



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL REVISION NO. E074 OF 2021

MURAYA KIAMA NDERITU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

BACKGROUND

Introduction:

1. The Applicant in this matter was charged with

Count 1: Attempted Murder contrary to Section 220(a) of the Penal Code.

Count 2: Attempted Murder contrary to Section 220(a) of the Penal Code

Count 3: Threatening to kill contrary to Section 223(1) of the Penal Code.

Count 4: Arson contrary to Section 332(a) of the Penal Code.

Count 5: Attempted Suicide contrary to Section 226 of the Penal Code as read with Section 36 of the Penal Code.

Background Facts:

2. The accused person in this matter was arraigned in court for plea taking on 29/06/2021 to face the charges listed below. The accused person did not take plea on the same day as the defence counsel made an application to have the suspect at the time undergo a mental assessment.

3. On 05/07/2021, the accused person was represented by a new counsel who sought the orders directing that the suspect undergoes a mental assessment be vacated. The orders were vacated. The orders were vacated and the accused person pleaded not guilty to all the five counts.

4. The prosecution sought time to avail an affidavit which was filed on 14/07/2021 with the defence counsel and counsel watching brief for the complainants filing their respective affidavits.

5. On 23/07/2021 a pre-bail report and a mental assessment report were filed. The pre-bail report recommended the release of the accused person on reasonable bond terms, while the mental assessment which had been ordered to be undertaken by the court found the accused person fit to stand trial.

6. The parties argued out their applications and a ruling was slated on 10/08/2021 on whether the accused person would be released on bond.

7. The learned Magistrate gave his ruling on 10/08/2021, directing that the accused person would not be granted bond terms until the victims had testified. A hearing date was fixed on priority basis, and the matter was fixed for hearing on 27/09/2021.

8. The defence being dissatisfied with the ruling of the court moved the High Court seeking a revision of the orders given by the learned Magistrate on 10/08/2021.

9. Thus the Applicant lodged certificate of urgency dated 16/08/2021 seeking directions on criminal review in the Ruling/Order of the trial court in Cr. No. E1316/2021. The same is supported by affidavit of Shadrack Wambui sworn on 16/08/2021 and annexures thereto.
10. Same is opposed by complainant Martha Nyaguthii Komu sworn on 20/08/2021 and also by affidavit of PC Daniel Kinoti the Investigating Officer sworn on 23/08/2021.
11. The parties canvassed application via submissions which were filed and exchanged.

APPLICANT'S SUBMISSIONS:

12. It is contended that, the denial of bail and/or bond by the trial court denies the Applicant's rights to a fair trial and access to justice as envisaged under **Articles 50 and 48 of the Constitution of Kenya 2010**, respectively.
13. That in rendering its ruling on 10/08/2021, the trial court acted illegally, incorrectly and improperly in denying the Applicant herein, his constitutionally guaranteed right to bail.
14. That the trial court ignored the findings and recommendations of the pre-bail report which it requested for *suo moto*.
15. It failed to recognize the fundamental fact that the Applicant's sisters were more than willing to accommodate the Applicant herein and ensure that he attends court religiously.
16. It is thus submitted that the learned trial Magistrate acted improperly, illegally and incorrectly in passing judgment before the trial has even commenced. The same is aiding the learned trial Magistrate in curtailing a fundamental right to freedom guaranteed by the Laws of Kenya.
17. It is contended that should this Court decline to vacate the ruling and orders of the trial court the Applicant would suffer a great injustice.
18. It is in this light, this Court is urged to apply the criteria set out in the **Bail and Bond Policy Guidelines 2015 at Section 4.2 6(h)** which provides that the following additional features in deciding whether to grant an accused person bail:

- a. The period the accused person has already spent in custody since arrest.*
- b. The probable period of detention until the conclusion of the trial if the accused is not released on bail.*
- c. The reason or reasons for any delay in the conclusion of the trial and any role of the accused with regard to such delay.*
- d. Change of circumstances during the trial.*
- e. The maximum custodial sentence in case the accused person is convicted.*

19. It is stated that applicant has been in custody for 75 days or so and If this Court fails to vacate the lower court's orders, the Applicant is likely to suffer irreparably.

20. Further, the Applicant's right to a fair trial will be curtailed and he would thus continue to suffer irreparably while in custody.

21. It is argued that, the Applicant's medical condition, which can only be proved through the production of his medical records, is a crucial part of his trial in proving his case. That unless the court intervenes, the Applicant's right to a fair trial will be unfairly denied. The court is referred to the case of **Republic v Sarah Wairimu Kamotho [2019] eKLR** which held that:

"Article 50 is titled "Fair hearing". This article guarantees an accused person the right to a fair trial and public hearing. The right to a fair hearing includes but is not limited to the right to be presumed innocent until the contrary is proved..... The right to a fair trial under Article 50 cannot be limited....It is worth repeating here that bail is a constitutional right that is limited where compelling reasons exist."

