REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL REVISION NO. 773 OF 2018

THE REPUBLIC.....PROSECUTION

VERSUS

1. HALIMA ADAN ALI

2. WALEED AHMED ZEIN.....RESPONDENT

RULING

INTRODUCTION

1. Halima Adan Ali (herein referred to as the 1st respondent) and Waleed Ahmed Zein (herein referred to as the second respondent) were on various dates arraigned before Milimani Chief Magistrate's Court facing separate charges relating to terrorism activities vide criminal file numbers 1262/18 and 1235/18 respectively. The 1st respondent appeared before the honourable court for plea taking on 10th July 2018 facing three counts interalia; provision of property for commission of a terrorist act contrary to Section 5 (1) (a) of the Prevention of Terrorism Act 2012, facilitating the commission of a terrorist act contrary to Section 9 (A) of the Prevention of Terrorism act and being a member of a terrorist group contrary to Section 24 of the Prevention of Terrorism Act 2012.

2. The second respondent who also appeared for plea taking on 5th July, 2018 faced seven counts of facilitating the commission of a terrorist act contrary to Section 9 (A) of the Prevention of Terrorism Act 2012 and three counts of provision of property for the commission of a terrorist act contrary to Section 5(1) (a) of the Prevention of Terrorism Act 2012. Both accused persons denied the charges and subsequently made application for release on bail pending trial.

3. The application for release of the accused(respondents) on bail triggered a sharp objection from the state who through an affidavit sworn on 10th July 2018 and 11th July 2018 by CPL Geofrey Busolo stated that the accused persons whose charges were consolidated, were a flight risk; were facing serious charges; investigations which were complex involving other countries and agencies were not complete; that there was a likelihood of interference with witnesses and that the accused had associates outside Kenya with whom they were planning to execute terrorist activities in the country.

4. In the consolidated ruling delivered on 23rd July 2018, the honourable Magistrate M.W. Mutuku dismissed the objection by the state for release of the accused on bail having found no merit in the same hence released them each on a bond of Kshs.1 million with one Kenyan surety or a cash bail of Kshs.500,000/=. In addition, they were ordered to report once a month to the officer in charge Anti terrorist police unit.

5. Aggrieved by the said ruling, the office of the Dpp (herein referred to as the applicant) moved to the high court under certificate of urgency vide a notice of motion dated 1st August 2018 and filed the same day seeking orders as follows:

(a) Spent.

(b) That the decision by the Chief Magistrate's Court Milimani in Cr. c. Nos 1262/2018 and 1235/2018 delivered on the 23rd day of July 2018 in which the respondents were granted bail be set aside and or revised.

(c) That an order of stay be granted pending hearing and determination of the application.

(d) Any further orders this honourable court may deem fit.

6. Application which is filed pursuant to Article 165 (6) of the Constitution, Section 362 of the Criminal procedure code and rule 3 of the High Court Practice and Procedure rules is predicated upon an affidavit in support deponed by CPL Geofrey Busolo on 1st April 2018 and the annexures thereof and grounds on the face of it. On 2nd August 2018, the application was certified urgent and directions for service upon the respondents made and interpartes hearing during vacation fixed for 7th August 2018. In response, the 1st respondent filed her submissions on the 7th August 2018 although dated 9th August 2018 which I think is an oversight. When the matter came up for interpartes hearing as scheduled, the applicant and the second 2nd respondent sought for more time to file their submissions. The court granted the adjournment and directed the 1st and 2nd respondents to file their submissions by 10th August 2018 which they did. The court further ordered for submission of the lower court files to the high court and interpartes hearing on 13th August 2013. However, by 13th August 2018, the 1st respondent had already been released on bond having paid cash bail on the same day.

Applicant's Case

7. The applicant's case is hinged on the grounds on the face of it, affidavit in support and submissions thereof filed on 10th August 2018. According to the applicant, the 1st respondent has several criminal matters pending before Mombasa Law Courts being Cr. Case No. 799/2015 and 2428/2016 all related to terrorism. It's the applicant's contention that the trial court did not properly, legally and correctly apply its mind to the law and guidelines governing release of accused persons on bail when it released the accused despite strong and persuasive grounds not to release.

8. Among the grounds relied on to oppose release of the respondents on bail are ; that the accused/respondents are a flight risk considering the fact that the charges they are facing are serious attracting punitive sentence; that the nature of investigations involved were complex stretching to several countries where the accused are said to be having associates facilitating movement of finances to fund terrorist activities; that investigators were in the process of obtaining and collecting data records, crucial bank and money transfer documents in the informal sector like hawallah; that if released they will interfere with witnesses and jeopardize the ongoing investigations and arrest of other potential suspects who pose national security challenges.

