



REPUBLIC OF KENYA

HIGH COURT

AT NAIROBI

CRIMINAL CASE NO. 57 OF 2016

REPUBLIC.....PROSECUTOR

V E R S U S

FREDRICK OLE LELIMAN.....1ST ACCUSED

STEPHEN CHEBURET MOROGO.....2ND ACCUSED

SILVIA WANJIKU WANJOHI.....3RD ACCUSED

LEONARD MAINA MWANGI.....4TH ACCUSED

PETER NGUGI KAMAU.....5TH ACCUSED

APPLICATION BETWEEN

STEPHEN CHEBURET MOROGO.....2ND ACCUSED/APPLICANT

SILVIA WANJIKU WANJOHI.....3RD ACCUSED/APPLICANT

LEONARD MAINA MWANGI.....4TH ACCUSED/APPLICANT

AND

REPUBLICRESPONDENT

RULING ON BAIL APPLICATIONS

1. The 2nd accused person also filed a Notice of Motion dated 31st March, 2020 where he sought for the following orders:

1. Moot.

2. That the Honourable court be pleased to release the Applicant on bond or bail on such reasonable conditions as the court may determine.

3. That this Honourable court be pleased to issue such orders as may be fair and just to secure the Applicant’s constitutional right to be released on bond or bail pending conclusion of the trial.

2. The 3rd accused person also filed a Notice of Motion dated 24th March, 2020 and is seeking for the following orders:

1. Moot.

1. (a) That the Honourable court be pleased to review its previous orders and to admit the Applicant/3rd Accused to such reasonable bail/bond terms as the Court may deem just pending the hearing and determination of this criminal case.

(b) That the Applicant/3rd Accused prays that Honourable Court do consider the Applicant's request to be admitted to a cash bail of KShs. 200,000.00 and 1 or 2 sureties of similar amount, or otherwise to such terms and conditions as are fair, just, and reasonable.

(3) That the court do issue any other or further orders and or directions as may deem just and expedient.

3. The 4th accused person desires to be heard on Bail Application and has filed a Notice of Motion dated 23rd March, 2020 and seek for the following orders:

a. Moot

b. That the Applicant herein be admitted to Bail/Bond pending the hearing and determination of this matter.

4. Mr. Mochere who was standing in for Mr. Ombetta for the 1st accused person submitted a Notice of Motion application by the 1st accused dated 31st March, 2020. That application was not in the court CTS, and equally had not been served upon the other parties and so was not argued. For what it is worth, I have noted the orders sought in that application which are:

1. Moot.

2. That the Honourable court be pleased to release the Applicant on bond or bail on such reasonable conditions as the court may determine.

3. That this Honourable court be pleased to issue such orders as may be fair and just to secure the Applicant's constitutional right to be released on bond or bail pending conclusion of the trial.

5. The application by each of the accused was opposed by the prosecution through two affidavits sworn by one of the Investigating Officers of this case, Inspector Clement Mwangi.

6. The arguments of the defence was that this case has delayed and there was no telling when it will be concluded. They also argued that the accused/Applicants had suffered various ailments while in custody. The 2nd and 4th were said to have suffered from Covid-19 virus, while the 3rd accused had undergone surgery and was due for another one. The defence also urged that the counsels were finding it impossible to access their clients, which is becoming critical as the case was entering the defence stage.

7. The learned Prosecution Counsel, Mr. Mutuku opposed bail. His basic argument was that the situation had not changed at all since the last bail consideration. He also urged that we were at the tail end of the case with one and a quarter witnesses left. He also urged the issues of health of the accused persons were well handled by prison, and by the best Referral Hospital in the country, as well as in Eastern and Southern Africa.

8. Mr. Fred Ojiambo, SC, counsel for the victims urged that the only new ground argued in the present applications was the issue of Covid-19, but that the mere fact they were in good health rendered the argument without basis. He urged court not to review its past rulings on bail.

9. Prof. Sihanya counsel for the LSK associated himself with the arguments of the prosecution and Mr. Ojiambo. He said he was positive the case could be concluded within the dates set for hearing, further that they were apprehensive that should bail be granted, it will delay the case further.

10. I have heard all the arguments put forward by the counsels on all three sides in these applications, together with the cases cited. I wish to highlight important principles which have heavy bearing and which dictate how courts should

11. This court has a duty spelt out clearly under **Article 159(2)** of the **Constitution** thus:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

2 (a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

12. It is clear that one of the principles applicable in the exercise of judicial authority is that justice should not be delayed. Further, the purposes and principles of the Constitution must be protected and promoted. In order to enable courts enforce these two principles, the NCAJ appointed a Committee in 2015 to formulate guidelines for the effective management of courts. This is the Active Case Management

Committee. This committee carried out various surveys, including the inaugural Baseline Survey, in pilot court stations. In regard to criminal trial, it was discovered that trials in which the accused were represented took **100% more time** to complete than those where the accused acted in person. Among the reasons for delay was the engagement of dilatory tactics to delay the trial, especially the application for adjournments.