22. In light of the foregoing, the question that remains is whether the prosecution has managed to bring forth before this Court, any compelling reasons why the Applicant herein should not be admitted to bail and/or bond.

23. It is submitted that the trial court erred in law and fact in making a finding that the Applicant herein is likely to interfere with witnesses. The case of **Republic v Sarah Wairimu Kamotho [2019] eKLR**, was cited where the court placed reliance on the case of **Republic v William Kipkorir Kipchirchir & Another [2018] eKLR** which stated as follows: ***".....intimidation, interference and threatening of witnesses are serious matters and they are compelling reasons where evidence of such intimidation, interference or threats is provided to the trial court.....in the absence of the evidence to support the same, these remain just mere suspicious and fears harbored by the prosecution.***

24. It is also contended that, the trial court erred in its ruling by stating that the Applicant herein is likely to interfere with the witnesses since they are his immediate family members while else the Applicant will in no way have access to the victims in the matter.

25. The probation officer's report clearly states that the Applicant's sisters are ready to accommodate him in their home in Lang'ata, Nairobi. The victims currently reside in Nyahururu, miles away from where the Applicant will be residing, in the event that this Court is pleased to allow his application and release him on bail and/or bond.

26. In any event, the burden should fall on the prosecution to ensure the safety of the witnesses if it indeed feels that they are in any danger of being influenced by the Applicant. The applicant cite the case of **Republic v Sarah Wairimu Kamotho [2019] eKLR**

RESPONDENT'S SUBMISSIONS:

27. In rejoinder, the respondent submit that, the trial court the court the compelling reasons for postponing terms of bond were disclosed and further noted that this was not a punishment to the Applicant but upon weighing the rights of both the victims and those of the Applicant, it was only fair that the Applicant be held in custody until the victims testifies.

28. The learned Magistrate, highlighted the issue of interference of witnesses, as the victims were the immediate family of the Applicant and thus the risk of interference was very high.

29. In doing this, the Learned Magistrate did not err in any way, but exercised the powers given in the Constitution of Kenya, 2010 under **Article 49(1) (h)** where the right to bail and/or bond can be curtailed if there are compelling reasons such as those given by the learned Magistrate in his ruling.

30. It is contended that, the right to bail and/or bond is not absolute. The trial court did not in any way illegally deny the Applicant his right to bail and/or bond but denied to give bond terms to the Applicant until key witnesses who were at the risk of being interfered with testify.

31. It is submitted that, the right to bail and bond has limitations and the said limitations are in form of compelling reasons, which were established before the trial court, notwithstanding the fact that the pre-bail report was in favour of the Applicant being released on bail or bond.

32. The right to bail and bond is not absolute, and where circumstances dictate so, the right is curtailed.

33. In its ruling dated 10/08/2021, the trial court held in part;

“to that extent, the court declines to have the accused released on bond until the Complainants have testified. The request for bond can then be made thereafter for consideration....”

34. This did not amount to an outright denial of the Applicant's right to bond. The learned Magistrate put the victims' right into consideration as well as the provisions of **Article 49(1)(h)** where the right to bail and/or bond is denied when compelling reasons are tabled before court.

35. Respondent cites the case of **State v Lucas Onyango Walo [2012] eKLR**, where court held that:

“Justice is for both parties in any case. The victim of the offence and the accused person.”

36. Also cited is the is the provisions of **Section 10 of the Victim Protection Act No. 17 of 2014, which states** as follows:

10 (1) A victim has a right to:-

a) Be free from intimidation, harassment, fear, tampering, bribery, corruption and abuse;

b) Have their safety and that of their family considered in determining the conditions of bail and release of the offender; and

c) Have their property protected.

37. One of the compelling reasons being the safety of the victims and the risk of the interference. To this extent, the learned Magistrate did not err in any way by giving the victims a chance to testify before the Applicant's application for bond is considered afresh.

38. The defence counsel refers to a pre-bail report which was filed in court recommending the Applicant's release on bail and/or bond. A pre-bail report acts as a guide to the court when considering the suitability of an accused person whether to be released on bail and/or bond. However, the pre-bail report is not the final say. It is a requirement by the law, but it cannot override the Constitution of Kenya, 2010 which is the supreme law.

39. Whether the pre-bail report found the Applicant suitable for bail and/or bond is not in question. The question is whether bail or bond should be granted at all instances. The laws gives instances where bail or bond can be denied, and the matter before the lower court qualifies as one of the those instances.

