



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NOS. 737 & 738 OF 2018

JOHN MAINA KIARII.....1ST APPLICANT

ANTHONY KITILA MAKAU.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, John Maina Kiarri and Anthony Kitila Makau are facing several charges under the **Prevention of Terrorism Act**. Their application to be released on bail pending the trial was rejected by the trial court. At the material part of the ruling, the learned trial magistrate (Hon. Andai W – Chief Magistrate) had this to say:

“It must be appreciated that efforts by law enforcement agencies to forestall terrorists attacks come through a lot of intelligence gathering before action is taken against suspects. That intelligence must be translated into concrete evidence that warrants a conviction. But at this point, I think the court is not considering how watertight that evidence or the veracity of the evidence as such but rather on a balance of probabilities whether the intelligence reduced into the affidavit can pass muster. I have considered the effects of the offences charged on national security and society. It must be remembered 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. I have considered the seriousness of the offence and the severity of the sentence if convicted. These are factors that are likely to cause the accused persons to abscond court.”

Aggrieved by this decision, the Applicants, separately, applied to this court for reconsideration of the decision of the trial court denying them bail pending trial. It is the Applicants’ plea that they are entitled to be granted bail pending trial under **Article 49(1)(h)** of the **Constitution** unless there are compelling reasons. The Applicants argue that the grounds that the trial court relied on to deny them bail pending trial were not tenable. The Applicants denied the assertion by the prosecution that they were a danger to national security or that they would abscond from the jurisdiction of the court if they were released on bail pending trial.

Learned counsels for the Applicants Messrs Muchoki and Chacha submitted that the fact that the Applicants have been charged with terrorism related offences, *per se*, should not be reason for the prosecution to raise the spectre of national security without sufficient proof that the Applicants would be a danger to the society if they were released on bail pending trial. The Applicants were of the view that the reasons the prosecution raised in opposition to their application for bail pending trial were speculative and were not substantiated. They urged the court to look at the pre-bail reports which were favourable. Learned counsels cited several authorities in support of the thrust of their submission that no compelling reason had been laid for this court to deny them bail pending trial.

Mr. Okello for the Respondent opposed the application. He submitted that the prosecution had established reasonable apprehension that was appreciated by the trial court that the Applicants would likely abscond if they are released on bail pending trial. The gravity of the offence and the danger the Applicants may pose to security of the society is a reason that this court may refuse to grant bail pending trial. Learned prosecutor relied on several authorities in support of his submission to the effect that the severity of the sentence that may be imposed is a factor in determining whether or not to grant bail pending trial. He denied the assertions by the Applicants that the fears expressed by the prosecution were merely speculative and were not based on fact. He explained that the threats posed to national security were real. As regard the issue of the pre-bail report, Mr. Okello submitted that the same was devoid of merit as all affected persons were not interviewed before the said report was submitted in court. He urged the court to uphold the decision of the trial court.

This court has carefully considered the rival submission made by the parties to this application. In all cases where the court is called upon to

exercise its discretion in regard to whether or not to 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 **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.

As stated earlier in this Ruling, the Applicants are facing terrorism related charges. This court agrees with the prosecution that terrorism poses a serious threat to national security. In a recent decision rendered by this court (Mohamed Abdi Ali & Another –vs- Republic [2017] eKLR), this court had this to say:

“This court takes judicial notice of the fact that terrorism and its effects constitute a threat to the security of the nation and the society. This is because terrorists more often than not target innocent members of the public. This is not to say that the court has formed an opinion in respect of the innocence or guilt of the Applicants.”

The prosecution is required to establish to the satisfaction of the court that the release of the Applicants on bail pending trial would pose a threat to national security.

In the present application, it was clear from the submission made on behalf of the prosecution, and the affidavits sworn by the investigating officer that the prosecution is relying on the evidence that it has already gathered in support of the charges brought against the Applicants to support its assertion that there are compelling reasons for this court to deny the Applicants bail pending trial.

At this stage of proceedings, this court will not delve into the evidence that the prosecution will adduce during trial. However, this court noted that the Applicants have been charged with others and it is likely during trial that their respective degree of culpability in the charges brought against them may vary. This court is not persuaded by the arguments advanced by the prosecution that the mere fact that the Applicants are facing a serious charge that will attract severe punishment if convicted, is sufficient compelling reason to deny them bail pending trial on the ground that they are likely to abscond from the jurisdiction of the court. This court is not persuaded the reasons advanced by the prosecution are of such compelling nature as to make this court reach the finding that the Applicants should not be released on bail pending trial.

In the premises therefore, this court will allow the Applicants’ application. The decision of the trial court denying them bail pending trial is hereby set aside and substituted by a decision of this court granting each Applicant bail pending trial on the following conditions:

I. Each Applicant is released on bond of Kshs.1,000,000/- with two sureties of the same amount. In the alternative, each Applicant may post cash bail of Kshs.500,000/- with one surety of Kshs.1,000,000/-.

II. The Applicants shall be required to appear before the Deputy Registrar of this court for mention of their case on the 1st Monday of each month until the hearing and conclusion of the trial or until further orders of this court.

III. The Applicants shall attend court without fail on the dates scheduled for trial.

It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF OCTOBER 2018

L. KIMARU

JUDGE