IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON THURSDAY THE
18TH OF AUGUST, 2016.

CHARGE NO: B/CD/396M/2016

BETWEEN

COMMISSIONER OF POLICE…… COMPLAINANT/RESPONDENT

AND

CHIEF NOSA ODOMORE OSADOLOR…… ……. ACCUSED/APPLICANT

RULING

This is a ruling in an application for bail by means of a Summons to admit to Bail brought pursuant to section 118(1) of the Criminal Procedure Law Cap. 49, vol. 11, Laws of the former Bendel State Of Nigeria, 1976, now applicable in Edo State; section 36(5) of the Constitution Of The Federal Republic Of Nigeria, 1999 and under the inherent jurisdiction of this Court.

Moving the application, the learned counsel for the Applicant, E.O.Afolabi Esq., prayed the Court for an order: admitting the Accused/Applicant (Chief Nosa Odomore Osadolor) to bail, pending the hearing and determination of the substantive criminal charge against him in respect of ChargeNo.MOGB/120c/2016.

In support of the summons is a 48-paragraph affidavit deposed to by the Accused/Applicant himself. Learned counsel relied on all the paragraphs of affidavit together with the exhibits attached. He also relied on an Affidavit of Urgency. He filed a Written Address which he adopted as his arguments in the said application.

Arguing the Application, learned Counsel submitted that the Criminal Procedural Act empowers the court to grant bail to the Accused/Applicant. He maintained that the purpose of bail is to ensure the attendance of the Applicant in court. He relied on the cases of: *EZEBOR v STATE (2005) ALL FWLR (PT 267) PG. 1486 @ 1491 RT. 9. And EKWENUGO V. F.R.N. (2011) FWLR (PT 63) 99 (2001) FWLR (PT 70) 171 at Para H-D* where Ogunbiyi J.C.A (as he then was) stated as follows:

> *"Bail is not meant as a punishment of an accused whom the law presumes innocent until proved guilty. The determinant factor unlike the criminal nature of an offence which must be proved beyond reasonable doubt is not applicable to the issue of bail which basic main contention is that the accused avails himself to trial."*

He also relied on the case of: *SULEMAN V C.O.P. PLATEAU STATE (2008) 21 WRN 1 @ 24 and 25*

He said that it is trite law that in granting bail, the Court must exercise its discretion judicially and judiciously. He further submitted that in an application of this nature, the exercise of the Court's discretion is based on some factors which have been enumerated in a plethora of cases among which is: *EVERISTUS OGBEHEMHE v COP (2001) ACRLR PG 2 r. 2.* The factors are as follows:-

1) The nature of the charge

2) The severity of the punishment

3) The character of the evidence amongst others.

See also, the cases of: *ANI V. STATE (2001) FWLR (Pt 81) 1751 @ 1725; and ORJI v. FRN (2007) 13 NWLR (Pt 1050) PG 55 RT 6.*

Counsel further submitted that the charge against the applicant as stated in the charge sheet is: promoting communal war, over which only the High Court can grant bail to the applicant. He said that the Court cannot consider the merits of the case at this stage. For this proposition, he relied on the case of*: SHAGARI v COP (1027) p 275 @ 281 R 3.and* urged the Court to grant the application in the interest of justice. He maintained that the accusation alleged against the

Applicant is unfounded and that he was arrested on fabricated allegations. He posited that the police have no credible evidence to show that the applicant destroyed the church and mosque in question. According to counsel, the failure of the police to search the house of the applicant and others for the guns they alleged were fired in the Aduwawa Community goes to show that they have no reasonable and reliable case against the Applicant.

He stated that the applicant is an old man of 80 years of age. He added that presently, he is weak and has some health issues.

Counsel submitted that by virtue of Section 342 (1) and (2) of the Criminal Procedure Code (sic), where a person is accused of an offence, a single judge of the High court may subject to the provisions of section 341 of the code (sic) direct that the person be admitted to bail and relied on the case of: *OFUELE v FGN (2004) 3 NWLR PT 913 P. 571 @ 575.*

He referred the Court to paragraphs 41 and 42 of the supporting affidavit where he stated that the Applicant will not jump bail if granted bail and that he has a credible, reasonable and reliable surety who is ready to take him on bail.

