REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL REVISION NO. 31 OF 2014

HASSAN MAHATI OMAR .....1ST APPLICANT

FARDOSA MOHAMED ABDI .....2ND APPLICANT

VERSUS

REPUBLIC .....RESPONDENT

R U L I N G

1. This is an application dated 13th May 2014 brought under **Section 362** of the **Criminal Procedure Code,** by way of Chamber Summons. In it, the applicants seek that the court be pleased to call for and examine the record of the criminal proceedings in Nairobi Chief Magistrate's Criminal Case Number 490 of 2014. The examination is for the purpose of the court satisfying itself as to the correctness, legality or propriety of the finding, or order passed by the Ag. Senior Principal Magistrate, Mrs. E. N. Nderitu on 2nd May 2014, in which she denied the applicants herein bond pending trial in the said case.

2. The Applicants therefore, pray that this honourable court be pleased to release them on such reasonable bond terms pending their trial in Chief Magistrate's Criminal Case No 490 of 2014 as the court may deem fit.

3. The grounds of the application are as they appear on the face thereof and in the supporting affidavit sworn by one Mr. Mohamed Abdi, a cousin to the first applicant and brother-in-law to the second applicant. The grounds are that the applicants are facing trial in Chief Magistrate's Criminal case No. 490 of 2014 at the Nairobi. That the prosecution presented to court an affidavit sworn by the Investigating Officer requesting that the applicants should not be admitted to bail pending trial for a number of grounds set out therein.

4. That in the ruling delivered on 2nd May 2014, the court rejected all the grounds raised by the Investigating Officer in the said affidavit as the basis for denial of the applicants pre-trial bail, but went ahead to deny them bail on one ground which was not raised by the prosecution, that *"releasing the accused person on bail at the moment will diminish public confidence in the administration of justice. The prevailing state of security demands that the accused person be not released on bail"*.

5. The applicants deposed that the above consideration was a violation of their right to be released on reasonable conditions pending trial unless there are compelling reasons not to be released and by

extension a violation of their right to be presumed innocent until the contrary is proved.

6. It was further deposed that the first applicant has in similar fashion of trumped up charges been charged in Kibera Chief Magistrate's Court Criminal Case No. 2787 of 2012, wherein the prosecution also opposed his release on bond but when the court released him on bond of Kshs.200,000/= or cash bail of Kshs.100,000/=, the first applicant attended court for his entire trial and was subsequently acquitted under **Section 210** of the **Criminal Procedure Code**, with no case to answer. That the first applicant is, therefore, not a flight risk.

7. It was also deposed that the second applicant suffers from diabetes mellitus and is therefore, in dire need of close medical and nutritional attention that detention facilities are not best placed to meet. That the applicants have two young children aged 7 years and 6 months respectively, who are now suffering for lack of parental care in spite of the constitutional presumption of innocence of the applicants. That therefore, it is just and equitable that the applicants be admitted to reasonable bail terms pending their trial.

8. The application was opposed by the state in reliance of the supporting affidavit sworn by Sgt Ezekiel Lulei, a police officer attached to Anti-terrorism Police Unit. In the affidavit, Sgt Lulei deposed that the police have information that the grenades launched at Al-Hidaya Mosque on 7th December 2012 at 8.00 p.m. in which twenty one people were injured; at Buffalo Guest House on 16th December 2012 at 8.30 p.m. in which one person was injured, and at a mini-bus along Mukunga road, Eastleigh on 19th December 2012, were in the applicant's possession.

9. Sgt Lulei deposed that the areas that were affected were adjacent to the applicant's residence and that the first applicant is a preacher whose preachings at Ushirika Bilal Mosque are against non-Muslims. Sgt Lulei also deposed that the first applicant has been under investigation since 2010 for related activities and has been arrested before, although no recoveries were made that were incriminating. Further that on 1st April 2014, the police recovered two grenades from the applicants' residence in Eastleigh and have information that there are 18 other grenades hidden at an undisclosed location which are intended for terrorist activities. The court was therefore, asked not to grant the applicants bail since they pose a threat to national security.

