REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 108 OF 2019

HASSAN ADAN NUR.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING.

1. Hassan Adan Nur, hereafter the Applicant, brought the present application through a letter dated 3rd April, 2019 seeking the main order that the court be pleased to call for and examine the record in **Milimani Criminal Case Number 373 of 2019** for the purposes of satisfying itself as to the correctness, legality and propriety of the ruling denying the Applicant bond. The application is grounded in the fact that the Applicant was in custody pending his arraignment and plea taking for a period of more than 30 days while investigations were ongoing. That upon plea taking his co-accused persons were admitted to bail while he was not on the basis of the averments by the investigating officer that he was in communication with known terrorists. However, these averments were not substantiated when the officer was cross-examined. That the learned Magistrate incorrectly refused to admit the Applicant to bail notwithstanding his finding that the grounds set out by the Respondent were not compelling reasons that would warrant the denial of bail or bond. Further, that since the Applicant's arrest in January, 2019 he was yet to be supplied with witness statements or any documentary evidence in the case. He therefore urged the court to find that there were no compelling reasons to deny bail or bond as required by **Article 49(1)(h) of the Constitution**, **Section 123 of the Criminal Procedure Code** and the **Bail/Bond Policy Guidelines**.

2. The Applicant also filed submissions and a list of annexures on 24th May, 2019 which this court shall rely on later in as far as it informs the court in arriving at a just decision.

3. The Respondent filed an Affidavit in Reply sworn by No. 235098 IP Monica Githaiga in which she deponed, *inter alia*, that she was the investigating officer in the matter and therefore well versed with the facts of the case. She set out a background of the matter and events leading up to the arrest of the Applicant. She affined that the Applicant was not a citizen of Kenya and that the trial magistrate had not erred in indicating that this was not a compelling reason to deny him bail as her team would find it difficult to trace him if he was granted bail as there was a high likelihood he would abscond from the jurisdiction of the court. Further, that a change in circumstances was not a ground for review under Section 362 of the Criminal Procedure Code.

4. The investigating officer goes on to state that the dropping of terrorism related charges against the Applicant did not mean that the investigations in relation to the attacks were concluded and they were pursuing other associates connected to the Applicant who are still at large. She deponed that the Applicant was facing serious charges that attract stiff penalties and this would increase his temptation to abscond. She concluded by stating that there were compelling reasons to warrant the detention of the Applicant pending the hearing and determination of the case and that it would be just and fair if the ruling of the learned trial magistrate was upheld to the extent of denying bail to the Applicant but revised with regards to the holding that the unknown nationality of the Applicant was a compelling reason to deny him bail.

5. The application was canvassed before me on 14th October, 2019 with Mr. Chacha and Mr. Kiarie representing the Applicant and Respondent respectively. They both canvassed the application by way of oral submissions.

6. Mr. Chacha submitted that the reasons the Applicant was denied bail were clear to discern from paragraphs 50,52,60,61 and 62 of the ruling by the trial magistrate, that it was clear that the findings were limited to the charges the Applicant was facing. That once the investigators were done with their investigations all charges relating to terrorism were dropped and the charges substituted on 21st May, 2019. He submitted that with regards to the pending charges there was no reason for denial of bail. Further, that there is no suggestion that the Applicant is a citizen of another Nation save to aver that his nationality was unknown. He urged the court to be guided by the provisions of Article 50(2)(a) which underpins the principle of innocence until proven otherwise.

7. With regards to the assertion that the Applicant might abscond he submitted that the Applicant was a M-Pesa dealer before his arrest. That he had not absconded but aided the police with investigations. Furthermore, as deponed by the Applicant, his account with Safaricom was

deposited with millions of shillings and although the monies had been frozen, the fact that he had invested heavily would deter him from absconding. Counsel challenged the denial of bail to the Applicant yet one of his co-accused who faced similar charges of money laundering had been admitted to bail.

8. He submitted that partial disclosure of the evidence had been done by the prosecution and that if the court were to deny him bail it would be unfair as the Respondent had not indicated that they would expedite the disclosure. That while the Applicant is being referred to as Unknown person he was actually arrested in possession of a genuine identity card and the same was confiscated by the police, therefore all reference to him as unknown was unfounded.

9. Mr. Kiarie, opposed the application and he relied on the affidavit sworn by Monica Githaiga, the investigating officer. He submitted that investigations were still ongoing, more particularly with regards to the fact that the Applicant was in constant communication with several known terrorists. Furthermore, the Applicant was also facing grave charges and was a person unknown nationality. That the assertion that his family members were known had not been disclosed, more so as regards their physical address. He referred the court to a ruling in High Court **Criminal Revision 211 of 2019** to buttress the submission that the fact that the Applicant was of unknown Nationality was a compelling reason to deny him bail.

10. Mr. Kiarie went on to state that all the disclosures in the matter had not been done owing to the complexities in the case. He pointed to the fact that other countries needed to be contacted, reasons wherefore, more charges may be preferred against the Applicant. He concluded by submitting that the grant of bail to the Applicant's co-accused did not entitle the Applicant to bail as circumstances of each accused should be considered on their own merit.

11. In reply, Mr. Chacha distinguished the instant case with Revision application No. 211 of 2019. He view was that in the latter the Applicant was a Somali National while the Applicant herein was a Kenyan National. Hence the likelihood of the Applicant herein absconding was remote. Further that no investigations could be ongoing given that the charges relating to terrorism were dropped and it defeats logic that the Applicant could still be communicating with terrorists. In any case no call data was produced to confirm the alleged communication. In addition, after the investigating officer was cross examined, he failed to adduce evidence of the alleged communication between the Applicant and any terrorist. As regards obtaining of the registration documents, it was the view of the learned counsel that the veracity of the charges would be tested in evidence. He urged the court to find that the application was merited and allow it.

