

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.9 OF 2017

REPUBLIC.....APPLICANT

VERSUS

MWANGOLO KIGUZO MGUTURESPONDENT

RULING

The Director of Public Prosecution was aggrieved by the order of the trial magistrate’s court that released the Respondent on bail pending trial. The prosecution moved to this court pursuant to **Article 165(5)** of the **Constitution** and **Section 362** of the **Criminal Procedure Code** seeking to have the said decision delivered on 16th January 2017 set aside and substituted by an order of this court denying the Respondent bail pending trial. The grounds in support of the application for revision are that: the Respondent was charged with a serious offence which will attract tough sanction should the Respondent be found guilty. The prosecution urged the court to take into consideration the fact that the Respondent was found with explosives and further that he had been radicalized and would be a danger to the society if he is released on bail pending trial. The prosecution asserted that if the Respondent is released on bail pending trial, he will fraternize with his associates who are yet to be arrested and who are intent on committing acts of terrorism. The prosecution urged the court to find that there are sufficient compelling reasons to deny the Respondent bail pending trial.

In response to the application, Mgotu Kiguzo Moti, the father of the Respondent, swore a replying affidavit in opposition to the application. While acknowledging that indeed the Respondent had been charged with charges connected to terrorism, he denied the prosecution’s allegation to the effect that the Respondent had engaged in acts of terrorism. He further denied that the Respondent was found with explosives as stated by the prosecution. He averred that since the Respondent was first arrested by the police on 24th May 2016, he had cooperated with the police including attending a counselling programme initiated by the Anti-Terror Police Unit. The Respondent had completed the counselling sessions and has always abided by the direction issued by the police. During this period, the Respondent had not absconded or skipped bail. He deponed that there were no cogent reasons why the Respondent should be denied bail pending trial.

During the hearing of the application, this court heard oral rival submission made by Ms. Atina for the State and by Prof Nandwa for the Respondent. This court has carefully considered the said submission. The issue for determination by this court is whether the prosecution placed before this court evidence that constitutes compelling reasons for this court to deny the Respondent bail pending trial. **Article 49(1)(h)** of the **Constitution** 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. In **Hassan Mahati Omar & Another –Vs- Republic [2014] eKLR** Achode J held thus:

“Granting of bail entails the striking of a balance of proportionality in considering the rights of the Applicant who is presumed innocent at this point on the one hand, and the public interest on the other. On the one hand is the duty of the court to ensure that crime, where it is proved, is appropriately punished; this is for the protection of the society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human right guaranteed to them under the Constitution.”

In **Republic –Vs- Danson Mgunya & Another [2008] eKLR**, Ibrahim J (as he then was) held that in determining what constitutes “*compelling reasons*” not to release an accused on bail pending trial some of the considerations that have to be taken into account include the nature of the charges, the gravity of the punishment in the event of the conviction, the strength of the evidence which supports the charges and the likelihood of the accused interfering with witnesses or suppressing evidence that may incriminate him.

In the present application, it was evident that the prosecution is relying on the compelling reason that the Respondent is likely to commit another more serious offence if he is released on bail pending trial. From the affidavits sworn by the father of the Respondent and the investigating officer, it was clear to this court that the police had interacted with the Respondent for a period of more than eight months before he was arraigned in court. It should be noted that the Respondent is a child within the meaning ascribed to the term under **Section 2** of the **Children Act**. The Anti-Terror Police Unit suspected that the Respondent may have been radicalized by Islamic extremists and therefore he is likely to be primed to commit acts of terror. It was in that regard that the Respondent was placed in a de-radicalization programme, which from the report of the clinical psychologist appears to have borne fruit. According to the prosecution, the Respondent did not abide by all the terms of the de-radicalization programme. This resulted in the police raiding his home. This raid resulted in the alleged recovery of explosives. The father of the Respondent denies that such explosives were found in his house. This court will not comment on that issue because the same is pending determination before the trial court.

Has the prosecution placed any compelling reasons for this court to deny the Respondent bail pending trial? This court does not think so. As stated earlier in this Ruling, it was clear to this court that the Respondent and the police interacted for some time before the Respondent was charged in court. During this period, the Respondent was not placed under any restriction. He complied with the direction of the police that required him to attend a de-radicalization programme. From the reports filed, it was evident that some headway was made in de-radicalizing the Respondent. His anger towards the society generally dissipated. Maybe there is need for the Respondent to attend further de-radicalization sessions. From the evidence placed before this court, the fears expressed by the prosecution that the Respondent is likely to commit an offence if released on bail pending trial has not been made out. The Respondent has the support of his family and is unlikely to commit another offence if he is released on bail pending trial. In any event, this court cannot infringe on the constitutional right of the Respondent to be presumed innocent unless otherwise proven guilty in a court of law.

In the premises therefore, the application for revision made by the prosecution lacks merit and is hereby dismissed. The Respondent shall be released on bail pending trial as ordered by the trial magistrate’s court. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2017

L. KIMARU

JUDGE