He submitted that Section 36 (5) of the Constitution of the Federal Republic of Nigeria 1999 provides that every person accused of a criminal offence is presumed innocent until he is proved guilty by a competent court of law. He argued that the Applicant is presumed innocent and should not be kept in prison or punished before he stands his trial. He maintained that the court should not be used as an object of oppression and cited the case of: *Vincent v. THE STATE (2001) 2 ACLR PT 96 @ 97 r. 1.*

Counsel maintained that the Court has unfettered discretion to grant an application for bail to an Accused/Applicant charged with the offence of promoting communal war. He however posited that this discretion must be exercised judicially and judiciously and referred to the case of *SHAGARI v C.O.P (supra).*

On the character of the evidence against the Applicant, he submitted that the evidence is so watery that a trial court cannot place much reliance on it. Again, he cited: *SHAGARI v COP (1027) P 272 @ 293 PARA C-D.*

He further submitted on the issue of the criminal record of the Applicant that there is nothing to show that the Applicant has ever committed any crime

previously. He maintained that the onus is on the prosecution to provide the criminal record of the Applicant if any.

He finally submitted on the likelihood of the Applicant repeating the offence and maintained that the Applicant did not commit the alleged offence and will not even think of committing such act, he being a responsible man.

He urged the Court to admit the Applicant to bail on liberal terms as he has a credible and reasonable surety who is ready and willing to take him on bail and ensure his attendance in court regularly.

Responding, the learned Counsel for the Respondent, Mrs. M.O.Oseghale, State Counsel, informed the Court that she was opposing the application. In opposition, she filed a 25 paragraph counter affidavit with 10 Exhibits.

The learned State Counsel submitted that in an application for bail pending trial, the court has an unfettered discretion to grant or refuse bail but in exercise of such discretion, the court is always guided by the following ingredients:

i. The nature of the charge.

ii. The severity of the punishment

iii. The character of the evidence

iv. The criminal record of the accused

v. The likelihood of the repetition of the offence.

See: *ANI VS. STATE (2001) 17 NWLR (PT 742) 411; and BAMAYI VS. STATE (2001) 8 NWLR (PT 715) 270.*

She stated that the charge against the Applicant is conspiracy to promote inter communal war, promoting inter communal war, malicious damage and threatening violence. She maintained that these are very serious offences; the most serious being: promoting inter communal war, punishable with life imprisonment.

She submitted that the evidence against the Applicant is very strong. She alleged that the Applicant ordered the tenant at the community hall on the 3rd of May 2016 to vacate the Town Hall and the tenant B. A. Iluobe Esq. filed a claim

and obtained an interim injunction restraining the Applicant from evicting him. She stated that on the 17th of May 2016 when the Applicant was served with the enrolment of the order of interim injunction, he sent his thugs to remove the roof of the church, in a bid to evict the tenant by force, contrary to the court order.

Narrating further, Counsel alleged that the applicant also sent his thugs to destroy the fence of a mosque at Aduwawa and the fence has been destroyed. That he ordered one Jackson Efosa to carry the blocks to the Applicant's house. She referred the Court to Exhibit G of their Counter Affidavit.

She informed the Court that on the 19th of June 2016 the Applicant's son was seen shooting a pump action gun in the Aduwawa community, which made people to run helter skelter.She, said that the Applicant also threatened the life of the complainant, one Ozo Edogiawere and some other people in the community.

Counsel maintained that the applicant is a very dangerous person and that he recently spent ten years and few months in prison over the murder of the former Chairman of Aduwawa community. She said that he was released in March this year and since his release, the people of Aduwawa community have not known peace. She urged the court to keep the applicant in prison so that the Aduwawa community can have peace.

