IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & OUKO JJ.A)

Criminal Appeal No. 103 Of 2016

BETWEEN

REPUBLIC..APPLICANT

AND

NUSEIBA MOHAMMED

HAJI OSMAN *alias* **UMMU FIDAA** *alias*

UMMULXARB..RESPONDENT

(Appeal from a Ruling of the High Court of Kenya

at Nairobi (G.W. Ngenye J) dated 11th *July, 2016*

in H.C.CR.R 232 OF 2016)

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JUDGMENT OF THE COURT

The right to be presumed innocent is considered as one of the most fundamental constitutional guarantees in the criminal justice system in Kenya. It relieves those suspected to have committed criminal offences of the burden of proving their own innocence.

By **Article 50 (2) (a)** of the Constitution;

> **"Every accused person has the right to a fair trial, which includes the right to be presumed innocent until the contrary is proved."**

Article 49(1) (h) on the other hand guarantees an arrested person 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."**

This is so because every accused person has the right to liberty and as a general rule, therefore, every accused person should not be detained upon arrest pending trial. Instead, he or she ought to be released, subject to there being a guarantee to appear for trial. It must follow that pre-trial detention can only be resorted to as a last measure and only upon showing some compelling reasons.

Bail provides the guarantee that accused persons will attend trial. It is therefore a security that aims to procure the release of an accused person from custody together with an undertaking that he or she will appear for trial.

Having set out that brief and broad constitutional and legal framework, we turn to consider how this appeal arose and how this constitutional and legal framework applies to this appeal.

The respondent, a Kenyan female and a fourth year medical student at the Kampala International University, Uganda was, at the time of her

arrest an intern attached to Mubeda Hospital in Uganda. She was arrested on 5th June, 2016, by Anti-Terrorism Police Unit (ATPU) officers at Entebbe International Airport allegedly intending to fly to Kenya upon learning of her husband's arrest. The officers confiscated *inter alia*, her laptop, two mobile phones, notebooks and WHO guidelines on pediatrics. It was also alleged that she had in her possession Kenya Airways plane ticket in her name with the destination being Kigali, Rwanda. Following that arrest, she was escorted to Kenya and charged with 3 counts under the Prevention of Terrorism Act, 2012 as follows: Count I: being a member of a terrorist group, contrary to **Section 24;** count II: possession of articles connected with the commission of a terrorist act, contrary to **Section 30** and count III: soliciting for the commission of a terrorist act contrary to **Section 9 (1).**

The following day, the respondent was presented before court and denied all the charges. Though the State objected to the respondent being admitted to bail, her application for bail pending trial was granted. In granting it, the learned magistrate was alive to her duty in considering such application and took into account the nature of the charges, whether, if released the respondent would attend trial whenever required, the likelihood of interfering with witnesses and whether she was a security risk to the public. Satisfied that the respondent deserved the exercise of her discretion, the trial magistrate granted her bail on the following terms: that the respondent would be guaranteed by 2 Kenyan sureties each providing security of Kshs. 5 million; that she would deposit her passport in court before being released; and that she would report to the ATPU offices fortnightly.

This order aggrieved the appellant who moved the High Court with an urgent motion on notice expressed to be brought under **Articles 24** and **49(h)** of the Constitution and **section 362** of the Criminal Procedure Code, asking it to exercise its revisionary powers and set aside the order and to issue an order of stay.

The appellant, represented by Mr. Okello, Senior Assistant Director Public Prosecutions in arguing that application before the court below submitted that the grant of bail was irregular and incorrect because the learned magistrate failed to consider compelling reasons presented by the prosecution through affidavit evidence; that the respondent faced serious charges that would attract, upon conviction, a maximum penalty of 30 years which was sufficient incentive for her to abscond; that there was evidence in the form of an air ticket that the respondent was destined for Kigali; and that the appellant was likely to interfere with witnesses. From these grounds, the prosecution believed that it had discharged the onus on it to warrant a denial of bail.

This application was opposed by Mr. Kilukumi, learned counsel representing the respondent, and relying on the case of **R. V Baktash Akasha Abdalla & 3 Others**, Criminal Appeal No.178 of 2014, he contended that **Section 362** of the CPC under which the court exercises revisionary jurisdiction was not available to the appellant; that the appellant could only appeal; that all the compelling reasons urged by the prosecution had already been presented to the trial magistrate; that the respondent enjoyed the presumption of innocence; and that in any case, courts have granted bail in cases even more serious than the one the respondent was facing.