Determination.

12. The jurisdiction of this court to consider this suit is not in question and has not been contested by either party. However, for purposes of certainty the court must state that it is called upon to exercise its supervisory jurisdiction set out under Article 165(6) and (7) of the Constitution as read with the statutory framework set out under Section 362 of the Criminal Procedure Code. It is now established that the supervisory powers of this court are wide ranging, See: **Bryan Yongo Otumba & another *v.* Director of Criminal Investigations & 4 others[2018] eKLR,** and aimed at ascertaining the correctness, propriety, regularity and correctness of the decision of the lower court sought to be impugned.

13. I find guidance in my determination in the words of Baroness Hale in **Re J (A Child) (Child Returned Abroad: Convention Rights) [2006] UKHL 4O**, as she then was, that courts must be cautious in so exercising their discretionary powers. She delivered herself thus;

> ***"If there is indeed a discretion in which several factors are relevant, the evaluation and balancing of those factors is … a matter for the trial [****Magistrate****].***
>
> ***Only if his decision is so plainly wrong that he must have given far too much weight to a particular factor is the [****supervisory****] court entitled to interfere: …"***

14. The Applicant submitted that the learned magistrate erred by reaching an incorrect decision that there was a compelling reason to deny the Applicant admission to bail or bond as he was allegedly in communication with known terrorist. From the ruling dated 15th March, 2019 it is clear that the learned trial magistrate was of the considered opinion that the Applicant was in communication with known terrorists as per the affidavit of the investigating officer and this coupled with the terrorism related charges sufficed to warrant denying the Applicant bail.

15. The decision was guided by the affidavit sworn by the investigating officer in the case, specifically the contents of paragraph 21. The investigating officer made similar depositions in the affidavit in reply to the instant application at paragraph 10. When she was cross examined on the issue of communication between the Applicant and the alleged known terrorists she did not adduce any evidence buttressing the assertion. Further, before this court she has not adduced evidence to buttress the same submission. She has gone ahead and sworn a deposition on the same issue notwithstanding that she could verify the averments as attested by the proceedings of 26th March, 2019 in the lower court. This raises questions as why the Respondent should rely on the same grounds in opposing the application.

16. Given the weakened allegation that the Applicant was in communication with known terrorists, it is my candid view that the learned trial magistrate erred in finding that this was a reason warranting the denial of bail to the Applicant. This is in light of the fact that the veracity of the deposition was severely shattered during cross examination of the investigating officer rendering its evidentiary value null. In the circumstances, it is impossible that the court can be guided by that assertion to constitute a compelling reason to deny bail to the Applicant.

17. The Respondent did further urge the court to deny the Applicant bail because he was a person of unknown nationality. Mr. Kiarie cited a ruling of this court in **Misc. Cr. Appliation No. 211 of 2019- Unknown Alias Mire Abdullahi Ali vs Republic.** The application therein was similar to the instant one. However, the same is distinguishable from the instant case in that the Applicant therein faced a charge of being illegally in Kenya, which *prima facie* pre-disposed him to absconding if released on bail. Of course the court considered other factors in disallowing the application. He also faced charges under POTA. The Applicant herein faces charges synonymous with money laundering.

Although he is charged with obtaining registration fraudulently, that is a matter of proof by evidence. *Prima facie*, he has demonstrated that he of fixed abode within the Republic of Kenya, carrying on business as such. The contrary is a matter to be determined at hearing but no proof was adduced that he is not a Kenyan, a citizen of another country or a stateless person. The prosecution was under a duty to demonstrate this particular assertion in order to rely upon it as a compelling reason to deny the Applicant bail. This coupled with the failure to charge the Applicant with being in the country illegally is *prima facie* evidence that the Applicant has some sort of formalized status in Kenya.In my view, it falls upon the prosecution to prove to a court why the citizenship of an Applicant is a compelling reason for denial of bail. It should not be a blanket factor asserted by the prosecution and abetted by the courts to fetter the right to be presumed innocent until proven otherwise. Other factors must intertwine as foreigners and Stateless persons must not be denied the right to accessing justice where they deserve. The court may counter assuage any doubts concerning such persons by setting out conditions of bail which ensure that the Applicant does not abscond its jurisdiction.

18. I emphasize that since the filing of the application in April there has been a change in the circumstances of the case. This regards the substitution of the charges facing the Applicant which had the effect of dropping all the terrorism related charges, yet the trial court found that in view that the Applicant was facing terrorism charges, bail had to be denied. I differ with the learned counsel for the Respondent that this court is not under a duty to consider any new circumstances. This is in view that the High Court on its own motion can grant bail to an accused person where it is of the view that the same was unnecessarily withheld, more so having regard to any emerging circumstances. See the Queen's Bench in **R. *v.* Nottingham Justices Ex parte Davies[1981] QB 38**, that:

> ***"The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that 'Has there been a change?' 'Are there any new considerations which were not before the court when the accused was last remanded in custody?' ".***

19. The main factor for consideration in an application for grant of bail/bond is to ensure that the Applicant attends court. I find no reason compelling enough that the Applicant herein is unlikely to attend the trial; that is to say that if he is released on bail/bond he is likely to abscond. I thus find the application merited. I set aside the order of the learned trial magistrate denying bail to the Applicant bail. I admit him to a bond of Ksh. 5,000,000/ with one surety of a similar amount. The surety must a Kenyan, to be assessed by the trial court. In the alternative he shall pay a cash bail of Ksh. 3,000,000/. It is so ordered.

Dated and Delivered at Nairobi This 12th November, 2019.

G.W.NGENYE-MACHARIA

JUDGE.

In the presence of;

1. Mr. Chacha for the Applicant.

2. Mr. Kiarie for the for the Respondent.-