She argued that the evidence against the Applicant is very strong and that if he is granted bail, he would jump bail. She referred to the dictum of the Court of Appeal in*: EVERISTUS OGBHEMHE V. COP (2001) 2 ACLR Page 1 at 6 where they* stated that:

> "The likelihood of an accused who has committed an offence escaping from justice is very high."

She therefore urged the Court to be very cautious in granting bail.

On the third factor, which is: the prevalence of the offence charged, she submitted that the offences charged are a menace in the society and still persist in spite of the concerted effort of the state to curb them? She urged the Court to take judicial notice of the fact of its prevalence in refusing this application, as was done in the case of: *THE STATE V. FELIX (1979) LRN 308*.

She submitted that the Applicant has not convinced this Court that the prison authority is unable to take care of his alleged ailment.

According to her, by virtue of Section 8 (1) of the Prisons Act Cap P29, LFN 2004, a prison inmate having a serious illness is to be taken to a specified Hospital for admission and treatment.

Counsel submitted that the Applicant can go for his treatment if any is needed at all, from prison custody and that there is nothing stopping him from going to the hospital if need be. She referred to the case of: *ABACHA V THE STATE (2003) 3 ACLR 1,*where the supreme court held that the mere fact that a person in custody is ill, does not entitle him to be released from custody or allowed on bail unless there are really compelling grounds for doing so. And that an obvious ground upon which bail will be granted for ill health is when the continued stay of the detainee poses a possibility of a real health hazard to others and there are no quarantine facilities for that type of illness.

She further submitted that the Applicant had already filed a summons to admit to bail at the regular court with suit No. B/CD/396m/2016 with similar facts this has been adjourned to the 20th September 2016 for hearing. She attached the said Summons as exhibit "J".

Finally, Counsel submitted that by virtue of the aforementioned factors, the applicant will be induced to flee from justice should the discretion of the court be exercised in his favour. She urged the Court to refuse this application.

In a brief reply, the learned counsel for the Applicant informed the Court that he has since filed a Notice of Discontinuance in respect of the earlier Summons filed on 20th September, 2016.

Having carefully considered the affidavit evidence, the submission of both counsel and the judicial authorities cited, the issue for determination is whether the Applicant has placed before the court sufficient facts to enable it grant the application. It is settled law that the grant or refusal of an application for bail is at the discretion of the Court. Like all other discretions it must be exercised judicially and judiciously, taking cognizance of the facts before it. See*: Ogbonna Vs FRN (2011) 12 NWLR (PT. 1260) Pg. 100 @ 104.* In the exercise of that discretion; the court must be guided by the laid principles set in a plethora of judicial authorities; See: *DAKUBO ASARI VS F.R.N* (2007) All FWLR (PT. 375) Para B – F.

In the case of: *UWAZURIKE VS. A.G.FEDERATION* (2008) 10 NWLR (Pt.1096) 444 at 449, the Court of Appeal enumerated the relevant factors to be considered in an application for Bail pending trial. They are as follows:

1. The evidence available against the accused;
2. The availability of the accused to stand trial;
3. The nature and gravity of the offence;
4. The likelihood of the accused committing another offence while on bail;
5. The likelihood of the accused interfering with the course of justice;
6. The criminal antecedents of the accused person;
7. The likelihood of further charges being brought against the accused;
8. The probability of guilt;
9. The detention for the protection of the accused; and
10. The necessity to procure medical or social report pending final disposal of the case.

In the said UWAZURIKE VS. A.G.FEDERATION case (supra), the Court opined that these factors are not exhaustive in guiding any trial court. Also that it is not necessary that all or many of these factors be present in a particular case to act as a guide to the court.

