IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS TUESDAY, THE 16TH DAY OF FEBRUARY, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO FCT/HC/CR/10/2019
MOTION NO: GWD/M/10251/2020

BETWEEN:

COMMISSIONER OF POLICE.....COMPLAINANT/RESPONDENT

AND

1. SAMSON MICHAEL……..DEFENDANT

2. JOHNSON MICHAEL
3. ISMAILA MUSA } **…….....DEFENDANTS/APPLICANTS**

RULING

The 2nd and 3rd Defendants along with 1st Defendant were arraigned before this court on a three (3) counts charge filed on 17th October, 2019 that borders on conspiracy to commit Armed Robbery and Armed Robbery under the provisions of **Section 6(b) and 1(2) a & b of the Robbery and Firearms (Special Provision) Act and Section 250 of the Penal Code.**

The charge was duly read to all the Defendants and they all pleaded not guilty.

The 2nd and 3rd Defendants filed a joint application for bail dated 29th September, 2020 and filed same date in the Court's Registry. The grounds of the application as contained in the motion paper are as follows:

i. The 2nd and 3rd Defendants/Applicants are presumed innocent.

ii. The 2nd and 3rd Defendants/Applicants from their arrest have spent over 1 year and 6 months in detention.

iii. There has been extraordinary delay in the investigation, arraignment and prosecution of the 2nd and 3rd Defendants/Applicants for a period exceeding one year.

iv. The proof of evidence cannot sustain the charge brought against the 2nd and 3rd Defendants/Applicants.

v. The refusal to grant the application will violate the Applicants' constitutional right to fair hearing within a reasonable time.

vi. There exist special circumstances to warrant the exercise of the Court's discretion in favour of the 2nd and 3rd Defendants/Applicants.

The application is supported by (1) a six (6) paragraphs affidavit deposed to on behalf of the 2nd Defendant by one Grace Antai, litigation Secretary in the law firm of Agbo J. Madaki & Company Advocates; and (2) another six (6) paragraphs affidavit deposed to on behalf of the 3rd Defendant sworn to by the same Grace Antai in (1) above on behalf of the 3rd Defendant.

The above affidavits in substance are in pari-materia. The application is supported by a written address in which one issue was raised as arising for determination as follows:

"Whether in consideration of the special facts and circumstances of this case, the Defendants/Applicants are entitled to the exercise of the court's discretion, granting them bail pending trial."

Submissions were then made which forms part of the Record of court to the effect that on the materials, the Applicants have disclosed exceptional circumstances in their affidavit to allow for the grant of the application.

In opposition, the complainant filed a common or joint counter-affidavit to the application of the two defendants along with that of 1st Defendant. A brief written address was filed in which no issue was streamlined or raised but it was contended

that that the offences for which the Defendants were charged are serious offences which carries sentence of death upon conviction. That in such a situation, bail can only be granted under **Section 161(2) of ACJA under exceptional circumstances and that in this case no such exceptional circumstances have been disclosed by Applicants to allow for grant of bail.**

At the hearing, counsel for the Applicants relying on the processes prayed for the grant of the application while counsel to the complainant equally relying on the processes urged that the application be refused.

I have carefully considered the totality of the depositions in this case, the written addresses and the oral adumbration in expatiation on both sides of the aisle and the issue to resolve is whether the 2nd and 3rd Defendants should in the circumstances of this case be granted bail. The general principles that guides a court and the factors that the court will consider in determining whether or not to grant bail have been comprehensively set out in the briefs of learned counsel for the parties. Indeed the principles are fairly well settled. In the case of **Alaya V State (2007) 16 N.W.L.R (pt.1061) 483,** the Court of Appeal repeated the considerations on the following terms:

"In the exercise of the discretion to grant bail to an accused person pending trial, the court has to consider the following:

(a) The nature of the charges;

(b) The character of the evidence;

(c) The severity of the punishment;

(d) The criminal record of the accused;

(e) The likelihood of repetition of the offence;

(f) Evidence that should applicant be granted bail, the witness for the prosecution may be interfered with or prevented from appearing to testify; and

(g) Whether the applicant if granted bail, would fail to attend court to face his trial: Obaseki Vs Police (1959) NRNLR149; Dantata Vs IGP (1958) NRNLR 3."

On the authorities, it is not expected that all the above listed criteria will be relevant in every case and they are also not exhaustive and any one of these criteria or in combination of others may be used to determine the question of bail in a particular case. See **Bamaiyi V. State (2001)8 N.W.L.R (pt.715) 270.**

In this case, the offences the 2nd and 3rd Defendants/Applicants are charged with are no doubt grave and serious in nature with the severest of punishment, the death penalty upon conviction.