40. The prosecution availed compelling reasons which upon consideration by court, the learned Magistrate gave conditions for the Applicant's bond application to be considered.

COMPLAINANT'S SUBMISSIONS:

41. The matter was given a hearing date on a priority basis as the same is coming up for hearing on 27/09/2021 barely a month or so from the date the ruling was delivered.
42. Bearing that in mind, the Complainant is one Martha Nyaguthii Komu together with her two children Shalyene Sharon Wanjiku aged 9 years and Shannel Wangari aged one year. Obviously, the child aged one year cannot testify in court thus bringing the Complainants to a total of two.
43. The relationship between the complainant and the accused herein is that of a husband and a wife and a father and his children. The charges the Applicant/Accused is facing in summary is attempted murder all the Complainants by stabbing them with a knife, threatening to kill the Complainant, arson to their matrimonial home and attempting to kill himself. Copies of the charge sheet have been annexed as **MNK 1**.
44. Despite appreciating ones right to be deemed innocent until proven guilty, the aforementioned charges carry with them a maximum sentence of life imprisonment and the evidence is overwhelming as the said incident was in a public domain. This makes the circumstances and nature of this case special in their own way.
45. The accused burnt down his only known place of abode over and above the fact that he is unemployed, thus a flight risk too and the community would not be willing and ready to accommodate him thus his own interest.
46. He threatened to also kill his neighbors and as such a risk to the public and also, he attempted to kill himself after the incident thus a threat to himself.
47. By virtue of the relationship between the accused and the Complainants, the court found it necessary to have the Complainants testify prior to entertaining such an application for bond terms.
48. The Applicant indicates that he has mental problems thus requires assistance. But a mental assessment report was presented in court and the same has been annexed as **MNK 3** which clearly states that the accused has no mental disorder and therefore fit to stand trial.
49. The said Bipolar Disorder is only at this juncture speculative to say the least being that one who alleges a fact must prove the same.
50. There is nowhere on record or even today has there been evidence or documentation brought to court to support the claim. This is where one could easily apply the saying desperate times call for desperate measures.
51. No prejudice will be occasioned in allowing the civilian witnesses to testify first before such an application for bail and bond terms is considered. The matter has not even began proceeding to see if any adjournment will be sought.
52. In fact, the witnesses intend to avail themselves within the record time to ensure proceedings are fast tracked and justice delivered to allow them heal from the traumatic experience they had to face.
53. The **Bail and Bond Term Policies** were put in place to guide the courts on granting bond terms, however, the **Victims Act** has also been put in place having been established by **Article 157 of the Constitution** which ensures that the rights of the victims are also protected during trial. The rights of an accused do not supersede those of the victim, in fact they ought to balance to ensure both parties have a fair trial during court proceedings.

ISSUES, ANALYSIS & DETERMINATION:

54. After going through affidavits by parties and their submissions, I find the sole issue is **whether there are compelling reasons for trial court to postpone grant of bond till Complainants testify?**

55. At the outset, with the enactment of the 2010 Constitution, all suspects charged with any criminal offences are entitled to the presumption of innocence until proven guilty. They are also entitled to be released on bond. **Article 49 of the Constitution** was considered in the case of **Michael Oyamo & Another [2019] eKLR** in which reference was made to the case of **Republic v William Kipkorir Kipchirchir [2018] eKLR** in which Mutuku J held:

“under Article 49(1)(h) of the Constitution, an arrested person has the right to be released on bond or bail, on reasonable conditions pending charge or trial, unless there are compelling reasons not to be released. It is clear from the wording of this article that the right to bail is not absolute. Where compelling reasons are advised under the court is persuaded by those reasons, the right to bail is curtailed.”

56. On the said case, the learned Judge made reference to what the Court of Appeal stated in the case of **Michael Oyamo & Another v Republic [2019] eKLR** that:

“that 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 cogent grounds that meet the high standards set by the Constitution.”

57. In the case of **Republic v Bernard Arabu Ndege (Cr. Case 26/2019)** at the High Court in Eldoret referred to by the defence, the accused had been charged with the murder of his wife. His wife's relatives opposed his release on bond whereas his family members thought otherwise.

58. As to whether the accused would interfere with witnesses, Justice Githinji relied on the case of **Panju v Republic [1973] EA 284** in which it was stated that where the prosecution expressed fear that the accused may interfere with the witnesses, it must be supported with facts otherwise they would be asking the court to speculate.

59. In the said case, the Judge found that the accused a police officer had minimal chances of absconding since his employer had all details about him. This would not be in resonance with the accused's situation since he is not in any employment at the moment having lost his job after the Covid-19 effects as indicated in the pre-bail report.

