



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CRIMINAL APPLICATION NO.411 OF 2016

(As consolidated with Miscellaneous Criminal Application No.102 of 2017)

MOHAMED ABDI ALI.....1ST APPLICANT

SALAH MOHAMED KHALIF.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, Mohamed Abdi Ali and Salah Mohamed Khalif are facing criminal charges before the trial magistrate's court. The charges were brought under the **Prevention of Terrorism Act 2012**. When the Applicants were arraigned before the trial magistrate's court, they pleaded not guilty to the charge. Their application to be released on bail pending trial was denied. Aggrieved by that decision, the Applicants have separately applied to this court to be released on bail pending trial. Their applications were consolidated for the purpose of this hearing.

Both applications were vigorously canvassed by Mr. Taib and Mr. Mureithi for the 1st Applicant, Mr. Kangahi for the 2nd Applicant and by Mr. Ondimu for the State. Mr. Taib and Mr. Mureithi submitted that the 1st Applicant was a Kenyan citizen and a medical doctor. He was a Somali and a Muslim. He urged the court to contextualize the charges brought against the 1st Applicant. He was of the view that the charges brought against the 1st Applicant were a continuation of discrimination against Muslims in Kenya. He complained that the prosecution had brought forth facts by affidavit evidence which is meant to prejudice the court into determining the application against the Applicants. He urged the court to treat the contents of the said affidavits as mere hearsay as it contained mere allegations which had not been proved before the court. He argued that the **Constitution** presumed the 1st Applicant innocent until proven guilty by a court of law. There was no basis upon which the court can deny the 1st Applicant bail pending trial. He urged the court to take into consideration that the 1st Applicant has been in remand custody for a period of more than one year yet no effort had been made by the prosecution to prosecute the case. He was of the view that the prosecution through the affidavits filed in opposition to the application were seeking to prosecute the charges brought against the 1st Applicant before this court yet they were not ready to prosecute the same before the trial magistrate's court.

Learned counsel submitted that there were no compelling reasons why the 1st Applicant should be denied bail taking into consideration that the 1st Applicant's co-accused was released on bail pending trial and had attended court without fail in the period that she has been out on bail. He urged the court to disregard

the argument advanced by the prosecution to the effect that the 1st Applicant would be a danger to society if he was released on bail pending trial. Learned counsel asserted that there was no evidence to support the contention that the 1st Applicant would commit other offences or would abscond from the court's jurisdiction if he was released on bail pending trial. The 1st Applicant stated that he was ready to abide by any terms that may be imposed by the court to secure his release on bail pending trial. Learned counsel cited several authorities, statute and the Bail/Bond Policy in support of the application to have the 1st Applicant released on bail pending trial.

Mr. Kangahi for the 2nd Applicant associated himself with the submission made on behalf of the 1st Applicant. He submitted that the contents of the affidavit sworn by the investigating officer in opposition to the application for bail should be disregarded by this court because, in his view, the said affidavit was premised on speculation and not based on real facts. He urged the court not to be persuaded by the prosecution's contention that the 2nd Applicant would be a threat to the public if he was released on bail pending trial. Mr. Kangahi submitted that the primary consideration that the court ought to take into account is whether the 2nd Applicant would attend court during the hearing of the case. If that is established, then, the 2nd Applicant should be released on bail pending trial. It was the 2nd Respondent's case that the prosecution had not placed any compelling reasons before the court to persuade it to deny the 2nd Applicant bail pending trial. He urged the court to allow the application.

Mr. Ondimu for the State opposed both applications. He submitted that the charges brought against the Applicants were serious. He stated that investigations had established that the Applicants were using communication gadgets to recruit and propagate acts of terrorism; that the Applicants were encouraging others to conduct war, undertake surveillance and even manufacture explosives. Learned counsel urged the court to take into consideration the new type of war that is being fought by terrorists which is predicated on using cyber space to recruit and organize acts of terror. He submitted that from the evidence gathered by the police, it was evident that if the Applicants were released on bail pending trial, they would abscond. This is because, if convicted, they will face a long period while serving in prison. He asserted that the Applicants had the means to flee from the jurisdiction of the court. He submitted that the court should take into account the entire circumstances of the case and reach the verdict that there were indeed compelling reasons why the Applicants should not be released 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.”

Article 49(1)(h) of the **Constitution** provides that any accused person shall be entitled to be released on bail or bond on reasonable conditions pending trial unless there are compelling reasons. Section **123A** of the **Criminal Procedure Code** provides thus:

“(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular –

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and,

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person –

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.”

This court agrees with the decision of Ngenye J in Nairobi High Court Criminal Revision No.232 of 2016 Republic –vs- Nuseiba Mohammed Haji Osman where she held as follows:

“A balancing act is required between the rights of the individual and public interest. The Bail and Bond Policy Guidelines recognize this principle under para.3(e) at pp. 9-10, acknowledging that in certain instances: ‘The interests of justice therefore demand the protection of the investigation and prosecution process against probable hindrance by accused persons. It is therefore important for police officers and judicial officers to appreciate that the public have an interest in the effective prosecution of offences.’ The Guidelines proceed to provide that: ‘it must therefore be demonstrated with convincing evidence that his or her release will present risks, and that such risks cannot be managed, even with the attachment of appropriate conditions’ (Emphasis added).”

In the present application, it is the prosecution's contention that due to the nature of the charges that were brought against the Applicants, and the evidence that the prosecution has obtained that connects the Applicants to alleged acts of terrorism, the court should not release the Applicants on bail pending trial because, to do so, would constitute a danger to the interest and security of the public. The prosecution is saying that such interest constitutes compelling reasons not to release the Applicants on bail pending trial. On the other hand, it is the Applicants' contention that the **Constitution** presumes them innocent and that the prosecution has not provided any evidence to support its assertion that the Applicants would be a threat to the security of the public if they are released on bail pending trial.

This court has grappled with the argument put forward by the parties in support of their respective positions. 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 to the innocence or guilt of the Applicants. Far from it. The prosecution argues that the Applicants were recruiting and training converts through cyber space to commit acts of terrorism. The investigating officer attached documents which allegedly set out communication between the Applicants and others. These communications allegedly relate to acts of terrorism. The Applicants deny involvement in any of those alleged acts of recruitment or training of converts to commit acts of terrorism. The issue of whether or not the Applicants were involved in acts of terrorism shall be determined by the trial court.

In the circumstance of this application, *does the evidence provided to this court by affidavit evidence of the investigating officer constitute compelling reasons to deny the Applicants bail pending trial? Is the public interest and public security that the prosecution is stating would be threatened if the Applicants are released on bail pending trial overriding to such an extent that the individual rights of the Applicants will be subsumed to such public right?* These are difficult questions which this court will be resolved in favour of the prosecution. This court is of the opinion that the prosecution has placed sufficient evidence before this court to establish that the interest of the public and the security of the public would be in

danger if the Applicants are released on bail pending trial. The threat to the public security constitutes compelling reasons for the Applicants not to be released on bail pending trial.

For the above reasons, the application filed by the Applicants seeking to be released on bail pending trial lack merit and is hereby dismissed. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF JUNE 2017

L. KIMARU

JUDGE