The relevant provision of **Section 161 of the Administration of Criminal Justice Act 2015 (ACJA)** on which counsel to the Applicants have anchored their submissions to grant bail on is clear on the issue of bail in relation to a suspect charged with a capital offence as in this case.

Section 161 ACJA provides as follows:

(1) A suspect arrested, detained or charged with an offence punishable with death, shall be admitted to bail by a judge of the High Court, under exceptional circumstances.

(2) For the purpose of exercise of discretion subsection (1) of the section, "exceptional circumstances" includes:

(a) ill health of the applicant which shall be confirmed and certified by a qualified medical practitioner employed in a government hospital, provided that the suspect is able to prove that there are no medical facilities to take care of his illness by the authority detaining him;

(b) extra ordinary delay in the investigation, arraignment and prosecution for a period exceeding one year; or

(c) any other circumstances that the judge may, in the particular facts of the case, consider exceptional."

The above provisions appear to me clear.

The import of the above is that Bail is not ordinarily granted where a suspect is charged with a capital offence unless the defendant can establish circumstances which bring his case within the exceptions or exceptional circumstances provided under **2 (a), (b) and (c) above of Section 161**. The sentence used under **Section 161 (1) ACJA is "shall only be admitted to bail by a judge under exceptional circumstance."** Shall in law is a word of command which does not allow for exercise of discretion.

A defendant therefore charged with a capital offence has the burden or bounden duty under **Section 161 (1) and (2) a, b and c (supra)** to establish creditably these exceptional circumstances that would then provide both factual and legal template to allow the court judicially and judiciously determine the propriety or otherwise of granting bail in each case on its merit.

Now reading the entirety of the affidavits of the Applicants which as stated earlier are the same, the basis or grounds for their bail application are on grounds that there has been (1) an extraordinary delay in the investigation, arraignment and prosecution of the case and (2) ill-health and fear of contracting coroner virus at the correctional facility at Kuje.

On the first point above, in paragraph 3 of the affidavits of the Applicants, they averred that they were arrested sometime in March 2019. There is however nothing on the affidavit precisely streamlining when this arrest was effected and the court cannot speculate. However from their statements which forms part of the proof of evidence, the statements of the Applicants were taken on 24th May, 2019. While this may not conclusively show when the Applicants were arrested, in the absence of any counter-evidence, the dates these statements were taken gives some indication as to when they were arrested. From the records, the extant charge sheet against Defendant was filed by the complainant within five months from when the statements were taken. I cannot really situate any extraordinary delay in the investigations in such circumstances at least from when the statements were taken and the filing of the charge. It must be underscored that there is no fixed time frame for investigations. Investigations may take time or not dependent on the nature or complexity of the case. Some cases present no seriously difficulty and the investigation does not take much. Others are not so easily resolved. The fundamental point is that a case must be thoroughly investigated and a prime facie

case made out before a charge is filed. There is no value in a hurried investigation and a flawed case is then filed which then fails miserably. A balance must then be met between proper and well investigated cases and the right of an Accused person not to suffer undue and long incarceration on ground of investigation. The investigation time frame here appear to me reasonable.

On the issue of arraignment, as stated earlier, the case was filed in October, 2019 but due to the COVID 19 pandemic which disrupted activities worldwide including Nigeria and in particular Court proceedings which were halted for months. The arraignment was only carried out in October, 2020. Any delay in the arraignment and prosecution cannot logically be laid at the doorstep of anybody or institution. Indeed, because of the strict observance of covid-19 protocols to protect Nigerians, it was even safer for the Defendants to be kept in a particular place, here the correctional facilities and avoid a situation where they are moved from place to place and putting them at risk of contracting the dreaded air borne virus. The correctional facility administration decided at that period when the virus was at its peak and rightly in my opinion chose not to bring Defendants to court. If the Defendants are not brought to court, it is difficult obviously for any arraignment and prosecution to take place in such situation.

On the whole, the delay in the arraignment and prosecution clearly is explained by the extenuating circumstances as demonstrated above and is therefore no ground to situate or base grant of bail.

Now on the second point, it is obvious that both Applicants complained that due to the outbreak of COVID-19, they are living in fear due to the fact that they have some **"underlying sicknesses"** which will increase their risk of contracting the disease.

