



**Chesang v Director of Public Prosecutions (Miscellaneous Criminal Application E011 of 2022) [2022] KEHC 10941 (KLR) (26 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10941 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
MISCELLANEOUS CRIMINAL APPLICATION E011 OF 2022**

**WK KORIR, J**

**MAY 26, 2022**

**BETWEEN**

**THOMAS KANGOR CHESANG ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... RESPONDENT**

**RULING**

1. The Applicant, Thomas Kangor Chesang, has filed the notice of motion application dated 21<sup>st</sup> March, 2022 under certificate of urgency and prays for orders as follows:
  - a. That this application be certified urgent and its service be dispensed with in the first instance.
  - b. That this Honourable Court be pleased to recall the subordinate court file number Kabarnet S/O No. E074 of 2021 Republic versus Thomas Kangor Chesang for purposes of reviewing and/or reversing ruling delivered on 3<sup>rd</sup> March, 2022 by the subordinate court.
  - c. That this Honourable Court be pleased to exercise its supervisory jurisdiction and order the release of the accused/applicant on reasonable bond/bail terms.
  - d. That the Honourable Court be pleased to make any order it may deem fit for the interest of justice and/or fundamental rights of the accused/applicant.
2. The application is based on the grounds on its face and the Applicant's affidavit sworn on the date of the application. From the pleadings, the Applicant's case is that on 21<sup>st</sup> December, 2021 he surrendered himself at Kabartonjo Police Station where he had been summoned on allegation of defilement. He was arrested, placed in custody and charged in Kabarnet Chief Magistrate's Court on 22<sup>nd</sup> December, 2022 in S/O Case No. E074 of 2021 with the offence of defilement which he denied.
3. The Applicant avers that his application for bond was opposed by the Respondent on the ground that he would interfere with witnesses. It is the Applicant's case that no tangible evidence was tendered



to prove that he had interfered with witnesses. The Applicant deposes that a ruling upholding the Respondent's objection to his application for bond was delivered on 3<sup>rd</sup> March, 2022 after several adjournments.

4. The Applicant avers that the complainant was apprehended by the State and is under witness protection. Further, that the complainant and her mother had disappeared and the father of the complainant had been charged for her disappearance. According to the Applicant, he has no intention of interfering with the witnesses as he will be staying away in Nakuru during the trial.
5. The Applicant's notice of motion is opposed through a replying affidavit sworn on 31<sup>st</sup> March, 2022 by one of the investigating officers, Police Constable Henry Owiti of Kabrtonjo Police Station. Constable Owiti avers that the Applicant is facing extremely serious charges and is liable upon conviction to imprisonment for a term of not less than 20 years.
6. The Respondent's case is that the Applicant holds a position of authority as the Assistant Chief of Kasaka Sub-Location and has overwhelming influence on the witnesses lined up by the prosecution as they all reside within his area of jurisdiction save for the clinical officer and the investigating officer. Further, that the Applicant and the complainant have family relationship and this puts the Applicant in close proximity to the complainant and there is very high likelihood of interference.
7. It is the Respondent's case that the complainant and her mother and brother went missing immediately after the case was reported and investigations commenced and that this disappearance is believed to have happened immediately after a kangaroo meeting spearheaded by the Applicant's family members. The investigating officer avers that some of the Applicant's family members had been arrested and charged with conspiracy to defeat justice while others are still at large.
8. Constable Owiti deposes that the pre-bail report filed before the trial Court showed that there was a likelihood of interference with witnesses. Further, that the pre-bail report indicated that the community members strongly believe that the Applicant had a hand in the disappearance of the complainant and her mother.
9. In support of the claim that the Applicant has interfered with the case against him, Constable Owiti avers that at the time the Applicant was arrested, the complainant was pregnant but she has since terminated the pregnancy. Further, that the complainant had been taken into hiding by her relatives and when she was rescued in Kapenguria in West Pokot County, she recorded a statement narrating how she had been made to terminate the pregnancy. According to the officer, the act of terminating the pregnancy, which was the outcome of the alleged defilement, not only shows interference with witnesses but also demonstrates the length the Applicant and his proxies are willing to go in tampering with the evidence notwithstanding the risk to the complainant's life.
10. It is also averred that if the Applicant is released on bond, there is a high likelihood that the safety of the complainant and the prosecution witnesses will be endangered and the proper functioning of the criminal justice system will be hampered.
11. It is further the Respondent's case that upon commencement of the investigations, the complainant, her mother and brother disappeared and it was only recently that the complainant was traced to Kapenguria but her mother and brother are yet to be found. He states that at the time the complainant was found, she was in the custody of the Applicant's relative who was under instructions to keep the complainant until the Applicant's case was finalized. According to the Respondent, the mother and brother of the complainant are crucial witnesses for the prosecution since the brother was the whistleblower of the alleged offence and the cover up by the Applicant.



