



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 698 OF 2018

FRANCIS MACHARIA KARICHU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Francis Macharia Karichu is facing two charges before the Chief Magistrate's Court. The first charge is under the **Prevention of Terrorism Act** and specifically **Section 9(1)**. The particulars of the offence were that on or before 15th February 2018, the Appellant with his co-accused, at the Nairobi Central Business District, jointly with others not before court, supported a gazetted terrorist group, namely Al Shabaab, by making a forged Kenya National Identity Card No.31528692 bearing the name Jirma Huka Galgalo (deceased) who was a member of Al Shabaab. He was further charged, with others, with **forgery of an official document** contrary to **Section 351** of the **Penal Code**. The particular of the offence were that on or before 15th February 2018 in Nairobi Central Business District, jointly with others not before court, forged a Kenya National Identity Card No. No.31528692 bearing the name Jirma Huka Galgalo (deceased) who was a member of Al Shabaab a gazetted terrorist group, purporting it to be a genuine and valid identity card issued by the Registrar of Persons.

When the Applicant was arraigned before the Chief Magistrate's Court, he pleaded not guilty to the charge. His application to be released on bail pending trial was denied. At the material part of the Ruling, the trial court held thus:

“I have also considered the effects of the offences charged on national security and society. It must be remember that the threat of terrorism around the world and in Kenya in particular is a matter of grave concern due to the devastating effects it has on lives and property. That terrorism is a most serious offence is underscored by the hefty penalties set by the law for offenders. It is transnational in nature and difficult to combat. I have considered the serious nature of the offence and the severity of the sentence if convicted. These are factors that are likely to cause the accused persons to abscond.”

The Applicant was aggrieved by this decision and has invoked this court's jurisdiction under **Article 49(1)(h)** of the **Constitution** to have the said decision reversed and the Applicant be admitted to bail on terms that this court may deem reasonable and just.

During the hearing of the application, Mr. Ngugi for the Applicant submitted that the main consideration that the court ought to have taken into account is whether the Applicant will attend court during the hearing of the case. No compelling reason had been placed before court by the prosecution to support its assertion that the Applicant would be a flight risk if he is released on bail pending trial. He urged the court to take into consideration the nature of the offence that the Applicant has been charged with. It is aailable offence. The Applicant is a Kenyan citizen who operates a printing business in Nairobi. He lives with his wife and children in Kayole Nairobi.

Mr. Ngugi submitted that the Applicant never went into hiding during the entire period of investigations. There was no evidence to support the prosecution's claim that he is a flight risk. He explained that it was not possible for the Applicant to interfere with witnesses nor was there justifiable reason for the Applicant to be denied bail. He urged the court to take into consideration the pre-bail report which was filed in court which indicated that the Applicant was hypertensive and was unlikely to abscond if he is released on bail pending trial. Learned counsel submitted that the court should not be persuaded by the thrust of the prosecution's objection to his release on bail pending trial: that the Applicant is facing a terrorism related charge. He explained that facing a terrorism charge *per se* cannot automatically translate into denial of bond. All the circumstances of the case has to be taken into account.

Mr. Ngugi cited several cases where persons facing terrorism related charges were released on bail pending trial. He finally submitted that the explanation given by the prosecution that the Applicant ought to be denied bail on the grounds of national security and the gravity of the offence did not apply to the Applicant because the Applicant was not a threat to national security. Neither was he likely to abscond from the jurisdiction of the court because he was persuaded by the strength of his defence and believes that he could be successful. In the premises

therefore, he urged the court to release the Applicant on bail pending trial on reasonable terms. The Applicant was willing to provide the court with substantial sureties to secure his released on bail pending trial.

Ms. Nyauncho for the State opposed the application. She submitted that the Applicant was facing a serious charge related to terrorism. She gave the background leading to the arrest and arraignment of the Applicant and his co-accused before court. She explained that the Appellant's co-accused were found in possession of AK 47 rifles, 36 unpinned grenades, 7 projectiles and 40 kilogrammes of explosive and other devices embedded in a motor vehicle. Intelligence revealed that the Applicant's co-accused were planning to detonate the explosive on key national institutions including courts and the National Parliament. During the operation that led to the arrest of the Applicant's co-accused, there was an exchange of gunfire between the police and the suspects. One of the suspects was gunned down. On being searched, he was found in possession of forged Kenyan Identity Card. Investigations established that the said identity card was forged at the Applicant's business premises.