9. In support of their case, the applicant attached two affidavits sworn on 10th and 11th July 2018 by CPL Geofrey Busolo which were relied on before the trial court in which the officer gave detailed explanation why he wanted accused denied bail.

10. In submission, counsel for the applicant M/S Sigei adopted their aforesaid submissions asserting that the trial court improperly and incorrectly misdirected itself by releasing the accused on bail without following bail guidelines thus compromising national security as the accused are dangerous persons with wide terrorism networks all over the world. Counsel submitted that the state had given compelling reasons as required under Article 49 (1) (h) of the Constitution to enable the court deny the accused bail. Learned Counsel relied on the authority in the case of **R vs Ahmed Mohamed Omar & 6 others (2010) eKLR** in which the court held that the right to bail pending trial is not absolute. Further reference was made to the case of **R vs Ahmed Abola Fathi Mohamed and another (2013)e KLR** and **R vs Taiko Kitende Muinya (2010)EKLR** in which both courts held that the nature of the offence and the severity of a sentence is a critical consideration in assessing whether to grant bail or not.

11. In a nutshell, counsel maintained that the release of the accused on bail will jeopardize the trial as they are likely to abscond and subsequently pose national security challenges in collaboration with their associates out there.

1st Respondent's Case

12. Mr. Chacha appearing for the 1st respondent relied basically on the submissions filed on 7th August 2018. He contended that the orders sought to stop the release of the 1st respondent are spent as the accused had already been released. He nevertheless opposed the application terming it as frivolous, baseless and lacking in logic. Mr. Chacha submitted that the 1st respondent has been on bond on the Mombasa cases to which she has been attending court faithfully without fail hence not a flight risk and that until proven guilty she is innocent. Counsel submitted that the 1st respondent is not a flight or a security risk or at all and that there was no proof to that effect. As regards incomplete investigations, Mr. Chacha contended that prosecution had been given sufficient time to do so and that nothing stopped the police from completing investigations before charging the respondent. **See Michael Rotitch vs Republic (2016) eKLR.**

13. Lastly, counsel asserted that there were no compelling reasons to warrant denial of bail. He referred the court to the case of **DPP vs Ummulkheir Sadri Abadalla and 3 others (2017) eKLR** in which the court in Mombasa in exercise of its revisionary powers refused to set aside the orders of bail granted to the accused by the lower court on grounds that the mere fact that one is charged of another offence is not a good reason to deny an accused person bail.

2nd Respondent's Case

14. In response to the application, the second respondent filed his submissions on 10th August 2018 thus opposing the application claiming that the court has no jurisdiction on grounds that the applicant ought to have appealed against the decision of the lower court and not revision contrary to Section 364 (5) of the Criminal Procedure Code. Mr. Kariuki holding brief for Mr. Odhiambo for the second respondent contended that the 2nd accused (2nd respondent) having been arrested on 7th June 2018 the police have had more than enough time to complete investigations. Counsel contended that an accused person cannot be denied bail without any compelling reasons and that his client is deemed to be innocent until proved guilty. To fortify his argument, Counsel referred the court to the case of **R vs David Muchiri Mwangi (2018) e KLR and R vs Richard David Alden (2016) eKLR**.

15. Concerning the element of accused being a flight risk, Mr. Kariuki submitted that there was no evidence or proof of that allegation. Regarding interference with witnesses, counsel opined that there was no proof as to whether the 2nd respondent was related to the potential witnesses referred to or had control over them. To buttress this position, learned counsel relied on the case of **Republic vs Jocktan**

Manyende and Others (2012) eKLR. As to the offence being serious, Mr. Kariuki dismissed that ground stating that that alone is not good enough to deny an accused bail. The court was further referred to the case of **R vs Nuseiba Mohamed Haji Osman (2016) eKLR**.

Analysis and Determination

16. I have carefully examined the application herein, objections and illuminating submissions by counsel. The only issue for determination is whether the application herein meets the threshold for grant of revisionary orders as envisaged under Section 362 of the Criminal procedure code and to what extent the trial court improperly or illegally, irregularly or incorrectly acted or applied the law.