These averments appear to be mere speculative posturing completely lacking any value. What is strange here is that absolutely no clear or precise medical condition was mentioned or disclosed by either Applicants and the court is in no position to guess or speculate as to the nature of these **"underlying sicknesses."** Furthermore, no medical report by a confirmed and certified medical practitioner employed in a Government Hospital was attached situating this alleged **"underlying sickness."**

Most importantly, there is no report from the correctional facility showing that there is any outbreak of convid-19 in the facility or that the inmates face the threat of contracting the covid-19 virus. There is similarly nothing before me showing that the bed spaces in the facility are **"clustered"** and how this then increases the risk factors for contracting any disease in the facility.

Furthermore, there is nothing showing that the correctional facility is incapable of treating or dealing with any health challenge that the Applicants may have due to for example lack of medical facilities or requisite medical expertise.

By the provision of **Section 161 (2) (a) of ACJA,** allusion to ill-health and for it to have practical resonance for purpose of granting bail, the Applicant must prove or show that there are no medical facilities to take care of his illness by the authority detaining him. Nothing as stated earlier was furnished to situate any ill-health of Applicants.

In any event, the court takes judicial notice of the fact that there are qualified medical personnel in the prison and even where the ailment is beyond their capacity, there is always room for a referral to a government health institution where such facilities and expertise are available.

The point to underscore is that the allegation or complaint of ill-health is not some sort of magical wand that if presented will automatically lead to the grant of bail. The ill-health must be such that cannot be handled by the prison clinic or facilities available at the prison and this has to be creditably established.

The Supreme Court in **Abacha V State (2003) 3 ACLR 1 at 10**-12 stated instructively per Ayoola J.S.C as follows:

"Were it the law that an accused person remanded in custody to await trial is entitled to be granted bail pursuant to a right to have access to a medical practitioner or medical facility of his choice, hardly would any accused person remain in custody to await trial. There is no general principle of law affording that right to an accused person remanded in custody."

Again the Apex Court in **Abacha V State (supra)** held thus:

"The special medical need of an accused person, whose proven state of health needs special medical attention, which the authorities may not be able to provide, is a factor that may be put before the court for consideration in the exercise of discretion to grant bail to the accused person. Such need is not brought before the court by the mere assertion of the accused or his counsel, but on satisfactory and convincing evidence."

The case made by Applicants in relation to the alleged underlying sickness clearly lacks credibility and is discountenanced without much ado.

There are therefore clearly no compelling exceptional circumstances in this case that discloses any exceptional situation within the purview of **Section 161(1) and (2)a & b of ACJA** to warrant the court to grant bail. Happily in this case, the prosecution is ready for trial which is to commence on 2nd November, 2020.

I have taken into account the relevant guiding legal principles. I have also again carefully evaluated the proof of evidence and the statements of 2nd and 3rd Defendants/Applicants. I agree that the Applicants enjoy the constitutional presumption of innocence but the right to enjoy his personal liberty must be weighed against the corresponding need and imperative that they stand their trial for what is no doubt grave and serious offences.

In addition, the availability of Applicants to face or stand their trial is one that has given me serious concern. Particularly in view of the gravity of the punishment on conviction. I have in that respect read the affidavits of Applicants and I cannot situate facts which show willingness to provide reasonable sureties as required by the provision of **Section 167(1) ACJA.** I am of the considered view, particularly taking into account the prevalent nature of the offences and the severity of the punishment, the absence of reasonable sureties in addition to clear absence of any exceptional circumstances, that it will unsafe to admit the Applicants to bail.

It is not enough considering the peculiar circumstances and the nature of the charge against Applicants as deposed to on their behalf that they shall not jump bail and interfere with investigations or that they shall not commit any offence if released on bail etc. Their availability to stand their trial is one seriously in question and this tips the balance in favour of refusing bail.

In summation, I have not been put in a commanding height with sufficient material facts situating grounds of facts or law to warrant the grant of this application. As such, I find no merit in the application of the Applicants and same shall be and is hereby accordingly refused.

In the overall interest of justice, I hereby order for **accelerated hearing**. I call on counsel to all parties to act *post haste*, bring all witnesses and relevant materials and ensure that this matter is given the utmost attention and determined with the minimum of delay.

……..
Hon. Justice A.I. Kutigi

Appearances:

1. **Fidelis Ogbogbe, Esq., for the Complainant/Respondent.**

2. **Ihite Emmanuel for the 1st Defendant/Respondent.**

3. **Mimio P. Anundu, Esq., holding the brief of Professor Agbo J. Madake, Esq., for the 2nd and 3rd Defendants/Applicants**