Learned State Counsel submitted that the Applicant facilitated terrorism suspects by supplying them with forged identity card. She expressed the apprehension that if the Applicant is released on bail pending trial, he was likely to interfere with efforts to trace other suspects. She explained that the Applicant was likely to face more charges related to aiding terrorism suspects to conceal their identity. Releasing the Applicant on bail would pose danger to security and public safety. The Applicant's release would be a threat to national security. Learned state Counsel cited several authorities in support of her contention that the Applicant should not be released on bail pending trial because he was facing serious charges that attract severe penalties that may likely motivate the Applicant to escape from the court's jurisdiction. She urged the court to uphold the trial court's refusal to release the Applicant on bail pending trial.

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.”

The issue for determination is whether the Applicant made a case for the court to reconsider the decision of the trial court that denied him bail pending trial. The **Constitution** under **Article 49(1)(h)** grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. The **Constitution** does not define what constitutes “**compelling reasons**”. However, courts have rendered decisions that articulate what constitutes compelling reasons and include the following: *the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with witnesses, the need to protect the victim of crime and the accused person, the relationship between the accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives.* (See **ALHAJI MUJAHID DUKUBO-ASARIN Vs. FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006**). In addition, the **Bail and Bond Policy** recently published by the **National Council on Administration of Justice** requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail.

In the present application, the prosecution has objected to the Applicant being released on bail pending trial essentially on two grounds: that the Applicant would be a threat to national security and public safety if he is released on bail pending trial because of the terrorism related charges that he is facing. The other ground is that due to the fact that the Applicant is facing a serious offence, whose consequences would likely be a long period of incarceration in prison, the incentive for the Applicant to abscond from the jurisdiction of the court was very real. On the other hand, the Applicant urged the court not to be persuaded by the argument advanced by the prosecution. The Applicant was of the view that the prosecution had not provided the court with compelling reasons for this court to deny the Applicant bail pending trial. The Applicant put forward his *bona fides* which, according to him, pointed to the fact that he was not likely to abscond if released on bail pending trial. He was not a threat to public safety. He was prepared to offer substantial sureties to secure his attendance before court during trial.

On evaluation of the rival arguments made before this court, this court is of the opinion that although the Applicant is facing serious charges which will result in the Applicant serving a long stretch in prison if convicted, the prosecution did not place before the court compelling reasons to persuade this court that the Applicant would be a flight risk if he is released on bail pending trial. The charges that the Applicant is facing are peripheral to the serious charges that the Applicant's co-accused are facing of actually committing terrorism offences. This is in no way to lessen or diminish the serious nature of the charges facing the Applicant. Indeed, the assertion by the prosecution is not misplaced or off the mark that it is those facilitating the movement of terrorists within the country in their bid to commit heinous crimes who pose a greater threat to national security. However, in the case of the Applicant, no evidence was placed before the trial court that he would be a flight risk if he is released on bail pending trial. The pre-bail report annexed to the Applicant's application convinced this court that the Applicant will faithfully attend court if released on bail pending trial. The prosecution's concern will be addressed by this court attaching stringent bond terms.

In the premises therefore, this court will allow the Applicant's application to be released on bail pending trial. The trial court's decision denying the Applicant bail pending trial is hereby set aside and substituted by a decision of this court releasing the Applicant on bail pending trial on the following conditions:

I. The Applicant is released on a bond of Kshs.5 million with 2 sureties of the same amount. In the alternative, the Applicant shall post cash bail of Kshs.2 million with one surety of Kshs.5 million.

II. The Applicant shall not have any contact with the prosecution witnesses while out on bond. If it is established that he has had any contact with the prosecution witnesses, the bail granted to him shall be cancelled.

III. The Applicant shall attend court on the scheduled dates for mention and trial without fail until the conclusion of the trial or until further orders of this court or the trial court.

It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF JULY 2018

L. KIMARU

JUDGE