



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION 312 OF 2016

ABDI KAFAR AHMED

MUSTAFA ABDI RIZACK

ADBALLAH JAMA SULEIMAN

HARUN AHMED ELMI

HUSSEIN AHMED ALI

MUHAMED ALI MUHAMUDAPPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicants, by way of Notice of Motion made an application to this court in the matter of bail pending trial in Criminal Case 1995 of 2016(Makadara). The same was supported by the affidavit of Conrad Maloba. The main prayer is that they be admitted the applicants to Bail/Bond pending trial in Criminal Case No. 1994 of 2016. Annexed to the application were affidavits of Abdinasir Abdillahi Adan, Ibrahim Muhumed Elmi and Abdirizak Elmi Hashi. The Applicants invoked this court's original jurisdiction under Article 165(1) of the Constitution of Kenya, 2010 and Section 123 of the Criminal Procedure Code.

The case for the Applicants is that Hon. H. M. Nyaga, C.M, in a ruling delivered on 18th August, 2016 rejected the application and denied them bail. The reason he gave included that the Applicants were refugees and therefore posed a flight risk. They averred that the denial of bail was largely based on allegations in an affidavit sworn by No. 48894 PC Joseph Njoroge of DCI Starehe Division on 9th August, 2016. That, contrary to the affidavit;

1. They were law abiding citizens with families in Kenya and are not a flight risk and that they were ready and willing to attend court or any other place as may be ordered by the court as a condition of grant of bail.
2. That they would not interfere with investigations or the prosecution of the case.

3. That the fear and apprehension of the complainant cannot (and ought not to) override their presumption of innocence.
4. That they have never been on the wrong side of the law and have no previous convictions.
5. That no compelling reasons for the denial of bail existed and all that the police gave amounted to allegations which were unsubstantiated.

They further emphasize that bail is a constitutional right enshrined in Article 49(1)(h) of the Constitution of Kenya, 2010. That amongst the Applicants there were minors and a denial of bail to them went against Section 4(2) and 187(1) of the Children's Act, 2001. They assert that their families were willing to give security and/or stand as surety on bail/bond terms as the court may reasonably grant. They say that before their arrest they were students in various schools and due to their incarceration they had missed classes and examinations and that their continued detention was adversely affecting their studies. It was therefore in the best interest of all the parties that they be granted bail/bond pending the trial.

The victim filed grounds of opposition. Her case is that the Applicants did not produce any documentation to show that they are Kenyans. She queried why the birth and school certificates were not produced in the lower court to demonstrate that they were Kenyans. It was submitted that the Supporting Affidavits that were annexed to the application were not sworn by their relatives but strangers. It was argued that the parents of the Applicants were the persons best placed to swear the Supporting Affidavits. That in any case, a birth certificate did not confer citizenship to a child.

Counsel for the victim submitted that the fundamental right to be admitted to bail was not absolute and is dependent on various factors to be assessed by the court on a case by case basis and each case should therefore be handled on its own merit. His view was that the Applicants were flight risks with no fixed abode and they could also tamper with witnesses if released on bail or bond.

The Respondent filed a Replying Affidavit sworn by No. 48894 P.C. Joseph Njoroge. He deponed that the Applicants had not demonstrated that they were Kenyan citizens and that they did not have fixed abodes. Further, that the 4th and 5th Applicants were adults who did not have identification cards. He submitted that he had been advised by the state counsel that birth certificates were not proof of citizenship. That the only way that citizenship could be proved was by the production of identity cards or passports of the parents of the minors. He confirmed that the 3rd Applicant, Abdulla Jamal Suleiman, is registered as a refugee under UNHCR dependent of one Baashe Hassan Rhoda, ration number 029743 but the refugee mandate expired on 13th July, 2016 and he is therefore in the country illegally. He further submitted that the Applicants were charged with serious offences which carry a penalty of death. As such, due to the seriousness of the offence and the attendant punishment they were likely to abscond. He urged that the application be dismissed.

In considering an application for bail pending trial, I am minded that bail granted to an accused or arrested person is a constitutional right as enshrined under Article 49(1)(h) of the Constitution which provides that;

“An accused 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.”

Therefore, bail can only be denied if there are compelling reasons that have been advanced. In the present case, it was argued by both the Respondent and the victim that the Applicants are a flight risk because they had not demonstrated that they are Kenyan citizens which factor would compel them to abscond the trial. **Section 123(2) of the Criminal Procedure Code** requires that in determining bail terms, the circumstances of the case should be given due regard and the terms ought not to be excessive. On the other hand **sub section (1)** gives some guidelines on factors to be considered as follows;

a) The nature and seriousness of the offence;

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

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.

Over time, case law has also settled on factors such as public interest, victim protection, gravity of the offence, gravity of the punishment in the event of a conviction, the security of the accused person upon his release, personal reasons such as the health of the accused and interference of witnesses.

In addition, the bail and bond policy guidelines were developed so that they too could guide court in making decisions regarding release of accused persons on bail/bond. They recognize the need of a balanced approach in preserving the public interest and the right of an accused person to a fair trial. In this respects, courts must be very cautious not to deny an accused bail unless there are well considered compelling reasons.

