



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**MISC. CRIMINAL APPLICATION NO.38(B) OF 2017**

**CHUKWUEMEKA JOHN EMMANUEL.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant, Chukwuemeka John Emmanuel, with another, is facing a charge of trafficking in narcotic drugs contrary to **Section 4(a)** of the **Narcotic Drugs and Psychotropic Substances Control Act**. The particulars of the charge are that on 25<sup>th</sup> April 2015 at City Square Post Office, within Nairobi County, the Applicant jointly with others not before court, trafficked in narcotic drugs namely heroine to wit 569.3 grams with a market value of Kshs.1,707,900/- concealed in a false bottom of a carton in contravention of the said **Act**. The Applicant pleaded not guilty to the charge. He applied to be released on bail pending the hearing and determination of the case. His application was denied by the trial magistrate's court. The Applicant has moved to this court seeking the intervention of this court to have him released on bail pending trial.

In his application, the Applicant contends that he has a constitutional right to be released on bail pending trial. He is presumed innocent until the contrary is established. The Applicant complained that the trial court had discriminated against him and denied him his constitutional right to bail on the basis of his nationality and background. The Applicant states that he suffers from a serious medical condition which cannot adequately be managed while he is in remand custody. He deponed that his health was deteriorating. He pleads with the court to exercise its discretion in his favour. The Applicant annexed a copy of a medical report by the Prison's doctor who noted that the Applicant suffers from Kidney impairment and hypertension. He also suffers from bronchitis and impaired vision. The doctor recommended that the Applicant be referred to Kenyatta National Hospital for further evaluation and treatment. However, due to the current doctors' strike, the Applicant had not been attended to. In his submission before court, the Applicant's counsel Mr. Ondieki reiterated the contents of the application and the supporting affidavit. He stated that the trial court discriminated against the Applicant on the basis of his nationality when it failed to release him on bail pending trial. He submitted that the Applicant was willing to provide Kenyan sureties so that he can be released on bail pending trial. He urged the court to exercise its discretion and release the Applicant on reasonable bond terms.

The application is opposed. Corporal Albashir Olow, the investigating officer in the case, swore a replying affidavit in support of the application. He deponed that the Applicant was a foreigner with no known fixed abode or family ties in Kenya. The Applicant was a flight risk if he was released on bond. This is taking into account the serious nature of the charge that he is facing. He averred that the prosecution had already produced all the witnesses save for three witnesses who are scheduled to testify on 27<sup>th</sup> April 2017. Ms. Sigei for the State reiterated the contents of the replying affidavit. She submitted that the likelihood that the Applicant would abscond if released on bail pending trial was very high taking into consideration the fact that if the Applicant is convicted he will likely be sentenced to serve life imprisonment. As regard his medical condition, she was of the view that the Applicant can be provided with the required medical treatment while in custody. She urged the court to dismiss the application.

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.”*

From the foregoing decision, it is clear that the paramount consideration that the court must take into account in determining whether or not to release an accused person on bail pending trial is whether the accused will attend court if he is so released on bail pending trial. Whereas the court may take into consideration other factors such as the serious nature of the charges facing the accused, and antecedents of the accused’s arrest and subsequent arraignment in court, such considerations will not overwhelm the primary and main consideration of ensuring that the accused person will attend court during trial.

In the present application, it was clear to this court that although the Applicant claims that he will not abscond if he is released on bail pending trial, the risk and the likelihood that he would fail to attend court if so released on bail pending trial cannot be overlooked or ignored by the court. This court notes that the Applicant is facing a serious charge that has international repercussions. This court is not persuaded that the Applicant’s health condition is such that it can influence the court to grant him bail pending trial. So far, the Applicant has been provided satisfactory treatment by the prison authorities. The court also has taken into account that majority of the prosecution witnesses have already testified. The Applicant already knows the strength or the weakness of the prosecution’s case.

The fact that the Applicant is of foreign nationality is more the reason why the court should exercise caution in exercising its discretion to release the Applicant on bail pending trial. This court is of the view that the serious nature of the offence facing the Applicant and the likelihood that he would abscond if released on bail pending trial constitutes compelling reasons as contemplated in **Article 49(1)(h)** of the **Constitution** to deny the Applicant bail pending trial. The application is hereby dismissed. The Applicant shall remain in custody until the hearing and determination of the charge facing him. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH 2017**

**L. KIMARU**

**JUDGE**