After considering the strictures under **Articles 49(h)** and **165** of the Constitution**, Sections 123A** and **362** of the Criminal Procedure Code, the learned Judge was not convinced that the appellant had made out a case for revision and rejected the appeal. But in doing so, the Judge modified the orders thus;

> **"a) 2 Kenyan sureties of Kshs. 5 million each who must be carefully examined by the trial court.**
>
> **b. The Respondent shall immediately deposit her passport with the trial court and shall not leave the country except with express permission of the trial court.**
>
> **c. The Respondent shall report to the ATPU and in particular to the investigating officer in this case twice a week, that is on Mondays and Fridays or as per the investigating officer's directions. The details of this compliance shall be filed in the trial court on a monthly basis."**

The appellant now brings this second appeal and has asked us top upset the decision of the learned Judge because in the appellant's view the principles to be taken into account in granting bail were ignored. Also overlooked, according to the appellant, was the fact that the charges were serious; that the respondent was a flight risk; that the prosecution case was strong; and that the respondent was a threat to public peace and security.

Before us Mr. Ondimu in his oral submissions reiterated these arguments and emphasized that the learned Judge did not address the seriousness of the offence, the strength of the prosecution case, the character and antecedents of the respondent who is said to have associates who were being sought by the police, public order, peace and national security; that the Judge ignored the evidence pointing to the likelihood of the respondent resorting to online platforms to interfere with the witnesses; and that the Judge did not properly balance the presumption of innocence.

Mr. Kilukumi, learned counsel for the respondent, on the other hand, opposed the appeal stating that under **Article 49 (i) (h),** all offences irrespective of the gravity are bailable unless compelling reasons are advanced; that the State had failed to prove the existence of a compellable reasons. The only allegation presented as a compelling reason was an allegation that the respondent was a flight risk; that at the time of arrest, the respondent was in possession of an air ticket to Kigali, indicative of her intent to leave the jurisdiction. This allegation was however contradicted by Kenya Airways Limited that confirmed by a letter dated 30th May, 2016 that the ticket the respondent had was a one way, from Entebbe to Nairobi. Therefore, on the basis of the foregoing, counsel argued that the prosecution had failed to discharge the burden of demonstrating that there were compelling reasons.

The single question before the two courts below and indeed before us in this appeal is whether or not the learned Judge properly exercised her discretion in granting the respondent bail. By the provisions of **section 361 of the Criminal Procedure Code,** this being a second appeal, the Court will only be concerned with the points of law and will, for that reason be bound by the concurrent findings of fact reached by the courts below, unless shown to have been arrived at without evidence or on misapprehension of the evidence or on wrong principles. See **M'Riungu -vs-R** (1983) KLR 455.

The ruling giving rise to this appeal was made pursuant to an application brought under **Articles 24** and **49(i) (h)** of the Constitution and **section 362** of the Criminal Procedure Code. It is apposite at this stage to state that under **section 362** aforesaid the High Court has the power to call for and;

> **"…..examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court".**

In discharging this role, the learned Judge examined how the trial court arrived at its decision to grant to the respondent bail and was satisfied that the decision was correct, legal and proper; and that the proceedings and the order ultimately issued were, in the circumstances of the case regular. The Judge only strengthened the terms of the bond.

Discretion such as the one exercised by the trial court in granting bail and by the High Court in agreeing with that decision can only be disturbed if the appellate courts are of the view that it was exercised erroneously by either the trial or first appellate court misdirecting itself in some matter and thereby arriving at a wrong decision, or if it is manifest that the decision was plainly wrong, occasioning an injustice. See **Mbogo & Another V Shah,** (1968) EA 93 and **John Martin Keevy V The State**, High Court of South Africa, Appeal No. A66 of 2013. Discretion to grant or not to grant bail cannot be exercised arbitrarily, capriciously and injudiciously, even though the heinous nature of the crime may warrant more caution on the part of the court in considering a bail application.

We reiterate that under **Article 49(1)** of the Constitution, an arrested person has the right—

> **"(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons.** (Our emphasis).