60. The court has considered the grounds set out in the two affidavits presented by the investigating officer and the first victim on her behalf and of the other two victims. This can be summarized as the accused person being a flight risk having no fixed abode, being a threat to the victims and witnesses, likely to interfere with the witnesses, being a danger to himself and his life being in danger from the possibility of members of the public lynching him.

61. It is stated that the victims are his close family members being his wife and two children. They say they are apprehensive since he threatened to kill them and caused the minors serious injuries in an attempt to murder them. That is what led to the charges being preferred against the accused person.

62. In the process, it is said he also burnt down their house hence the charge of arson. If released on bond it would be difficult for the victims to reside with him and yet they have to come to court and testify against him. There is every possibility that his presence to them especially the minors would be traumatizing.

63. The accused had said he is bipolar and was going through depression. Whereas it is alleged he might be a danger to himself, the mental assessment that was presented shows that he is indeed fit to stand trial. The psychiatrist noted that the accused had no homicidal or suicidal thoughts and no mental disorder.

64. As was rightfully put by the accused, his medical documents could not be released by his doctor owing to the patient confidentiality. The defence suggested that the victims and Investigating Officer are appealing to court's emotions. This court observes nothing of the sort and thus not correct. The court adheres to issues of fact and law not emotions.

65. The court did request for a PBR which was furnished with a report prepared by Jackson Abukuse, County Probation Director, Nyandarua. This court has also perused it. The history of applicant life is given from childhood to date

66. His information was gathered from the community, his family members, the prison authorities and the victims. Without going into other details of the report, the conclusion is that the accused person may be granted suitable bond terms with conditions to guarantee court attendance since his sisters have shown interest in providing surety and necessary therapy support.

67. Given that the right to bail is not automatic, the determination of whether there are compelling reasons that can justify the denial of bail should be made by evaluating whether or not the accused person will attend his or her trial. In practice, courts have made this evaluation by considering the following non-exhaustive factors:

a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

Where the charge against the accused person is serious, and the punishment heavy, the courts assume that there are more probabilities and incentives for the accused person to abscond, whereas in case of minor offences there may be no such incentives.

b) The strength of the prosecution case.

An accused person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence against the accused person is strong.

c) Character and antecedents of the accused person.

Although the character and antecedents of the accused person do not by themselves form the basis for denial of bail or bond, they may justify the refusal of bail or bond if they are coupled with other adverse factors.

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.

Where there is a likelihood that the accused will interfere with prosecution witnesses if released on bail or bond, he or she may be denied bail or bond. However, bail or bond will only be denied if there is strong evidence of the likelihood of interfering with

prosecution witnesses, which is not rebutted, and if the court cannot impose conditions to the bail or bond to prevent such interference.

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.*

If the accused person is either related to the witnesses or stands in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact the accused person might have on the witnesses, if he or she is released pending trial. However, this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice.

h) *The accused person is a flight risk.*

Where the accused person is a foreigner who does not have a fixed abode or hosts in the country and Kenya does not have an extradition treaty with the accused person's country, there is a presumption that he or she is a flight risk and may therefore fail to attend trial if granted bail or bond. The rationale for this presumption is that it would be impossible to prevail upon such a country to return its national to Kenya to be prosecuted should they abscond after being granted bond or bail.

i) *Public order, 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 disturb public order or undermine public peace or security.

j) *Protection of the accused person.*

Pretrial detention could apply where the accused is threatened with lynching for committing a crime

68. This court has noted and agreed with trial court observation that;

“in considering the strength of the prosecution’s case as an element of compelling reasons, the court is not in a position to weight the same. At this stage, the hearing has not started and the court is not privy to the witness statements. However, the charges which the accused faces are serious. In the event he is found guilty, the possible sentences he may face as provided under the Penal Code is a maximum of life imprisonment. It is said he might be a flight risk. Since the house where he was staying with his family has been burnt, he may not have a place to stay. The probation report shows that his sisters are willing to accommodate him. Would he interfere with witnesses? The key witnesses are his immediate family members. It is logical that he should not be in contact with them to guarantee non-interference or threats to them”

69. Having considered the materials before me from the parties, the pre-bail report, submissions and the authorities cited, the court is satisfied and agrees with trial court that at this state there are compelling reasons to deny the accused bond. The court is alive that pre-trial detention should not be deemed as a punishment. And thus the court makes the orders ;

(i) The revision of the trial court ruling/order impugned herein is rejected and the trial court orders are affirmed.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 24TH DAY OF SEPTEMBER, 2021.

.....

CHARLES KARIUKI

JUDGE