



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 77 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

RAPHAEL MUOKI KALUNGU.....ACCUSED

RULING

BACKGROUND

1. The applicant faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which were that between the 6th and 7th July 2014 near Imara Daima Railway Station along Mombasa Road within Nairobi County jointly with others not before the court murdered **MARY WARUGURU MAINA**.
2. He pleaded not guilty to the said charges and by an application dated 10/10/2014 sought to be released on bail pending trial. The said application was heard by Justice Kimaru who through a ruling dated 11th day of December, 2014 declined to release the applicant on bail for reasons stated therein having noted that the prosecution had established compelling reasons to enable him deny the same the employment of his constitutional right under Article 49(1)(h)
3. On 14th December, 2015, the trial herein commenced before me and for record purposes as at the time of this ruling I had heard and recorded the evidence all the twenty (20) prosecution witnesses and put the applicant on his defence when the application dated and filed on 30th day of May, 2016 was heard before me.

APPLICATION

4. In the said application the applicant sought orders to be released on reasonable bond or cash bail terms pending hearing of the criminal case above. The application was supported by his annexed affidavit where it was deponed that he was arrested in the year 2014 and had been in custody since then, whereas he is entitled to be released on bond or bail under the provisions of **Article 49(1)(h)** of the Constitution pending trial. It was stated therein that there were no compelling or irresistible reasons why he should be denied bail in as much as he had been denied bail on the grounds of fear of witness interference.
5. It was deponed further that the witnesses who had been alleged to have received threats had since testified against him and that should he be released on bond, he shall reside with his parents in Ruai along Kangundo Road. It was contended that he faces no eminent danger from the public and will not execute any public revulsion.
6. The application was opposed through a replying affidavit sworn by Joseph Maina Kimani the father of the deceased dated 3rd February, 2017 in which he stated that one **JOSEPH MUTUKU KALOVU** a cousin of the applicant who had been released on police bail having recorded his statement with the police went into hiding and had not been traced to date and should the applicant be released on bail the chances of him absconding were high. It was deponed that the applicant had not demonstrated change of circumstances to enable the court review the order of 11/10/2014.
7. The application was also opposed through the affidavit of Detective **CLEMENT MWANGI** in which he supported the reasons advanced by Justice Kimaru and stated that there were no change of circumstances.
8. It was deponed that efforts to trace the 2nd accused person Joseph Mutuku a cousin of the Applicant had been futile and therefore if

released on bond, the accused could further complicate and frustrate the efforts by the police to apprehend him. It was deponed that the release of the accused at this stage would occasion unnecessary delays and complication that would frustrate the ends of justice.

9. On 2/2/2017 the court ordered for a pre-bail report to be filed in respect of the application herein which was duly filed. It was stated that the family of the accused supported his application for review as they largely depended upon him before his arrest for support. On the victim impact statement it was stated that her family were opposed to the release of the applicant since the evidence advanced against him were overwhelming and should he be released on bond, he will use the opportunity to run away and defeat the trial. It was contended that the accused had issued life threats to them and had shown bitterness towards the father and the sister of the deceased.

SUBMISSIONS

10. It was submitted by Ms Kilonzo for the applicant that there was no evidence produced by the prosecution linking the accused to threat to witness and interference with witnesses which were the grounds upon which he was denied bond. She submitted that the rights of accused to bond or bail continues even where the court had found that there is a prima facie case. It was submitted that the members of family of the accused have been supportive and have attended every single mention and hearing and will therefore ensure that he attends court Ms. Kilonzo distinguished the case of **REPUBLIC v REGINA WAMBUI NJOROGE [2019] EKLR** submitted by the family of the deceased on the ground that in that case the family asked for free bond. It was submitted that the accused had been in custody for five years.

11. Mr. Karigi for the victim's family submitted that right to bail was not absolute and submitted that the strength of the prosecution case should be considered as stated in the Judiciary Bail and Bond Policy Guidelines and as confirmed by the court in **REPUBLIC v REGINA WAMBUI NJOROGE (supra) eKLR**. He submitted that the application should be dismissed as it was Review of the Order declining bail for which the case of **REPUBLIC v EZEKIEL MOMANYI ONSONGO & 2 OTHERS [2018] eKLR** was submitted in support.

