



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA

IN NAIROBI

CRIMINAL DIVISION

MISC. CR. APPLIATION NO. 211 OF 2019

UNKNOWN ALIAS MIRE ABDULLAHI ALI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant moved this court seeking grant of bail pending trial. His application is by Notice of Motion dated 26th April, 2019 and is brought under **Articles 123(1), 49(1)(h) and 165(3)(a)(b)(d)(ii)** of the **Constitution, Sections 123(3) and 362 of the Criminal Procedure Code** and all other enabling provisions of the law. The same is supported by an affidavit sworn by Mohamed Hassan Sheikh as the Applicant.
2. He was charged with twenty-two (22) counts under the **Prevention of Terrorism Act (POTA)** and four (4) counts under the **Penal Code** in the Chief Magistrate's Court at **Milimani Criminal Case No. 474 of 2019**. He is the 1st accused person amongst five others. He seeks that this court reviews his suitability to be released on bail.
3. The Applicant argued through counsel, Mr. Abdulhakim that his right to freedom had been unjustifiably withheld. It was the counsel's submission that the Applicant is a Kenyan with familial and business ties in the country. Further, that the Applicant owns property in Kenya. As well, Mr. Abdulhakim reiterated that the Applicant had lived in Kenya all his life and was therefore not a flight risk. It was also the counsel's submission that the assertion that the offence was serious ought to have been accompanied by reasons. He submitted that there was no proof presented in court that the Applicant would interfere with witnesses. Counsel argued that the Applicant was not a threat to national security as all he had and was accused of was operating alternative internet. He urged that bail be granted on grounds that the trial was going to be protracted especially with the indication from the prosecution that they were going to consolidate the case with others charged separately with the Dusit D2 Hotel attack.
4. It was further argued that the Applicant is physically challenged and that the continued incarceration will only worsen his condition. Lastly, counsel urged that the Applicant is ready to abide by the bail terms that shall be set by court.
5. Counsel for the Respondent, Mr. Kiarie opposed the application. It was his view that the nature of the application was not clear. This was because the substantive application was brought under **Section 123 (3) of the Criminal Procedure Code** while a Chamber Summons accompanying it was brought under **Section 4 of the Children's Act**. Further, counsel submitted that it was not clear whether the application sought was for review or revision or appeal.
6. Counsel asserted that the trial court delivered itself on the application for bail on the 5th of April, 2019 and clearly cited compelling reasons that warranted a denial of bail; as the seriousness of the offence and attendant penalty, strength of the prosecution case and complexity of the offences. Further, that the Respondent had filed a fresh charge sheet of fifty-one (51) counts dated 21st of May, 2019. In these fresh charges, twenty-two (22) prescribed a penalty of life imprisonment.
7. Counsel submitted that the Applicant's nationality was disputed. He stated that the prosecution had evidence from the Immigration Department and National Registration Bureau to the effect that the Applicant's identification card and passport were forged. Therefore, if granted bail there was likelihood that he would flee the country.
8. As regards the Applicant's disability, counsel submitted that it did not render him immobile or incapable of standing. As such, the prison health services were able to handle it.

Determination

9. Bail pending trial is a constitutional right as envisaged under **Article 49(1)(h) of the Constitution** which 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.

10. In the present case, main ground on which the court was persuaded to deny bail to the Applicant is that the Applicant was a flight risk in that his Nationality is unknown and that therefore there was likelihood that he may abscond attending court. It was further cited the seriousness of the offence and attendant penalty, strength of the prosecution case and complexity of the offences. Additionally, that there would be consolidation of the Applicant’s trial with other cases related to the Dusit 2 Hotel terrorist attack.

11. I underscore 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.’

12. But this is not to say that other reasons do not play in whilst considering an application for bail. Each case should be determined by its own merit. The trial court addressed itself to such reasons as; whether the Applicant was a flight risk, whether the offences and their penalties would incite the Applicant to abscond, the strength of the prosecution’s case and the complexity of the offences charged. The court found in the affirmative and determined that the Applicant be denied bail.