10. Sgt Lulei deposed that considering the gravity of the charges they are facing, the applicants are likely to abscond. For emphasis, he attached several examples of instances where accused persons charged with terrorism related offences jumped bail.

11. Learned counsel Mr. Ongoya appeared for the applicants and urged the court to enforce **Article 49(h)(l)** of the Constitution. He urged the court to apply its mind to the provisions of **Article 20(3)(b**) of the Constitution and adopt the interpretation that most favours the enjoyment of the rights in applying the provisions in the Bill of Rights.

12. Mr. Ongoya took umbrage with the fact that the court rejected all the specific grounds raised against the applicants, but took judicial notice of frequent terror attacks and massive loss of life and property, and found that their would diminish public confidence in the administration of justice. He argued that such a blanket attitude would result in the least possible enjoyment of fundamental rights by the applicants.

13. Mr. Ongoya submitted that the first applicant was released on bail in **CM Cr. Case No. 2787 of 2012** at Kibera, in which he faced charges for terrorism-related wrongs and he attended court diligently to the end and did not interfere with witnesses such a history said he, should have earned the applicant favour with the court in the current application. He contended that other suspects in terrorism-related cases had since been released on bail and further that the applicants are presumed innocent until proved guilty.

14. Mr. Okelo, learned state counsel opposed the application on behalf of the respondent. He contended that the application having been brought under **Section 362** of the **Criminal Procedure**

Code, the applicant had failed to state what the learned trial magistrate did that was irregular or unlawful in her order. Mr. Okelo argued that revision was not about the interpretation of constitutional rights, and that **Article 49(l)(h)** of the **Constitution** itself provides that bail will not be granted where there exists compelling reasons not to.

15. Mr. Okello submitted that the trial court cannot be faulted for taking judicial notice of the prevailing situation in the contrary. He cited the case of **Republic v. Milton Kabulit & 60 Others, Criminal Revision case No. 115 of 2008,** in which compelling reasons were enumerated by Emukule J. He invited the court to consider the nature of the charge and the gravity thereof, and pointed out that the offence in **CM Cr. Case No. 2787 of 2012,** attracts a penalty of up to 7 years imprisonment, while the second attracts a sentence of 20 years imprisonment which, Emukule J found could be a motivating factor to jump bail.

16. Mr. Okello also invited the court to consider the weight of the evidence which is that the Applicants were found in possession of two grenades at the time of the arrest. This, it was said, could be put to use if they are released on bail, to which Mr. Ongoya replied that to accept such a statement would leave no room for the presumption of evidence.

17. I have considered the arguments from both sides. **Section 362** of the **Criminal procedure Code** is very specific. A party who approaches the court on this platform must demonstrate what the irregularity, illegality, impropriety or incorrectness was, in the lower court proceedings to warrant the court invoking its powers under **Section 362** of the **Criminal Procedure Code** to reverse the orders issued in the lower court.

18. Be that as it may, the paramount issue for determination in considering an application of this nature is whether the applicants will avail themselves for trial if they are admitted to bail. The constitutional right to bail applies to all persons who come before our courts without discrimination. **Article 49(1)(h)** of the **Constitution** in which the right to bail is enshrined however, is not coached in absolute terms. The Article states as follows:

"An arrested 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."

Clearly then, the right to be released on bail or bond is constitutionally limited by the presence of compelling reasons not to be released.

19. 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 society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under the Constitution. (See Court of Appeal decision In **Gerald Macharia Githuka v. Republic, Cr. Appeal No. 119/04**.)

20. The duty lies on the prosecution to demonstrate compelling reasons justifying denial of bail. Compelling reasons as alluded to in **Article 49(1)(h)** of the **Constitution** must be stated, described and explained. If based on belief, the justification or basis for the belief must be demonstrated or shown. Sometimes this may call for more than oral submissions.