17. Authority to exercise revisionary powers over a subordinate court or tribunal is anchored under Article 165 (6) and (7) of the Constitution which provides:

> **Sub-Art 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.**
>
> Sub Art. 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".**

18. Further provision underpinning revision of subordinate courts' proceedings, sentence or orders is Section 362 of the Criminal procedure code which provides as follows:

> **"the high court may 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 ruling, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".**

19. In the instant case, the applicant is alleging that the trial court did not address its mind properly to the law and guidelines governing release of accused persons on bail by not taking into account the detailed information laid before it regarding the accused being flight risk persons, likelihood of interfering with witnesses, incomplete investigations, seriousness of the offence and being a threat to national security

20. The law underscoring grant of bail to accused persons pending trial is Article 49 (1) (h) of the Constitution, which states that:

> **"An arrested person has 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".**

21. The clear and plain reading of this provision is that, the right to be released on bail is a fundamental right which cannot be curtailed arbitrarily unless there are exceptional circumstances (compelling reasons) to warrant such curtailment. It is however not lost in my mind that the right to individual liberty is not absolute such that any denial thereof must be lawful and justified within the dictates of the constitution. In other words, the right to individual liberty is not without limitation as it is subject to other constitutional conditions such as compelling reasons to curtail such liberty.

22. Before I proceed to determine as to whether the impugned ruling falls within the parameters of revisionary powers of this Court, I would wish to address the issue of jurisdiction of the court first as raised by the 2nd respondent who contended that the applicant ought to have filed an appeal and not revision.

23. Under Article 165 (6) and (7) of the constitution, the high court has unlimited powers to call for the record of any proceedings in the subordinate court and can proceed to make any appropriate orders to ensure fair administration of justice. Sub Article 7 espouses a wider approach by extending the powers of the high court beyond the confines of Section 362 of the CPC. What Sub-Article 7 contemplates is substantive justice thus summoning the high court's intervention by way of revision where an injustice is apparent or bound to occur. Further, Section 362 refers to the High Court powers to call for such records to satisfy itself on the correctness, propriety, regularity or illegality of any finding or order. The impugned ruling is a finding as well as an order capable of revision to determine whether it complies with legal standards with regard to grant of bail to an accused person**(See R vs Enock Wekesa & Another (2010) eKLR)**. Based on the above, it is my honest and sincere finding that this court has jurisdiction to exercise its revisionary powers in relation to the ruling in question.

24. The power to grant bail pending trial is pegged on well known criteria which are replicated in the bail and bond guidelines. Consideration therefore must take into account the following general guidelines:

> **(a) Whether an accused person is a flight risk.**
>
> **(b) Whether his release is likely to interfere with witnesses.**
>
> **(c) Whether investigations are complete.**
>
> **(d) Whether the security of the accused will be compromised if released**
>
> **(e) Seriousness of the offence.**

(f) Severity of the sentence

(g) Character and antecedents of the accused.

(h) Relationship between the accused and potential witnesses.

(i) Whether the release of the accused will disturb public order, or peace or security.

25. The essence or objective in releasing an accused person on bail is firstly to ensure that nobody is subjected to pre trial detention as that will be tantamount to being condemned unheard and therefore undermining the presumption of innocence until proved guilty as enshrined under Article 50 (2) (a) of the Constitution thus underscoring the importance of a fair trial. Secondly, the court seized with the power to grant bail must take into account and actually be satisfied that the accused person will attend court for trial if released on bail **(See R vs Danson Mgunya & Another (2010) eKLR**.

26. As to whether the trial court addressed its mind properly or carefully to the necessary considerations before granting bail is an issue for this court to review and not a matter strictly for appeal which if the applicant wished would as well have pursued.

27. I will now turn to the specific concerns by the applicant

(a) That the respondents are a flight risk

It was the applicants' argument that the 1st respondent had several cases pending before Mombasa law courts hence likely to abscond. Regarding the 2nd respondent it was alleged in the affidavit of CPL Busolo that he is likely to abscond to join his family members in Syria and that due to porous borders he is likely to leave the country. The magistrate did not find any of the above grounds sustainable as there was no prove. As stated above, the essence of release of an accused person on bail is to ensure attendance for trial at the same time uphold the right to individual liberty.

28. There is no dispute that the 1st respondent is facing other charges before Mombasa Law Courts to which she is on bond and has been attending faithfully. Unless and until convicted, the 1st respondent is innocent and the number of cases preferred against her should not perse be counted against her. How come she has not absconded since released on bond with regard to Mombasa cases? It is not a general principle that once an accused person has more than one case pending before a court of law, one will automatically not be entitled to bail on subsequent charges. Supposing some of the subsequent charges are maliciously preferred to circumvent the right to a fair trial by detaining one first for the sake of meting out pre-trial punishment? It will be dangerous to generally deny an accused person bail merely because he or she has been charged twice or thrice. There must be other factors or consideration to back up this condition. The 1st respondent has demonstrated obedience to the court's conditions attached by attending court at Mombasa all the time. There is no evidence or proof before me to show that the 1st respondent is likely to abscond or has failed to attend to the Mombasa cases.