13. It was against the trial court’s decision in the ruling delivered on 5th April, 2019 denying the Applicant bail that the instant application arose. Effectively, this a case clearly of a revision of the trial magistrate’s ruling denying bail to the Applicant. To this end, counsel for the Respondent argued that the Applicant was not certain what he intended the court address. It is factual the Chamber Summons dated 25th April, 2019 seeking to admit the application for hearing during the Court’s vacation was brought, *inter alia*, under Section 4 of the Children’s Act which was entirely misplaced. However, the substantive application, being the Notice of Motion dated 26th April, 2019 was brought, *inter alia*, under Section 123 and 362 of the Criminal Procedure Code. Section 123 regards admission to bail of an accused and the factors a court should consider whilst Section 362 accords this Court revisionary jurisdiction of an order or ruling or finding of a subordinate court.

14. Mr. Abdulhakim insists that this is a fresh application for pretrial bail, while the opposing counsel, Mr. Kiarie is clear that there is a procedural anomaly. The sentiments of Mr. Kiarie are warranted as there is indeed a ruling from the trial court bearing the parties to this application and the same subject matter. It is evident that the trial court did pronounce itself on the matter of bail pending trial. Equally, it is evident that the instant Notice of Motion application seeks to invoke the revisionary jurisdiction of this court provided for under Section 362 of the Criminal Procedure Code. As such, it is my finding that the Application was not properly couched but is nonetheless properly before this court; firstly because the prayers sought are clear and secondly, the proper provisions of the law have been cited.

15. Having that in mind, I now consider to satisfy myself on the correctness or irregularity or illegality of the ruling by the trial court denying bail to the Applicant. The trial court determined that the seriousness of the offences charged and their attendant penalties, the strength of the prosecution’s case and the complexity of the offences were sufficient reasons to deny the Applicant bail.

16. It is clear that the offences charged are related to acts of terrorism. Therefore, the nature of such offences and the attendant complexity is not in question. As well, the case of prosecution while not fully expounded on is already weighty, with particular reference to the Affidavit annexed to a Notice of Motion Application dated 4th February, 2019 before the trial that draws a nexus between the primary attackers of the Dusit D2 Hotel and the Applicant. Lastly, the charges and their attendant penalties indicated that twenty-two (22) counts carry a life imprisonment sentence. I am therefore satisfied that the court did exercise its mind in a correct and legal manner.

17. On the part of this court, I am convinced that the likelihood of the Applicant to abscond is real. It is the position of the Respondent that the Applicant’s identity card and Passport are forged. It is contended that his Nationality is unknown. I would not doubt this at all as can be discerned from the drafting of the charges where he is referred to as **“Unknown”**. Incidentally, he called himself Mohamed Hassan Sheikh as the deponent of the supporting affidavit to the application, yet he made no attempt to distinguish the name charged and this Mohamed Hassan Sheikh. It is therefore difficult to ascertain his place of abode. As at this point, the Applicant’s domicile cannot be verified.

18. The Applicant’s counsel submitted that the Applicant was married in Kenya and had property in the country. In my view, this is not the avenue through which a person acquires Nationality. Nationality is acquired through proper registration under the relevant law. He already faces charges of obtaining Nationality by false pretenses. This, *prima facie*, points to the fact that his Nationality is not ascertained. There exists good ground on which to deny him bail as it cannot be ruled out that he is likely to abscond if he is released on bail. Securing his attendance is certainly not assured.

19. As regards his health, as submitted by Mr. Kiarie, the condition he suffers from can well be catered for in prison. It poses no health risk factors to warrant his release on bail.

20. In the upshot, I find that the present application is unmerited and I dismiss it. The trial court file should forthwith be remitted to the trial magistrate for mention on 17th October, 2019 to fix a hearing date.

Dated and Delivered at Nairobi This 9th October, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of:

1. Mr. Abdulhakim for the Applicant.

2. Mr. Kiarie for the Respondent.