We stress the key words **"unless there are compelling reasons"** and adopt the definition of what amounts to compelling reasons in the High court decision of **R V Joktan Mayende & 3 Others,** Criminal Case 55 of 2009 as follows:

> **"…And accordingly, the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution."**

Also see **R V Musili Dewrock Kithome & Anor,** Nairobi HCCRC No. 91 of 2011**; R V Mohammed Hagar Abdirahman & Anor,** Garissa HCCRC No. 1 of 2012 and **Job Kenyanya V R** Criminal Application 399 of 2012.

The right of an accused person to be released on bail pending either a charge or trial, is subject to the bail terms being reasonable and more importantly, there being no compelling reasons. It is a balance between the rights of the accused person and the interest of justice, law and order.

The liberty of every person is sacrosanct, and being presumed to be innocent until proved guilty is a constitutional principle that is intended to keep intact the general fabric of the accused person's life. On the other hand, the State has a constitutional duty to prosecute those who commit crimes, to ensure public safety between the time of arrest and trial of an accused person, and to protect the integrity of the criminal justice system. In the course of realizing these goals, the individual right to liberty may be qualified. It follows that where there is sufficient and compelling evidence that an accused person may undermine the integrity of the criminal justice system, by, for example, intimidating witnesses or interfering with the evidence, or fleeing the jurisdiction of the court, or by posing a danger to himself or to any other individual or to the public at large if released, then there will be justification to either deny such an accused person bail, or set stringent bail or bond terms in the interests of justice.

Through judicial pronouncements, the courts have in the past laid down certain guidelines to be followed in considering an application for bail. These guidelines have now been codified pursuant to the provisions of **Article 49(1) (h)** of the Constitution in **section 123A** of the Criminal Procedure Code, which is to be read with **section 123**. The former provides as follows;

> **"123A (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".

These considerations are now augmented by the recently launched Bail and Bond Policy Guidelines. Like all courts, the trial magistrate was guided in her decision by all these factors.

The prosecution based their objection to the respondent being released on bail on the grounds of public order, peace or security; that the respondent was a flight risk, her character, antecedents and associations; the nature or seriousness of the offence, and the strength of the prosecution evidence.

Although the prosecution insisted that the evidence they had gathered "*heavily*" implicated the respondent, the determination of the question of the strength of the prosecution evidence is problematic as there would be no basis for a court to arrive at the conclusion that the prosecution has a strong case without hearing the evidence. Ibrahim J. (as he then was expressed this concern in **R V Danson Mgunya & Anor,** HCCRC No.26 of 2008 thus:

> **"…However I am of the view that most of the criteria set out above are reasonable and ought to apply in our cases with a caveat that the most important or critical criteria is whether the Accused will turn up or be available at his trial.**
>
> **I think that criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is statements that show that the accused was caught-red handed or where there is a lawfully admitted confession…"**

No doubt terrorism-related charges are serious and a suspect may be tempted to flee in order to avoid trial. In the instant matter, the prosecution conceded that, since she was released on bail, the respondent has faithfully complied with the terms of the bond and has been consistently reporting to the ATPU.

The fear that the respondent would leave the jurisdiction of the court merely because of an alleged air ticket to Kigali, Rwanda was dispelled by the airline, Kenya Airways, when it confirmed that the respondent only had a one-way ticket from Entebbe to Nairobi. This ground was not proved. The particulars of her associates with whom she was said to have communicated before her arrest were not disclosed.

Denial of a constitutional right is not a matter to be treated lightly. The prosecution having based their claims against the respondent on speculation and conjecture did not expect the courts to give countenance to such complacency.

In conclusion, we note with deep concern the delay in commencing the trial. As at the time we heard arguments in this appeal, the trial had not started, two years after the arrest of the respondent. The time and energy with which the prosecution has spent pursuing the issue of bond from the subordinate court through to this Court would properly have been utilized to bring witnesses to testify and considering that there are only seven witnesses, according to the prosecution counsel, the case would have been long concluded.

This appeal, for all these reasons, lacks merit. It is accordingly dismissed.

Dated and delivered at Nairobi this 27th Day of April, 2018.

P.N. WAKI

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JUDGE OF APPEAL

R.N. NAMBUYE

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR