Case No. 343 of 2019** delivered on 18<sup>th</sup> March, 2019 by Hon. Mutuku M.M, SPM granting bail to the Respondent. The Respondent was granted a bond of Ksh. 2,000,000/ with two sureties of a similar amount and in the alternative a cash bail of Ksh. 1,000,000/. Several other conditions were attached to the bond terms, namely; that she deposits her passport or other travel documents with the court, that upon her release not to make direct or indirect contacts with the prosecution witnesses, not to leave the jurisdiction of the court, to attend all court sessions without fail and to be reporting to the Officer in charge of ATPU once a monthly until the case was heard and determined.

3. She was charged with failure to disclose information relating to terrorist acts contrary to Section 41 (1) of the Prevention of Terrorism Act, 2012. It is alleged that on diverse dates between 2015 to 2019 at Kula Mawe in Isiolo County, in breach of her duty to disclose information pertaining the whereabouts of one ALI SALIM GICHUNGE, information which was within her knowledge, and information which would have been used to prevent the commission of a terrorist act to wit "The Dusit Attack", failed to disclose this information to the police.

4.The prosecution relies on the Affidavit sworn by No. 235219, Inspector Abdishakur Adan, the investigating officer attached to the Anti-Terrorism Unit Headquarters on 20<sup>th</sup> March, 2019. The broad gist of the application and the submissions made by the Applicant is that the Respondent, if released on bond is a flight risk and is likely to interfere with prosecution witnesses.

5. Both learned counsel, Mr. Kandembe and Mr. Kiarie represented the Applicant whilst Mr. Chacha and Mr. Kiogora represented the Respondent. Mr. Kandembe the lead counsel for the Respondent based the opposition to bail to the assertion that the Respondent was a flight risk and was likely to interfere with prosecution witnesses if released on bail. It was submitted that it was within the knowledge of the Respondent that her son, one Ali Salim Gichunge one of the key suspects in the Dusit attack was in Somalia and was planning to stage the attack that she failed to disclose to the law enforcers. Mr. Kandembe added that going by this conduct her release on bail would prejudice the prosecution case as some of the witnesses they intend to call are very close to her, namely her daughter who is in Form II who lived with her and her estranged husband. In this regard, he submitted that the bond terms granted to her cannot mitigate against her likelihood to interfere with witnesses. It was argued therefore that the learned trial magistrate failed to judiciously exercise her discretion to deny the Respondent bail.

6. The Respondent relied on the following authorities to buttress the submissions;

a) **Neeru Yadav vs State of U P and Another [2014](Supreme Court of India)**

b) **Mohamed Abdi Ali and Another vs Republic [2017] eKLR**

c) **Hassan Mahati Omar and Another vs Republic [2014] eKLR**

7. Mr. Kandembe asserted that the prosecution intended to conduct the trial as soon as possible to mitigate against the denial of bail. To

emphasize this submission, Mr. Kiarie submitted that although the trial had not been allocated a hearing date, there was a mention date on 21<sup>st</sup> May, 2019 for purposes of consolidating or separating all Dusit Attack related matters and that this was the only matter in which such an application had not been made. He stated that the application would be made on 13<sup>th</sup> May, 2019. He further stated that witness statements would be served after the consolidation or separation of the cases.

8. Mr. Chacha on his part submitted that there was no ground on which the court should vary the decision to grant bail to the Respondent. Instead, he argued that the trial court erred in granting very hefty bond terms which the Respondent could not meet and urged that the court varies them to reasonable terms. It was his view that the application was frivolous and vexatious. It was submitted that the likely maximum sentence under POTA being three years imprisonment was not an enticement to abscond bail. He submitted that a perusal of the charge disclosed no ground for consolidation of the instant trial with other Dusit Attack related matters.

9. On the assertion that the Respondent knew that her son would travel to Somalia, Mr. Chacha submitted that she had no obligation to enquire the whereabouts of her adult son. That indeed she was arrested whilst at her home in Isiolo which arrest took her by surprise as she was unaware that her son was a key witness in the Dusit Attack. That her arrest was preceded by news flash that her son was involved in the Dusit attack. Furthermore, there was no pronouncement that people ought to have volunteered information of their knowledge of the whereabouts of the said Ali Salim Gichunge so that the Respondent could be held accountable for not disclosing where he was.

10. Counsel submitted that as soon as the Respondent was arrested, her daughter went to live with her estranged husband who is a military officer and that therefore there was no chance that she would interfere with prosecution witnesses. He emphasized that the defence had not been supplied with witness statements since the Respondent was charged on 21<sup>st</sup> February, 2019, which demonstrated the reluctance by the prosecution to have the case heard and determined as soon as possible.

11. Mr. Chacha also submitted that the case law relied upon by the Applicant was irrelevant. As regards that of **R V Ahmed Abdullahi & Another**, bail was denied because the Applicants were foreigners and found to be in possession of offensive materials. In the case of **Hassan Mahati Omar & Ano. V R**, both Applicants were a husband and wife respectively. The wife was granted bail because she was a first offender. They were eventually acquitted. Counsel urged the court to find that the application had no merit and dismiss it.

12. In rejoinder, Mr. Kandembe submitted that the prosecution's interest was to establish the offence under Section 41 of POTA and not to punish the Respondent merely because she gave birth to an offender. Mr. Kiarie added that it was evident that the Respondent was likely to interfere with witnesses by virtue of her daughter currently living with her estranged husband. He added that disclosure of evidence has not unnecessarily been withheld as the prosecution has indicated that it would withhold some information until close to the hearing date.

#### **Determination.**

13. The application before this court is for revision of the decision of the trial court granting bail/bond to the Respondent. In so doing, the court must satisfy the threshold of the provisions of **Section 362** of the Criminal Procedure Code which gives the High Court power to '**call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.**'

14. This provision is buttressed by **Article 165(6)** and **(7)** of the Constitution, which provides that:

***'(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***

***(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.***

15. Article 165 crystallizes the purpose of the revisionary jurisdiction of the High Court as in furtherance of its supervisory jurisdiction over the subordinate courts.

16. The substantive question for determination is whether the trial court erred in granting bond/bail to the Respondent. **Article 49(h)** gives every arrested person the right '**to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.**' The onus lies with the prosecution to show that there are compelling reasons to deny the grant of bail.

17. The compelling reasons argued by the Applicant are twofold, namely that the Respondent is likely to abscond and interfere with witnesses. As regards the first limb, counsel for the Applicant did not candidly disclose what reasons would compel the Respondent to abscond save to argue that the prosecution was up to the task to prove the offence charged under Section 41 of POTA. The High Court and courts superior to it have set criteria of what constitutes compelling reasons that would compel a denial of bail. For purposes of this application, the only tenable argument would be that she is charged with a serious offence and more so, one related to terrorism. But again, a charge under POTA is not sufficient ground for a denial of bail unless it is tied to other reasons. In this respect, the attendant reason can only be deduced to be the likely sentence upon conviction. Under Section 41 the maximum sentence provided is three years imprisonment, which in my view cannot entice the Respondent to abscond.

18. Furthermore, it was uncontested that the Respondent was arrested at the comfort of her home, even after it had gone viral in the media that her son was one of the suspects in the Dusit Attack. Honestly, common sense dictates that if she knew that her son had travelled to Somalia for purposes of perpetrating the Attack, she would have fled so as to avoid an arrest. Instead, she went about her duties in the normal

manner unawares that she would be arrested. In that case, the prosecution failed to demonstrate that she is a flight risk if she was released on bond.

19. Under the second argument that the Respondent would interfere with witnesses, I find this an assertion without basis. The argument that the prosecution intends to call the Respondent's daughter and her estranged husband who she can easily reach out to, to meddle with evidence is mitigated by two factors. First is that the daughter has already moved in to live with her father, a military officer. The Respondent no longer lives with her husband and therefore there is no likelihood that the two will meet to discuss the case. Second and most importantly is the stringent bail terms that were placed by the learned magistrate. The Respondent was ordered not to make any contacts with prosecution witnesses. That order has not been upset and it remains in force until the case is heard and determined. On the part of this court, the prosecution having disclosed that the Respondent's daughter is one of their witnesses, I make a further caveat that she (her daughter) shall remain with her father until the case is heard and determined.

20. I have read the case law submitted on by the Applicant and I entirely concur with counsel for the Respondent that it does not compare with the instant case. In the case of **Mohammed Abdi Ali & Ano v Republic**, bond was denied because the Applicants were a public security threat. No reasons have been advanced in the instant case that the Respondent is a security threat to this country. In the case of **Hassan Mahati Omar & Anor v. Republic**, the 1<sup>st</sup> Applicant was denied bail because his antecedents did not favour the grant of bail. He had previously been charged with terrorism related cases. The 2<sup>nd</sup> Applicant on the other hand was granted bail because she had not been in conflict with the law. The latter case obtains in the present case and hence speaks in favour of the Respondent to grant her bail.

21. It is trite that the underlying consideration for the grant of bail is to secure the attendance of the accused in court when required. As stated in the case of **Republic v Danson Mgunya & Another Cr. Case No. 26 of 2008 [2010] eKLR**

*'The main function of bail is to ensure the presence of the accused at the trial...Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.'*

22. Denial of bail is a limitation of a fundamental human right and freedom as per the guiding constitutional principles under **Article 24(1)** which provides that:

*"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*

*(a) the nature of the right or fundamental freedom;*

*(b) the importance of the purpose of the limitation;*

*(c) the nature and extent of the limitation;*

*(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*

*(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."*

23. It is undoubted that the Respondent is charged under POTA but the fact that one is charged under this statute does not place an exception for grant of bail. I add that the circumstances of this case tilts in favour of the Respondent in that since she was arraigned in court on 22<sup>nd</sup> February, 2019, the prosecution has made very few strides in setting the matter down for hearing. Although it was submitted that the prosecution shall make disclosure of some information close to the hearing date, nothing has been said of the balance of evidence that is not subject to this rule. Further, it was not stated that the evidence that shall be adduced by the Respondent's daughter and husband was shouldered under this rule. Hence, it can easily be concluded that the prosecution are reluctant or are not ready to have the case heard and determined as soon as possible. This implies that if bail is denied the Respondent shall continue to languish in prison in utter violation of her constitutional right to bail. It also implies that the Respondent may have been charged without the investigations having been completed.

24. On the part of the Respondent, it was argued that the bail terms were so high that she has not been able to afford them. The Applicant not having advanced any good reasons for denial of bail means that reasonable bail terms should be accorded. I have previously delivered myself that if harsh bail terms are granted, they are tantamount to a denial. That defeats the spirit and letter of Article 49(1)(h) of the Constitution. It is for this reason that the court, whilst dismissing this application varies the bond terms to Ksh. One Million (1,000,000/=) with two sureties of a similar amount or cash bail of Ksh. 600,000/-. All other conditions as issued by the learned trial magistrate remain unchanged.

**DATED and DELIVERED THIS 13<sup>TH</sup> DAY OF MAY, 2019.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

**In the presence of:**

1. *Mr. Kiarie for the Applicant*

2. *Mr. Kiogora for the Respondent.*