



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CRA CASE NO. 16 OF 2014

ABDIKADIR ADEN ALIAS TULLLU....1ST APPLICANT

BARAKO BORU.....2ND APPLICANT

ZARQU GALLABO.....3RD APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The three Applicants have approached this court by way of a Notice of Motion dated 21st May, 2014. The application seeks to have the Applicants admitted to bail pending hearing and determination of Marsabit Criminal case NO. 36 of 2014.
2. The grounds for the application are cited on the face of the application namely:
 - i. **The trial magistrate declined to grant bail to Applicants.**
 - ii. **The Applicants are charged with bailable offences.**
 - iii. **The Applicants have fixed and identifiable homes.**
 - iv. **The Applicants had presented themselves to the police station where they were arrested.**
 - v. **There is no compelling reason why they should not be released on bail.**
3. The application is supported by an affidavit sworn by the 1st Applicant on behalf of himself and the other two Applicants. The gist of the affidavit is the fact the Applicants applications to be released on bail had been rejected twice by the trial court in Marsabit Criminal Case NO. 36 OF 2014. The proceedings of that case together with the rulings are annexed.
4. The other fact stated is that a fourth person charged together with the Applicants was granted bail.
5. Mr. Ondari for the Applicants urged that his clients presented themselves to the Police when they learnt that they were being sought. Counsel urged court to find from that conduct that the Applicants were not persons who can abscond if granted bail. He urged that the Applicants, their parents and homes are well-known.
6. Mr. Ondari relied on case of **Aboud Rogo Mohamed and another -V- Republic** Nairobi HCCR No.793/2010 for proposition that the High Court in a case similar to the instant one upheld Article 49 (1) (h) of the Constitution and granted bail to the accused.

7. Mr. Ondari also relied on the case of **REP –V- MUNEER Harron Ismail and other** Nairobi Criminal Revision No. 51 of 2009 where the court held that even though the Applicants faced charges under the Terrorism Act they were entitled to bail.
8. Mr. Ondari also cited **Republic –V- Eustace Bundi Rufus** Meru HCCR Case No. 19 of 2010 where the trial court granted bail in a murder charge, after dismissing the prosecution’s plea that the lives of the accused may be endangered.
9. Mr. Mungai, Prosecution Counsel for the state opposed the application. Counsel urged that even though bail was a Constitutional right it is not an absolute right. Counsel urged that the Applicants had applied for bail before the lower court but that the same was rejected by the court. Learned Counsel for the state urged that the court should consider the severity of the offence and the circumstances of the offence, potential lengthy term of imprisonment the Applicants may be liable to get if convicted.
10. Mr. Mungai urged that the offence was serious and bordered on terrorism. Learned Prosecution Counsel urged the court to consider the public interest due to terrorism threat and decline bail.
11. I have considered the application before me and the submissions made on behalf of the Applicants and the State.
12. I have considered the rulings of the learned trial magistrate in which bail was denied to the Applicants. I am impressed by the learned trial magistrate’s considerations and the manner in which he weighed all the factors and interests affecting the case.
13. In my reading of the rulings the reasons given why the Applicants were denied bail are:
 - a. **Incidents of terrorist’s acts are common to the point of being alarming in the country.**
 - b. **The security situation in the country and it’s against public interest to have the accused persons being released on bond.**
14. I noted that the fourth person charged along with the Applicants was granted bail. That was after an attempt by the state to withdraw the charges against that accused was declined.
15. The bottom line is the Applicants are charged with an offence of possessing Articles connected with a terrorism offence in that the Articles they had were for the use in instigating the commission of terrorist acts. Without appearing to belittle or trivialize the alleged offences, I note that what the Applicants are alleged to have been found with are audio and visual material which could be used to investigate terrorist acts. They are in a foreign language. An appeal by the Applicants counsel to know whether there has been an interpretation of the Articles into the language of the court went unanswered.
16. In other words the audio and visual material the Applicants are alleged to have been in possession of are material to be used to influence people ideologically, to commit terrorist acts. The actual content and how appealing it is will be demonstrated at the hearing of this case. There is also likelihood that as of the moment, even the prosecution is unaware of the actual content of the articles and the impact or effect they may have on those coming across the same. This is more than just speculation. It means that the Applicants are being held in custody on speculations.
16. Article 19 (3) (a) of the Constitution makes it abundantly clear that the rights and fundamental freedoms in the Bill of Rights belong to each individual and they are for each individual to enjoy. The limitations upon which these rights and freedoms are subject to are spelt out under Article 49(1) (h) of the Constitution, which in short is **“unless there are compelling reasons to decline bail”**.
17. The burden lies with the prosecution to establish what the compelling reasons are. All the prosecution has said is that the Applicants face terrorism connected charges. The word “terrorism” doubtless invokes fear or even terror. However, the prosecution should be able to demonstrate what exactly it is that

constitutes the compelling reason. There must be some cogent or tangible basis for alleging so. In this case, nothing cogent or tangible has been demonstrated or placed before the court. For that reason alone, I find there is no compelling reason demonstrated to deny the Applicants bail.

18. In the result I do grant the Applicants bail in the following terms:

1. Each Applicant may be released on a bond of Kshs. 500,000/- and with two sureties of Kshs. 500,000/- each.

2. Alternatively each Applicant may deposit cash bail in the sum of Kshs. 1 million.

19. The Applicants Notice of Motion application dated 21st May, 2014 is granted as herein above.

DATED, SIGNED AND DELIVERED AT MERU THIS 10th OF JULY, 2014.

LESIIT, J.

JUDGE