12. Still in support of the claim of alleged witness interference, Constable Owiti deposes that the deputy head teacher of the complainant's primary school who is a prosecution witness has been threatened by the Applicant's brother against testifying in the defilement case. The officer avers that the teacher has reported the threats to the police and the Applicant's brother is being looked for.
13. The Respondent refutes the Applicant's averment that he presented himself to the police. It is averred that the Applicant only went to the police station because he was under the impression that the police did not have the complainant's witness statement, P3 form and treatment notes as his proxies had earlier attempted to destroy the documents. The Respondent also relies on the adverse pre-bail report in opposition to the application.
14. Constable Owiti contends that the right to bail under the *Constitution* is not absolute and compelling reasons have been advanced in this case warranting the denial of bail to the Applicant. Further, that the complainant has since been traced and is ready to testify in the Applicant's case which has a hearing date. This Court is therefore urged to dismiss the application.
15. The parties filed written submissions which were partially highlighted on 28<sup>th</sup> April, 2022. The submissions will be taken into account in the determination of this matter.
16. In an application like the one before this Court, the starting point would be to appreciate that the Applicant, like every other accused person, has a constitutional right to bond or bail pending trial as guaranteed by Article 49(1)(h) of the *Constitution*. The *Constitution* is, however, clear that the right is not absolute and can be denied where there are compelling reasons for declining to release an accused person on bond or bail.
17. Denial of bail should be an act of last resort because as it was stated in *Republic v Danson Mgunya & another* [2010] eKLR:

“Liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted.”
18. As was held in the just cited case, whenever the prosecution sets out to oppose the release of an accused person on bail or bond, it shoulders the burden of proving the compelling reasons.
19. There is consistency in the decided cases that because of the doctrine of the presumption of innocence of the accused person, the prosecution can only upset an accused person's application for bail or bond by providing compelling reasons for the denial of that right-see *Albanus Nyayo Kimeu v Republic* [2015] eKLR and *Republic v Francis Kimathi* [2017] eKLR. The reasons advanced by the prosecution must be strong enough in order to warrant the denial of the right to bail. The denial of bail or bond to an accused person is not a light matter because of the domino effect of the decision on almost all the other rights and fundamental freedoms secured by the Constitution. I suspect it is for this very reason that the Constitution is categorical that the right to bail or bond can only be denied for compelling reasons.
20. Although what constitutes compelling reasons has not been defined in the *Constitution*, the courts have gone ahead to enumerate such reasons in various decisions. In *Republic v Danson Mgunya & another* [2010] eKLR, the Court enumerated the factors to be considered in an application for bail as follows:

“

- “(i) The nature of the charges



- (ii) The strength of the evidence which supports the charge
- (iii) The gravity of the punishment in the event of conviction
- (iv) The previous criminal record of the accused if any
- (v) The probability that the accused may not surrender himself for trial
- (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him
- (vii) The likelihood of further charges being brought against the accused.
- (viii) The probability of guilty
- (ix) Detention for the protection of the accused
- (x) The necessity to procure medical or social report pending final disposal of the case.”

21. Section 123A of the *Criminal Procedure Code*, Cap. 75 sets out the factors to be considered in a bail application 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.

[Act No. 18 of 2014, Sch.]”



22. Aside from the provisions of the *Criminal Procedure Code* and case law, the Kenyan Judiciary's Bail and Bond Policy Guidelines issued in March, 2015 details some of the factors to be considered in deciding an application for bail or bond as follows:

- “(a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
- (b) The strength of the prosecution case.
- (c) Character and antecedents of the accused person.
- (d) The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond.
- (e) Likelihood of interfering with witnesses.
- (f) The need to protect the victim or victims of the crime from the accused person.
- (g) The relationship between the accused person and potential witnesses.
- (h) Child offenders.