29. As to the second accused (respondent), the porosity of Kenyan borders is not sufficient to deny him bail. Concerning his family having relocated to Syria, that is not an automatic ground to deny an accused person bail. In any event, the accused person's travel documents can be detained in court. No attempt was made to show how the accused (respondents) were planning to leave the jurisdiction of the court or had attempted or made arrangements to leave the country. For the above reasons stated, that ground is not sustainable.

(b) Complexity of Investigations

30. It is the applicant's assertion that investigations stretching outside

Kenya as far as Uganda, Congo, Sudan, Syria among others were incomplete and complex including collection of data calls, money transfer and documents relating to terrorist activities. As correctly stated by the trial court, there was no proof placed before court to show the length of time required and how far investigations had gone. It is worth noting that accused persons had prior to their arraignment in court been held in custody over 20 days to enable police department complete investigations. Since June 2018, it is almost three months now. I believe any investigations contemplated at the time of taking plea must have been complete otherwise the court may be subjected to acceding to indefinite investigations at the expense of a fair trial. It is my finding that the investigators have had ample time to complete investigations and that ground should not be left open like an open cheque.

31. In any event, there was no proof that the respondents have such wide connections to the alleged associates vide correspondences or close relationship. For those reasons that ground fails.

(c) Seriousness of the offence and severity of the penalty

32. In the wisdom of Kenyans, the Constitution allows all accused persons to be released on bail regardless of the seriousness of the offence capital offences inclusive. If there are serious offences such as terrorism, it is murder, robbery with violence and treason. All these are bailable. The gravity of the offence perse is not a ground to deny an accused person bail. Prosecution must go further and demonstrate how the gravity of the offence and severity of sentence likely to influence the accused person in absconding. There is no evidence laid before the court that the respondents have attempted to run away from the security agencies or even court's jurisdiction. Courts cannot apply an omnibus condemnation on all accused persons facing serious offences by denying them bail. I am aware that it is a delicate balancing act but it is ordinarily exercised in favour of an accused person unless the prosecution tables compelling reasons to prove that based on the gravity of the offence and severity of the sentence, an accused person is not likely to turn up in court. I cannot rely on a general statement based on the gravity of the offence to deny accused bail.

(d) Interference with witnesses

33. The applicant argued that, accused persons are well connected with their associates both from within and outside the country. Interference with witnesses is not merely a speculative assertion. He who alleges interference or likelihood of interference with witnesses has the onerous duty to prove interference against who, how and to what extent. In this case, the applicant did not prove any physical contact or otherwise with witnesses within or outside the country. There was no evidence or any form of communication, threats sent to those witnesses or any form of inducement, influence or approaches of whatever nature intended to pervert the course of justice. (**See Republic vs Joktan Manyende and another (Supra) where J. Gikonyo** had this to say:

> **"where there is evidence that a person is accosted, physically or otherwise, by an accused person in the case where the person is a witness, it suffices to prove that the accused did act (s) tending or intended to interfere with a witness…."**

34. There is no doubt that terrorism is a national and international concern. Kenya has been a victim of such heinous criminal activities which have left most families destitute, or orphaned and devastated. However, the law is an ass and we must accept it as its. It protects an individual who is innocent until proved guilty. It is true, terrorism is a threat to national security to which commensurate punishment should apply. Before then, accused person should be left to enjoy his freedom while on bail because he is innocent until proved guilty.

35. For the above reasons stated, it is my finding that the applicant has failed to prove that the trial magistrate improperly acted or misdirected herself in granting bail to the respondents and that there was nothing incorrect or any illegality, irregularity or impropriety committed by so granting bail. Application is therefore disallowed and the respondents shall be released on the terms set out by the trial court. In addition, the respondents shall deposit their travelling documents in court and then appear for mention every month. The original files from the trial court be returned immediately for purposes of proceeding with the trial.

Order accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF SEPTEMBER, 2018.

J. N. ONYIEGO (JUDGE)

In the presence of:

M/S. Sigei.....Counsel for the applicant

MR. Chacha.....Counsel for the 1st respondent

MR.Odhiambo.....Counsel for the 2nd respondent

Edwin.....Court Assistant