However, the major factor the Court is called upon to determine in an application for bail pending trial is whether the accused will be available to stand his trial. In the recent case of: *AKANO VS. FEDERAL REPUBLIC OF NIGERIA* (2016) 10 NWLR (Pt.1519) 17 at 19, the Court of Appeal, Ibadan Division, posited that:

> *"It is a proper and useful test, whether bail should be granted or refused, to consider the probability that the accused will appear in court to take his trial. In that regard, it is proper to consider the nature of the offence, the nature of the evidence in support and the severity of the punishment which conviction will entail".*

Applying the foregoing principles to the instant application, the first factor to consider is that of the nature of the offence. In all, there are four counts. The most serious count is that of promoting native war punishable with life imprisonment under section 42 of the Criminal Code. Commenting on this offence, the learned author of: *THE CRIMINAL LAW AND PROCEDURE OF THE SOUTHERN STATES (3RD EDITION), JUSTICE T.AKINOLA AGUDA*, maintained that:

> "*The provision contained in this section has become anachronistic in so far as the Constitution does not recognize a native chief as a different type of person from other citizens".*

In essence, the offence appears to be one of the relics of our colonial heritage. In modern times, the offence of promoting native war is quite outdated, irrelevant and anachronistic.

Coming to the nature of the evidence in support of the charge, a careful examination of the facts will reveal that this matter is predicated on a protracted land tussle and leadership dispute between the complainant and the Applicant and the other arrested suspects. Although the witnesses did not state that they saw the Applicant at the different scenes of crime, some of them alleged that the people they saw were acting on the directives of the Applicant. However, such allegations cannot be considered at this interlocutory stage. In the case of: The *STATE VS. ADAIDU AKAA* (2002) 10 NWLR (Pt.774), 157 at 164, the Jos Division of the Court of Appeal cautioned that:

> *"A court when dealing with an interlocutory matter should limit itself to that alone, and should not delve into the substance and merit of the case."*

From the parts of the proof of evidence exhibited so far, the nature of the evidence at this stage does not appear strong against the Applicant. He was never seen at the scene of crime. All we have are allegations that he sent people to commit the havoc.

On the severity of the punishment which conviction will entail, I have observed that the most severe is the count on promoting native war which attracts a maximum sentence of life imprisonment upon conviction. It is to be noted that this is not a capital offence. In the case of: *AYO OLUBUSI VS C.O.P. (1970) 2 ALL NLR 1 AT 4,*it was held that:

> *"…where a crime is of highest magnitude; the evidence in support of the charge, strong and the punishment the highest known to the law, the court will not interfere to admit to bail. Where either of these ingredients is wanting, the court has a discretion which it will exercise*".

The essence of bail therefore is simply to ensure the attendance of the Accused person at trial of the charge preferred against him. It is an incontrovertible fact that the Applicant is 80 years old. There is nothing before the court to show or establish that the Applicant would subvert the trial or the course of justice by jumping bail or interfere with any further investigations.
I should also add that having gone through the materials before me, it is

clear that investigation has been concluded. This is so because the practice as I understand it is that before the complainant brings any person or persons accused of having committed an offence to court, investigations into the alleged criminal act must have been concluded and the prosecution must have been satisfied that there is a prima facie case against the Accused Person. This appears to be the case here. There is therefore absolutely no question of interference with investigations here.

In the instant case therefore, there is really nothing to preclude the exercise of the court's discretion in favour of the Applicant. Section 35 of the 1999 Constitution of the Federal Republic of Nigeria guarantees the right to personal liberty for every citizen. The section also stipulates how the right is to be fettered.

Consequently, on grounds of law and the materials before me, I am satisfied that this is a proper case where the Court can exercise its discretion in favour of the Applicant.

I accordingly order as follows:

1. **The Applicant is admitted to bail in the sum of N1,000,000.00 (one million naira) with one surety in the like sum;**
2. **The surety shall be a civil servant from grade level 10 and above;**
3. **The surety and the Applicant shall each attach two passport photographs to the Bail Bond;**
4. **The surety shall swear to an affidavit of means with evidence of ownership of a house within the jurisdiction of the Benin Judicial Division, duly verified by the Registrar of this Court;**
5. **The surety shall also produce a verifiable means of identification as a civil servant.**

P.A.AKHIHIERO
JUDGE
18/08/16

COUNSEL:

E.O.AFOLABI ESQ……..APPLICANT

EDO STATE DIRECTOR OF PUBLIC PROSECUTIONS ……..RESPONDENT