



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CR. APPLICATION NO. 441 OF 2019

JOYCE AKINYI OCHIENG alias

MAPE MARLINE KAMBURA.....1ST APPLICANT

KALALA PAULIN MUSANKISHAY.....2ND APPLICANT

PERIS ONYANGO OMONDI alias

RAHA EVERLINE KAMBERE.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. There are two applications before the court. The first is filed on behalf of the 1st and 2nd Applicants, Peris Onyango Omondi and Joyce Akinyi Ochieng. It is a Notice of Motion dated 27/9/2019. The record is a Notice of Motion dated 11/11/2019 on behalf of the 3rd Applicant, Musankishay Kalala Paulin. The latter application requests the court to exercise its revisionary jurisdiction and vary the bond terms granted to the 3rd Applicant. The former too makes similar prayers. It suffices to state that the parent file is in respect of a miscellaneous criminal application despite the fact that the orders sought are for revision of bail/bond terms. Nevertheless, this does not affect the gist of the application in terms what brings the Applicants to court.

2. The three were charged at JKIA Law Courts in **Criminal Case No. 121 of 2019**. Five counts were filed. Count I is in respect to the 1st and 3rd Applicants. They are charged with the offence of trafficking in narcotic drugs contrary to Section **4(a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994**. The particulars of the charge are that on the 13th day of July, 2019 in Joyce Akinyi Ochieng's office at Deep West Resort within Nairobi County, jointly with others not before court, trafficked by storing a narcotic drug namely heroin to wit 1,050 grams with a market value of Kshs. 3,090,000/= concealed in a clear polythene bag wrapped with cello tape under a shoe rack in contravention of the said Act.

3. Count II is in respect of the 2nd Applicant Peres Anyango Omondi alias Raha Eveline Kambere. She is charged with trafficking in narcotic drugs Section **4(a) of the Narcotic Drugs and Psychotropic Substance Control Act No. 4 of 1994**. The particulars of the charge are that on the 13th day of July, 2019 in room No. 19 at Deep West Resort within Nairobi County jointly with others not before court, trafficked by storing a narcotic drug namely heroin to wit 832.86 grams with a market value of Kshs. 2,498,580/=, concealed in the false sides of her bag in contravention of the said Act.

4. Counts III and IV are in respect of the 1st Applicant, Joyce Akinyi Ochieng. In Count III, she is charged with possessing of a forged passport contrary to **Section 54(1)(c) of the Kenya Citizenship and Immigration Act No. 12 of 2011**. The particulars are that on the 13th day of July, 2019 in her office at Deep West Resort within Nairobi County she had in her possession a forged Democratic Republic of Congo passport No. OP0501179 under the names Mape Marline Kambura, whilst in count IV, she is charged with the offence of being in possession of a passport without reasonable explanation or authority for its possession contrary to **Section 54(1)(d) of the Kenya Citizenship and Immigration Act No. 12 of 2011**.

5. Count V relates to the 2nd Applicant, Peres Anyango Omondi who is charged with the offence of possessing a forged passport contrary to **Section 54(1)(c) of the Kenya Citizenship and Immigration Act No. 12 of 2011**. The particulars of the charge are that on the 13th day of July, 2019 in room No. 19 at Deep West Resort within Nairobi County, she had in her possession a forged Democratic Republic of Congo

passport No. OP0501178 under the names Raha Eveline Kambere.

6. Learned counsel, Mr. Ogada represented the 1st and 2nd Applicants whilst Mr. Abenga represented the 3rd Applicant. Both 1st and 2nd Applicants are currently enjoying a cash bail of Kshs. 1,000,000/=. In addition, each has to yet two contact persons who should also each pay cash Kshs. 1,000,000/=. Mr. Ogada requests the court to waive the requirement that the contact person should also pay cash Kshs. 1,000,000/= and that each of the Applicants should report to the police once a week. He submitted that the requirements have made it practically impossible for the 1st Applicant to visit her children in school because she cannot leave Nairobi without the permission of the court. Additionally, that her son who had cancer recently died and the body is still lying in the morgue. She is a single mother and is completely unable to raise the cash bail. He proposes a cash bail of Kshs. 200,000/=.

7. As regards the 3rd Applicant, he was not admitted to bond because he is a foreigner. Mr. Abenga requests for grant of bond or cash bail. He submitted that the 3rd Applicant was injured during arrest and he requires to leave prison so that he can access treatment.

8. Miss Akunja for the Respondent opposed the application stating that all the terms attached to the bond/bail are reasonable. She underscored the seriousness of the offence of trafficking in narcotic drugs against which stringent bail terms should attach. As regards the 3rd Applicant, she submitted that he had no fixed bode as he was arrested at Deep West Resort yet he is a foreigner. He was also in Kenya on a Tourist Visa rendering him a flight risk. She opposed bail in this respect.

9. As regards his treatment, she submitted that the court ordered that he be taken to hospital on 24/9/2019. Furthermore, it was an illness that the prison could address. She however took issue with the order of the learned trial magistrate requiring 1st and 2nd Applicants' contact persons to deposit cash bails.

10. I have considered the application and the respective submissions. As has been severally held by this (High Court) and courts of superior jurisdiction to it, bail terms must be proportional to the nature of the offence. Both the 1st and 2nd Applicants amongst other charges, face the charge of trafficking in narcotic drugs. This is a serious offence by its nature. Additionally, the court must consider the value of the subject matter attached to the charge. The narcotic drugs in issue are valued at more than Kshs. 3,000,000/=. They also each face additional charges as spelt out above. My view is that the cash bail granted to them is reasonable and I see no reason to vary it.

11. As regards the order that the contact persons should pay each a cash bail of Kshs. 1,000,000/=: there is no rationale to it. The contact persons are not the accused persons. Their role is only to confirm that they know the accused persons and their contacts and so can be reached out when called upon to do so. In that regard, I find no legal basis for that order and I accordingly set it aside.

12. As regards the issue of reporting to the police once a week, I also find it too tedious and unnecessary since there is no evidence that the two Applicants are likely to abscond. I thus vary the number of times of reporting to the police to once every two weeks, on days to be agreed upon between the Applicants and the investigating officer.

13. On permission to leave Nairobi, the first two Applicants are Kenyans. They should be allowed the freedom to go anywhere in any part of this country. The only thing they should not do is to leave the jurisdiction of the court without informing the investigating officer. If they must travel out of Nairobi, they only need to call the investigating officer for information purposes.

14. As regard the 3rd Applicant, he is a foreigner who came to Kenya on a tourist visa. The likelihood of absconding is real; he could flee the country. The trial court did not therefore improperly come to a conclusion that he is a flight risk. The denial of bond/bail was well informed and the order made within the law.

15. As for his treatment, I entirely agree with learned Counsel, Ms. Akunja that the trial court is up to the task of making any referral to a big hospital for his treatment whenever the prison cannot handle the nature of illness. The illness he is suffering from does not warrant a release on bail/bond.

16. In sum, the application in respect of the 1st and 2nd Applicants partially succeeds to the extent I have delivered myself here above. The application in respect of the 3rd Applicant is dismissed in its entirety.

DATED and DELIVERED this day of 10th **December, 2019.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. M/s Hamba h/b for Mr. Ogada for the 1st and 2nd Applicants.
2. M/s Hamba h/b for Abenga for the 3rd Applicant.
3. M/s Akunja for the Respondent.