12. On behalf of the prosecution Mr. Mwendwa submitted that the applicant had not demonstrated change of circumstances. It was submitted that the Applicant was aware of the weight of evidence tendered against him and that incentive to ran away cannot be wished away. It was submitted that the applicant co-accused was still at large which casts a dark shadow in the matter from which the case of **REPUBLIC v JANE MUTHINI & ANOTHER [2019] eKLR** was submitted in support.

ANALYSIS AND DETERMINATION

13. From the affidavits, pre-bail report and the submissions herein, it is clear that the application before the court is that of review of the order granted by Kimaru J in which he declined to release the Applicant on bail and not a fresh bail application. The court has powers to grant bail at any time in the course of trial and to review an order granted by the court in denying the same bail. Faced with a similar application Justice Lesiit had this to say in the case of **REPUBLIC v FREDRICK OLE LELIMAN & 4 OTHERS [2019] EKLR**.

“16. The court has the power to hear and determine the accused person’s application which is a review of this court’s ruling declining to release on bail or bond pending the conclusion of their trial. It being the second such application it is important to state to because the consideration the court will make at this stage, as stated clearly by the learned Prosecution Counsel are whether the circumstances prevailing in 2016, when the ruling under review was delivered were in existence in this case had changed.”

14. This court faced with a similar application in **REPUBLIC v JOSEPH KURIA IRUNGU alias JOWIE & another [2019] eKLR** has this to say:-

*“14) The Applicant bears the burden on review to show on a balance of probability why the earlier order should be vacated and why it should be unjust not to vacate the order. He must show that the circumstances of the case are so altered that compelling reasons are disclosed for review of the earlier order. This position was clearly stated by Justice Muriithi in his well argued decision in **REPUBLIC v DIANA SULEIMAN SAID & ANOTHER [2014] eKLR** :-*

“11. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful Applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail . . .

12. I find nothing in the provisions of Article 49(1)(h) of the Constitution or Section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49(h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail until and unless compelling reasons are demonstrated. If compelling reasons are arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person is presented at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.”

15) This position has been captured by the Judiciary in the Bail/Bond Policy Guidelines 4.2 6 (h) in which the court is required to consider 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. (Emphasis added)*

16) It must be clear in mind that the purpose for bond still remains as stipulated in Section 123 of the Criminal Procedure Code as read with Article 49 of the Constitution:- Section 123 of the Criminal Procedure Code provides as follows:-

“When a person is accused of any offence under the Penal code or any statute and the Person has been arrested or detained without a warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided in this Code.” (Emphasis added)

“123A – Subject to Article 49 (1) (h) of the Constitution notwithstanding Section 123 in making a decision on bail and bond the court shall have regard to all the relevant circumstances in particular the nature and seriousness of the offence, the character, antecedent, associations and community ties of the accused person, the defendant’s record in respect to the fulfillment of obligation under the previous grant of bail, the strength of the chance of his having committed the offence.”

Section 124 provides:-

“Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.

15. As submitted by Ms Kilonzo one of the conditions upon which the applicant was denied bond being interfered with the prosecution witnesses has since changed as all the prosecution witnesses have testified and their evidence is on record. However this therefore raises a new compelling reason which as per the Bail and Bond policy guidelines at 4.9 (b), being the strength of the prosecution, which the court must take into account now that the evidence is on record. When confronted by a similar situation where an application was made in the course of the trial, Justice Ngugi had this to say in the case of **REPUBLIC v JANE MUTHONI MUCHERU & Another [2017] eKLR**.

“22. In the ruling of 20/12/2016, I explained the proper context of when the strength of the prosecution case can be a legitimate factor in denying bail. The Bail/Bond Policy Guidelines at p. 16 (Paragraph 4.9(b)) is couched in the following language:

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 of the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is aware of the weight of the prosecution’s case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.