13. There is no doubt that each actor in a criminal trial has specific roles, which must be respected, they have no real in the unreasonable delay of the trial. This trial begun very well with the Pre-trial Conference in which early identification of issues in dispute, the issues of admissibility of exhibits and the setting of timelines and ground rules for the trial were set for the seamless and efficient conduct of the trial.

14. I believe that is the reason learned friends say of the cases they are handling that they have the conduct of the case. I can boldly say that I have the conduct of this case, just as much as each party has on behalf of their client. I am seated on the seat of Judgment and Justice with an open but learned mind. I have a right and a righteous mind. And my duty is to do justice to all the parties who are directly as well as indirectly involved in this matter. My mind has to carry the interests of each of these parties into consideration fairly, justly and effectively.

15. It behooves each one of us to play their roles professionally, honestly, appropriately and efficiently, with utmost good faith. It is the duty of every party to this proceeding to ensure that the case is heard and concluded with efficiency, effectiveness and expedition. The court serves as the leader and active umpire to the process.

16. **Article 50 (2)(e) of the Constitution** provides thus:

“Every accused person has a right to a fair trial, which includes the right-

(e) to have the trial begin and conclude without unreasonable delay.”

17. This provision is a reminder that the accused persons are on trial. It means the case has to be heard. The law provides the manner in which it should be heard, which is it should begin and conclude without unreasonable delay.

18. I said I have sat over this case with a right and a righteous mind. I can say without any hesitation that we should have completed this case latest in 2018. But no, we are still here, now seated in a cold tent, with Covid-19 hovering all around wherever we go. Something changed in 2018. New tactics set in which, without a doubt were geared towards delaying the case. I discussed these new strategies, especially by the defence in my ruling on bail review dated 16th May, 2019. In that ruling I summarized the conduct of the case since 14th February, 2017, when I took over the case and continued from PW3. The ruling speaks for itself. It shows that in 2017 we heard 34 witnesses in the case. In 2018 we heard only two witnesses, excluding the witnesses in the trial within trial.

19. In paragraph 24 to 28, I observed that in 2018 this case stalled and that the reason for stalling is traceable mostly at the doorsteps of the defence. I also discussed the issue whether the statement of the defence that it was uncertain how long the case will take. The finding then was that there was assurance by the defence the case could be completed in two weeks.

20. The defence should not be heard to raise the issue of delay as it is 99% The greater cause of delay falls squarely on the defence. And sadly, that cause has not stopped, having been played out as late as this week.

21. It is very clear to this court that in 2018 onwards there has been heightened effort to delay these proceedings. While we were all walking briskly towards the finish line of this trial in 2017, in 2018 some of us started walking on their heels, while wearing high heels. How fast can you walk that way? At some point we heard the sound of screeching to a halt. As if that was not enough, the same side grabbed the gavel, and to the amazement of all present, took off at top speed running towards the opposite direction. That reminds me of the quip by His Excellency President Kenyatta during the launch of the BBI Report just this month. While the rest of us are moving forwards towards the finish line at varying speeds, there are a few others who have decided to take the baton of the progress of the case backwards at top speed in the opposite direction.

22. There is truth in what was said here by the counsels for the defence that the compelling reasons that led to the denial of bond to the accused persons in this case are largely exhausted. However, due to the great efforts which have decisively been made to delay this case, the defence have churned new compelling reasons that warrant this court to hesitate to consider bail at this stage. I like to think of it like the act of a peacock, shaking itself to draw the attention of all around, before it proudly spans its feathers for all to see.

23. Let me conclude by saying that nothing would give me greater joy than to grant the accused persons in this case bond, including the one who has never applied for it. But not at this stage. It would be interpreted by all to mean I am rewarding indolence. That said, bond can still be negotiated but only when I put the final full stop at the close of final submissions in the case. At that time, I will consider bond, and if satisfied it should be favourable, I will consider bond terms, starting with those suggested by the 3rd accused Applicant. Your guess is as good as mind, with all the tactics that have been displayed so far, what will happen if a release order comes in before the stage I have mentioned.

24. I find that there have been new developments in this case which have created new compelling reasons, which never existed at the time bail was considered before. And if they existed, those were rudimentary and have now matured.

25. The accused circumstances which have been argued by the defence can be mitigated. The accused health issues can be managed by the Prison authorities, as has already ably been done, as the medical reports on each accused person from Prison testify to.

26. As for the taking of instructions from the accused by their advocates, that is a conversation that has taken place separately between the Prison Commanders and the Division on one hand, and the LSK leadership and the Division on the other, not for this case but for all criminal

cases before this court. The court can, on request, have the accused persons produced in court, as it did even before Covid-19 in the case of one of the accused persons in this case.

27. In the result, the consideration of the applications for bail by the accused/Applicants, including that by the 1st accused are suspended to a later stage. In the meantime, I order that the Probation do carry out Pre-Bail/social enquiry reports on each of the accused in this case.

DATED SIGNED AND DELIVERED THIS 30TH DAY OF OCTOBER, 2020

LESIT, J.

JUDGE