Where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the accused person, who is a minor.

- (i) The accused person is a flight risk.
- (j) Whether accused person is gainfully employed.

The courts also consider the fact that an accused person is gainfully employed to enhance the likelihood that he or she will attend trial.

- (k) Public order, peace or security.

Whether the release of an accused person will disturb public order or undermine public peace or security. Pretrial detention may be necessary to preserve public order where it is demonstrated that the public response to an offence is such that the release of the accused person would be likely to lead to a public disturbance.

- (l) Protection of the accused person.

Whether pretrial detention is necessary to protect the accused person.”

23. A perusal of the Respondent's grounds of opposition to the release of the Applicant on bond, shows that three factors have been cited namely the likelihood of interference with witnesses; the need to protect the victim of the crime from the Applicant; and the kinship between the Applicant and the victim and witnesses. As per the Bail and Bond Policy Guidelines, where the prosecution objects to the release of an accused person on bond on the ground that he is likely to interfere with witnesses,

“bail or bond will only be denied if (i) there is strong evidence of the likelihood of interfering with prosecution witnesses, which is not rebutted, and (ii) the court cannot impose conditions to the bail or bond to prevent such interference.”

24. The question is whether the prosecution has provided strong evidence, which has not been rebutted, that the Applicant is likely to interfere with witnesses, and if so, whether there are no measures



that can be imposed in order to ensure that there would be no interference with the witnesses. The Respondent's case is that the Applicant has through proxies forced the complainant to terminate the pregnancy arising from the defilement, spirited the complainant and her relatives away from the jurisdiction of the trial Court, and threaten witnesses not to testify in his case. These are serious allegations that were not met by any opposition from the Applicant. Instead, counsel for the Applicant argued that the Applicant had not been found guilty. I must state that a denial of bond has no nexus with the guilt or innocence of an accused. What is simply required is for the prosecution to demonstrate that there are strong reasons warranting the detention of the accused during the trial.

25. The evidence that has been placed before this Court strongly points to the commission of the offence of defilement in that the complainant who is a child was pregnant at the beginning of the investigations. Whether the commission of the offence is proved or whether the pregnancy was connected to the Applicant is a matter to be determined by the evidence to be adduced at the trial. There is therefore strong unrebutted averment that the serious crime of defilement could have been committed.
26. There was an assertion by the Applicant that the potential witnesses are under witness protection. The Respondent's reply to this is that the witnesses are not under State protection and are exposed to influence and interference which has already happened despite the Applicant being in custody. Coupled with the said interference with witnesses is the claim by the Respondent that there is kinship between the Applicant and the complainant's family and the potential witnesses.
27. There is also the undisputed statement that the Applicant who is the Assistant Chief of Kisaka Sub-Location holds an influential position in society. The Respondent asserts that the Applicant is likely to use his position to interfere with the case. I am in agreement with the Respondent that the Applicant has influence over the witnesses who live within his area of jurisdiction. His pervasive and entrenched influence has been demonstrated in the replying affidavit of Constable Owiti.
28. The affidavit of Constable Owiti is flooded with several incidents that points to an attempt to disrupt and stop the trial of the Applicant. The forced termination of the complainant's pregnancy; the disappearance of the complainant and her mother and brother; and the threat to the complainant's deputy head teacher, all point in the direction of the Applicant for it is only him who can benefit from an aborted trial. His claim that his tribulations are as a result of a longstanding land dispute is a matter to be decided in the trial.
29. From what I have stated in this ruling, it follows that I find no merit in the application dated 21<sup>st</sup> March, 2022. I agree with the Respondent that releasing the Applicant on bond may torpedo his trial resulting in the defeat of the administration of justice. The application is therefore dismissed.
30. In a case like this where bond has been denied, the trial Court has a duty to expeditiously hear and determine the matter. In the circumstances, the trial Court is directed to fix the Applicant's case for hearing on priority on a day to day basis until it is concluded and judgement delivered.

**DATED, SIGNED AND DELIVERED AT KABARNET THIS 26<sup>TH</sup> DAY OF MAY, 2022.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**