23. The Policy Guidelines cited R v Margaret Nyaguthi Kimeu [2013] eKLR for the last proposition. Ms. Mwaniki has argued that at this point the instant case is on all fours with the Margaret Nyaguthi Kimeu Case. This is because, she argued, the Court has now heard key Prosecution witnesses and has a sense of what direction the trial is taking.

24. In the ruling of 20/12/2016, I expressed the view that while the strength of the prosecution case can be a valid factor in consideration whether bail should be granted and whether there are compelling reasons to refuse bail, it alone, like the nature of the offence, is not sufficient reason to deny bail. The apparent strength (or weakness) of the Prosecution case can be one of the factors that a Court takes into account but it cannot be the anchor reason for denying bail.

25. In the present case, after hearing ten witnesses, I am prepared to say that the prosecution case is not tenuous. I do not wish to say more for the fear of embarrassing the remaining trial and pre-judging issues. This in itself would not be sufficient reason to deny bail as I stated above. However, here, it is coupled with the unresolved question of Mr. Nelson Njiru who is a fugitive of justice in this case. Both direct evidence received in Court as well as the statement by the 1st Accused Person establish a connection between Mr. Njiru and both Accused Persons. The almost literal vanishing of Mr. Njiru into thin air should give us pause about the real possibility that the two Accused Persons could follow suit hence subverting justice in this case. Despite Mr. Njanja’s valiant efforts to disassociate the 1st Accused with Mr. Njiru, I believe that her own statement speaks for itself: “I requested a friend, a Mr. Njiru who is also a teacher at Voi University if he could get me a friend who could assist me with a car....” Those are the 1st Accused Person’s own words. It blitzes Mr. Njanja’s denials from the bar.

26. It is a rare and exceptional case when the Court will deny bail to an Accused Person. The circumstances of this case makes this one of those rare and exceptional cases. To mitigate the effect of this decision and balance the rights of the Accused Persons, the Court shall prioritize the hearing of this case. It has already heard the case on two consecutive back-to-back days. Ten out of twenty possible witnesses have been heard. The Court will now set aside, subject to the availability of defence counsels, time to conclude the prosecution case within the next three weeks.

16. Whereas the accused remains and must be considered as innocent throughout the trial, notwithstanding, the fact that he has been put on his defence and since the court is not in a position to conduct risk assessment at this stage so as to know the effect of the evidence so far record on the mind of the accused and whether based on the evidence so far tendered there may be possibly of the same to abscond now that he knows the evidence so far against him, I associate myself with Justice Ngugi ruling in the case of **REPUBLIC V JANE MUTHONI MUCHERU (supra)** to the effect that where the case of the prosecution has been presented then the apparent strength or weakness of the case can be taken into account in determining whether or not to grant the accused bond.

17. In this matter having heard the witnesses for the prosecution and the accused having heard what they have said and as stated herein above, since the court has no means to know the effect of the same on the mind of the applicant I am prepared to find that the risk of the accused absconding trial is real and may not be wished away notwithstanding the support of his parents.

18. Ms Kilonzo also raised the issue of the need for the accused to be afforded opportunity to prepare for his defence while out on bond, but I am of the considered opinion that this can be mitigated by appropriate order to the Prison authority should need arise.

19. There still remains the issue of the whereabouts of one KALOVU who remains a person of interest and was who allegedly with the accused person at some bar where witnesses were threatened and who I still at large and whereas it is not for the applicant to account for his whereabouts. I am satisfied that eh risk of the accused absconding cannot be wished away in this case and that therefore still remains a compelling reason to enable me deny the same the enjoyment of his constitutional rights.

20. Further since the case herein has reached the defence stage and is likely to be concluded soon, I see no prejudice likely to be suffered by the applicant, the court having balanced his right to bail and that of preserving the integrity of the trial to the end and therefore decline to grant the applicant the orders sought and therefore dismiss the application herein and it is so ordered.

Dated, signed and delivered at Nairobi this 28th day of January, 2020

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J. WAKIAGA

JUDGE

In the presence of:-

Ms Gikonyo for the State

Ms Kilonzo for the accused

Mr. Karigi for the victims

Court assistant: Karwitha

Accused present