REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CRIMINAL REVISION NUMBER E143 OF 2021

CHRISTOPHER KYALO KITILA.......................APPLICANT

VERSUS

REPUBLIC..RESPONDENT

(From original order in Machakos Chief Magistrate's Court Criminal Case No. 129 of 2020

(Hon. Ondieki, SRM, PM on 10th March, 2020)

BETWEEN

REPUBLIC..PROSECUTOR

-VERSUS-

CHRISTOPHER KYALO KITILA ....ACCUSED

RULING ON REVISION

1. The applicant herein was charged before Kangundo SPM's Court in Criminal Case No. 1578 of 2020 with three counts of Incitement to Violence Contrary to Section 96 of the ***Penal Code***, Creating Disturbance in a Manner Likely to Cause a Breach of the Peace Contrary to Section 95(a)(b) of the ***Penal Code*** and Failing to Maintain Physical Distance or Not Less Than One Meter from Another Person in a Public Place Contrary to Rule 6(1)(b) as Read with Rule 11 of the Public Health Covid-19 Restriction of Movement of Persons and Related Measure Rule 20.

2. He was arraigned in court on 12th July, 2021 and upon the charge being read over to him, he pleaded not guilty whereupon the prosecution opposed has release on bond on the ground that the applicant had been charged in Criminal Case No. E1539 of 2021 with the same offence and was warned to desist from interfering with the complainant company but repeated the same offence. It was the prosecution's case that if so released, he was likely to cause trouble by interfering with the workers of the same company and prevent them from working.

3. In her ruling the trial court held that:

> **"The accused has repeated offence while out on cash bail vide CR E1539/21 for now he will remain in custody. Bond terms not set. Mention on 19/7/2021 before court one (1) for pretrial hearing."**

4. It is that decision that provoked the present revision.

Determination

5. I have considered the material before me and the submissions made and this is the view I form of the matter.

6. In order to fully appreciate the matter before the Court it is important to regurgitate the principles that guide the grant of bail pending trial.

7. Article 49(1)(h) of the Constitution provides that:-

An accused 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 not to be released.

8. The Constitution however has not identified what qualifies under the term "compelling reasons". The ordinary meaning according to ***Thesaurus English Dictionary*** of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.

9. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of her release. In **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**, the Court held that:

"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system… the ties of the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account…In considering any question… the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account… In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *The State* HH 63/2008… The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."

10. Gravity of the offence as a consideration was appreciated however by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."

11. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

(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.

12. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined 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 a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."

13. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

(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 fulfilment 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.

14. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the

Constitution to refuse bail in the particular case."

15. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.

16. I associate myself with the view expressed by **Muriithi, J** in **Kelly Kases Bunjika vs. Republic** (supra) that:

> **"It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that "*the accused person is likely to fail to attend court proceedings*". The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his "constitutional right to be granted Bond/Bail on reasonable and favourable terms."**

17. From the constitutional point of view, however, an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore, the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in **Republic vs. William Mwangi Wa Mwangi [2014] eKLR** where **Muriithi, J** held that:

> **"It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the Constitutional right to bail…It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail."**

18. In **Foundation for Human Rights Initiatives vs. Attorney General [2008] 1 EA 120,** it was held by the Constitutional Court of Uganda that:

> **"The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening the Constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially…]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person's appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer**

the charge or charges against him."

19. As regards the same issue, **Ochieng, J** in **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** expressed himself as hereunder:

> **"Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;**
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> **'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'**
>
> **Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."**

20. In this case, it is clear the learned trial magistrate's decision to deny the applicant bail was based on the fact that the applicant had, in the words of the learned trial magistrate "repeated offence while out on cash bail". While the commission of another offence while one is out on bond may, depending on the nature of the offence committed, be taken into account in determining whether to release the accused on bond in a subsequent case or not, it is my view that it does not necessarily follow that that must always be the position. The nature of the offence committed must be considered. For example, a person facing a murder charge cannot be denied bail simply because while out on bail he committed a minor traffic offence. However, where the subsequent offence is similar to the earlier one and there is a propensity by the accused to repeat the offence, that may be taken in account in denying him bond.

21. Secondly, the mere fact that a person who is out on bond is charged with commission of an offence which he denies cannot amount to a commission of an offence while out on bond since the accused must always be treated as innocent until found guilty. In this case the applicant is yet to be found guilty of any of the offences charged in the two cases. Therefore, it cannot be said with certainty that the applicant did commit any of the offences with which he is charged. It cannot therefore be said that the applicant "has repeated the offence while out on cash bail" as the learned trial magistrate found.

22. In my view to deny an accused person the right to bail on the basis that he is facing another charge requires more than just an allegation, unless there is a conviction.

23. I agree with the position adopted by **Ouko, J** (as he then was) in **Nicholas Kipsigei Ngétich & 2 Others vs. Republic [2011] eKLR** that:

> **"…it is the duty of the State in terms of Article 29(c) and 238 of the Constitution to ensure the security and safety of the applicants, a duty which the State cannot run away or abdicate. It cannot be in the mouth of a State official charged with this duty to imply that Kenyans will only be safe in prisons. Thirdly from the statements annexed to the replying affidavit, it is not in doubt that some of the witnesses have been threatened. However, the police have not linked the applicants with those threats. The police have the means and technical know-how to be able to trace the source of the threats."**

24. Section 367 of the ***Criminal Procedure Code***, provides as hereunder:

> ***When a case is revised by the High Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified, and, if necessary, the record shall be amended in accordance therewith.***

25. In this case I find that the material placed before the trial court did not meet the threshold being forceful, convincing, persuasive, undeniable and gripping. While those facts constituting the subsequent offence may well have been relied upon to have the applicant's bail cancelled, I do not agree that those facts could be the basis for a definite finding that "the accused has repeated offence while out on cash bail" as the court found herein.

26. As regards the allegations of interfering with witnesses, I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & Others High Court Criminal Case No. 61 of 2012** that:

> **"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."**

27. In **Felity Sichangi Nyangesa vs. Republic (2014) eKLR** the Court held that:

> **"Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the Case where a person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The Court is then entitled, if not bound to infer that the intention of the accused in accosting the witness had been to dissuasive the witness from giving evidence."**

28. That is an example of the test to be applied in determining whether there is interference with witnesses by the accused. In this case I am not satisfied that the test has been met.

29. Consequently, I hereby allow the application, revise the decision made on 12th July, 2021 in Kangundo SPM's Court in Criminal Case No. 1578 of 2020 and admit the applicant herein to cash bail of Kshs 10,000.00 or bond of Kshs 50,000.00 with surety of similar amount. The surety to be approved by the trial court. If released, the applicant must refrain from interfering with the witnesses in the case or the manner in which the case is being conducted and must attend court whenever required to do so.

30. It is so ordered.

READ, SIGNED AND DELIVERED AT MACHAKOS THIS 30TH DAY OF JULY, 2021.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Mwongela for the Applicant

Mr Ngetich for the Respondent

CA Simon