In my view, the omnibus of all factors is whether an accused will avail himself for trial when required to do so. And in this case, it is contended that the Applicants will most likely abscond the trial as they have not demonstrated they are Kenyan citizens. On their part, the Applicants endeavoured to demonstrate that they have Kenyan roots. They have tendered the following documents; birth certificate No. 278341 for one Abdikatif s/o Ahmed Ilmi, birth certificate No. 5485998 Mohamed s/o Mohamud Ali Khase, copy of school Identity card belonging to Abdikafar Ahmed Elmi, letter from Compit Educational center *vis a vis* Abdikafar Ahmed Elmi, letter from the Komarock School *vis a vis* Abdirizak Mustafa, KCPE certificate belonging to one Jamal Abdalla Suleiman, School leaving certificate belonging to Jamal Abdalla Suleiman, A copy of school identity card(Compit Secondary School) belonging to Harun Ahmed, KCPE certificate belonging to one Ahmed Harun Elmi, KCPE certificate belonging to Ahmed Hashim Elmi, A letter from The Komarock school *vis a vis* Ali Hussein, KCPE certificate belonging to one Ali Hussein Ahmed, Kenya primary school leaving certificate belonging to one Mohammed Mohamud from Blue Sky education center, KCPE certificate belonging to one Mohammed Mohamud Ali, A letter from the Komarock school *vis a vis* Abdirizak Mustafa and A KCPE certificate belonging to one Mustafa Abdirisak Omar.

The Respondent and the complainant made submissions that these certificates did not prove that the Applicants were Kenyan citizens and did not make them lesser flight risks. The complainant in her submissions also queried why the certificates had not been produced before the lower court during the application for bail.

I have noted that the affidavits attached to the Notice of Motion were sworn by relatives whose level of consanguinity to the Applicants is quite remote leading the court to question whether they have ability to monitor and ensure that the Applicants would attend court when required to do so. The affiants are an uncle to Harun Ahmed Elmi, Abdikadir Ahmed Elmi and Hashim Ahmed Elmi, a cousin to Muhamed Ali Muhamud and an uncle to Ali Hussein Ahmed. Although they did aver that the Applicants were under their care and control this court is perturbed by the fact that the Respondent demonstrated that one of the Applicants is indeed a refugee, namely, Abdulla Jamal Suleiman under the guardianship of Baashe Hassan Rhoda whose refugee mandate had expired. This is attested by a UNHCR identification document dated 13th July, 2010 which shows the refugee mandate expired on 13th JULY, 2011. Therefore, both the 3rd Applicant and his guardian, unless otherwise proved, are in the country illegally. The court cannot then vouch that the said Baashe Hassan Rhoda would be the appropriate person to monitor the 3rd Applicant if he is admitted to bail. It also raises eye brows why the immediate relatives namely, the parents of the Applicants are keeping away from exposure. If they have nothing to hide, they would be on the fore front to swear the supporting affidavits. They would also be in court to state how well they know their children and are able to monitor their movements if bail is granted. The mere fact that the Applicants are in school does not imply that they cannot abscond court proceedings. Birth Certificates too are not documents that could hinder a person from absconding proceedings. After all, they are issued to persons upon birth. Identification cards are the sure documents that a person has Kenyan roots and if he

absconded would be traced at a certain locality.

In these circumstances, I am convinced that the Applicants are a flight risk. Their fixed abodes were not disclosed. That applies to their relatives who swore the Supporting Affidavits. That even if they have homes, they do not live with the Applicant as to be able to monitor their movements if they are granted bond. For instance, the uncle to the 4th and 5th Applicants live in Mombasa yet the Applicants are said were born in Ijara and Garissa respectively. The two were arrested in Kayole yet their place of residence in Nairobi is not disclosed. Another case is that of the 2nd Applicant who did not denounce the fact that he had disclosed to the magistrate's court that being a refugee, he had obtained an air ticket for relocation to the USA.

In addition, I also give regard to the fact that the Applicants are charged with serious offences, one of which is capital robbery which attracts a death penalty in the event of a conviction. Whereas it is a cardinal principle in the justice system that an accused is presumed innocent unless proved guilty, I add that owing to the high risk that the Applicants can abscond, the seriousness of the offence may further urge them not to turn up for the trial.

Finally, it was submitted that the trial magistrate in denying bail to the Applicants shifted the burden of proof to them to demonstrate that they were Kenyan citizens. They submitted that the burden lay on the prosecution to prove the contrary. Before me, the prosecution has demonstrated to the satisfaction of the court that the Applicants are a flight risk, and I have enunciated the reasons. They have not tendered any tangible evidence to dislodge that fact. As regards the evidence likely to be tendered, I have not been exposed to it. Neither was the learned magistrate exposed to it. His insinuation of its likely strength may not have been appropriate, but the sentiment does not in any way influence the outcome of this application.

In the upshot, I find that the application lacks merit. The prosecution has demonstrated that there are compelling reasons to warrant a denial of bail. The same is dismissed accordingly. However on noting that two of the Applicants are minors, I direct that the trial be heard on a priority and on a day to day basis in the best interest of the minors. I order that the matter be mentioned before the trial magistrate on 17th October, 2017 for fixing of a hearing date in compliance with this court's direction. It is so ordered.

DATED AND DELIVERED THIS 11TH DAY OF OCTOBER, 2016.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Dan Amaliba & Mike Amaliba for the Applicants.*
- 2. Mr. Ayora for the Complainant*
- 3. Miss Atina for the Respondents.*