21. What amounts to compelling reasons as envisaged in **Article 49(1) (h)** of the **Constitution** is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the **Bail Act** of **England** and **Section 60(4)** of the **Criminal Procedure Code** of **South Africa**, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case.

22. **Section 60(4)** of the South African, **Criminal Procedure Act** lists the grounds on which it would

not be in the 'interests of justice' to grant an accused person bail. These are that the accused person, if released on bail, would:

a. Endanger the safety of the public, or any person, or will commit a certain specified offence;
b. Attempt to evade trial;
c. Attempt to influence or intimidate witnesses or to conceal or destroy evidence;
d. Undermine or jeopardise the objectives or the proper functioning of the criminal justice system, or,
e. Where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security.

23. In **Republic v Danson Mgunya & Ano. HC. Cr Case No. 26 of 2008**, Hon. Ibrahim J, as he then was, borrowed from Nigeria a comprehensive list of issues to be taken into account in determining "**compelling reasons**" not to release an accused person on bail. Some of those issues include the nature of the charges, the gravity of the punishment in the event of 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.

24. **Section 123(3) Criminal Procedure Code,** vests in the High court the jurisdiction to interfere with the decision of the trial court on matters of bail, emanating from a trial court. That intervention by the High Court however, ought to be exercised judiciously, and in reliance of principles which have been developed by the courts.

25. In an application of this nature, the court must consider various factors and circumstances. One paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public. (See **Republic vs Muneer Harron Ismail & 4 others, H.C. Cr. Revision No. 51 of 2009**).

26. In considering what would be the fair and just thing to do in the matter before me, I had recourse to the words of Lord Taylor in the case of **R v Smurthinaite [1994]1 All ER 898 at page 903**, in which he said:

"Fairness of the proceedings involves a consideration not only of fairness to the accused but also, as has been said before, fairness to the public."

27. Denial of bail when justified in accordance with the law does not amount to the applicants' lose of their right to the presumption of innocence or to a fair hearing. The right to bail is not one of those illimitable rights under **Article 24** of the **Constitution.**

28. I have considered the applicant's antecedents, and find that the fact that the second applicant has never come into conflict with the law speaks in her favour in this application, unlike the first applicant who has been arrested and charged before on what Mr. Ongoya referred to as "terrorism related wrongs". It is however noted that he was acquitted of the said charge.

29. I have also considered the nature of the charges, and the gravity of the punishment in the event of conviction. Ordinarily, where the charges against the accused person are serious and the punishment prescribed is heavy, there is more probability and incentive to abscond, whereas there may be no such incentive in cases of minor offences. (See **Republic v. Ahmad Abolafathi Mohammad & Another, High Court Criminal Revision No. 373 of 2012).** The nature of the charge herein is grave and the punishment in the event of conviction is 20 years. The first applicant's previous charge in **CM Cr. Case No. 2787 of 2012** was minor in nature as compared to the present charge.

30. Attempts by the applicants to liken this case to other terrorism cases where accuseds were admitted to bail, or the respondent to liken it to cases where suspects in terrorism-related cases who were admitted to bail failed to avail themselves at the trial, were not helpful.The applicants

cannot be punished for the misdeeds of other suspects who have skipped bail, no more than they can be granted bail merely because other suspects in terrorism cases were granted bail. Each case must be determined on its own circumstances.

31. The learned trial magistrate was quite in order to take judicial notice of the prevailing pertinent circumstances in the country to inform her decision. Indeed, the court does not operate in a vacuum and serves the interests of justice which are intended to safeguard the interests of the public.

32. For the foregoing reasons, I find that the interests of justice will be best served by denying bail with regard to the **first applicant** and allowing it with regard to the **second applicant**.

33. The 2nd applicant is therefore granted bond of Kshs. one million shillings with one surety of like amount.

SIGNED DATED and **DELIVERED** in open court this ***2nd*** of **July 2014.**

L. A. ACHODE

JUDGE