



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL CASE NO. 65 OF 2019**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

**VERSUS**

**ELPHAS OTIENDE ANDURU alias OTINA.....1<sup>ST</sup> ACCUSED**

**LILIAN ANGISO ROBERT.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The two accused persons herein had been charged separately, in Kakamega HCCCRC Nos. 65 and 76 of 2019, charging them with having murdered Gilan Arunga, on 15<sup>th</sup> October 2019. The two were admitted to bond on the dates plea was taken in each case.
2. The two causes were consolidated on 13<sup>th</sup> October 2020, when the two accused persons pleaded not guilty to the consolidated charge. When Mr. Wangatia, advocate for the first accused, and holding brief for Mr. Obwatinya, the advocate on record for the second accused, applied that the pre-set bond terms be retained, that plea was opposed by Mr. Mutua for the Republic. He applied that the court cancels the bond terms of the accused because the witnesses had been receiving threats from the accused persons. He stated that the said threats had been reported to the police, and that he had an investigating officer in court, who had sworn an affidavit, and who he was ready to avail for cross-examination on the contents of the said affidavit.
3. The investigating officer in question was Number 77811 Corporal Kenneth Mugambi, attached to the Directorate of Criminal Investigations (DCI), Emuhaya. He was sworn, and stated that the accused persons, after they were released on bond, had started threatening witnesses. The second accused was accused of having threatened Alfred Arunga Jite, and the deceased's wife. Both accused persons were said to have had bragged to witnesses that they were out on bond. The complaint was that when the matter came up in court on 17<sup>th</sup> February 2020, the accused persons met the witnesses at the gate to the courthouse, and threatened them, saying that they had committed the offence, and were out on bond, and the witnesses could not take them anywhere.
4. During cross-examination, the investigating officer stated that the accused persons and the witnesses were neighbours, and that reports of the threats were made to the police on 17<sup>th</sup> February 2020 and 21<sup>st</sup> February 2020. He stated that he had not charged the accused persons with any offence related to the alleged threats, and that the accused had not executed the threats. He explained that no action had been taken with respect to the threats, until the matter came up for consolidation, because of the onset of the corona pandemic.
5. The advocates on record thereafter made brief submissions. Mr Esuchi, for the family of the victim, submitted that under Article 40(1)(h) of the Constitution, liberty can be given to an accused person, but the same can be limited where there is a threat to the witnesses. He submitted that they were reporting to the court the fact that the witnesses were apprehensive. He cited the decisions in *R. vs. Danson Ngunya & another* HCCRA No. 26 of 2008 and *R. vs. Joktan Manyende & Others* [2012] eKLR, on circumstances that may be inferred as proof of interference of witnesses, which may include both direct and indirect interference.
6. Mr. Wangatia submitted that the application was an attempt to abrogate the rights of the accused, and was causing a delay in the hearing of the matter. He stated that the accused had been released on bond, and had been adhering to their bond terms. He further stated that the investigating officer was handling the matter causally, as he could not recall the names of the persons alleged to be threatened. He also mentioned an affidavit had been previously lodged in Kakamega HCCCRC No. 65 of 2019, and which had sought that the first accused be denied bond, saying that the investigating officer had pleaded that he knew nothing about the said affidavit. He submitted that the casualness with which the investigating officer was handling the matter suggested that no compelling reasons to deny the accused persons bond. He submitted that the words allegedly uttered did not connote violence, and, in any event the affidavit of the investigating officer comprised of generalizations. On his part, Mr. Obwatinya submitted that the application was an attempt to paint the accused persons negatively ahead of the trial.
7. I have had occasion to peruse the affidavit that the investigating officer swore on 19<sup>th</sup> March 2020. Its contents mirror what he informed the court orally on 13<sup>th</sup> October 2020. The other affidavit that the parties alluded to was that sworn on 13<sup>th</sup> December 2019, by Hezbon Arunga, largely averring that the release of the first accused on bond was likely to terrify the witnesses and the family of the deceased, and

that it was also likely to put the accused person in harm's way.

8. The reason given by the prosecution, for seeking to have the accused persons' bond cancelled, is that they threatened witnesses. I have looked at the affidavits on record, by the investigating officer and Hezbon Arunga, and I do not see anything close to a grain of threat from either of the accused persons. The accused persons were said to have had bragged to the witnesses that they had been released on bond, and that the witnesses could do nothing. That does not sound like a threat. To my mind the scenario painted is more of contact with witnesses as opposed to threats to them.

9. The courts have had occasion to pronounce themselves on the matter of interference with witnesses in numerous cases. For example, in *R. vs. Dwight Sagaray & 4 others* (2013) eKLR, on an allegation that the accused were likely to interfere with witnesses, the court said:

*“For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrates actual or perceived interference. It must show the court, for example, the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others.”*

10. In *Republic vs. Joktan Mayende & 3 others* [2012] eKLR, the court said:

*“All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The description of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”*

11. In *Republic vs. Danson Ngunya & another* [2010] eKLR, the court, while adopting the reasoning in the *M. Lunguzi vs. Republic* CMSCA Appeal No. 4 of 1995, stated:

*“... In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. That is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial, then it is up to the state to prove when the court should make such an order ....”*

12. From what my colleagues stated, in the above decisions, contact with witnesses can take many forms. It need not necessarily take the form of threats for the court to consider cancelling or denying bond. Contact with witnesses, that is intended to intimidate, would fall in that class of acts by an accused person that have the potential of causing their bonds to be cancelled. Ideally, it is usual for terror to be visited upon the hearts of some members of the public, in particular, members of the family of the persons said to have been killed and the witnesses lined up by the prosecution, whenever they come into contact with the suspect or the person accused of the murder. So, as matter of policy, such an accused person, once admitted to bond or bail, ought to stay completely clear of the witnesses, lest any contact between them is deemed to be an effort by the accused to influence or intimidate the witnesses. The bragging of the kind alluded to by the prosecution amounts to contact and interference with witnesses. It has the potential of intimidating witnesses.

13. Having said that, the next consideration is what the court ought to do in the circumstances. Of course, the burden is on the prosecution to establish that there was, indeed, such contact, and that the same had the potential effect of intimidating the witnesses contacted or interfered with. The burden of proof should not be beyond reasonable doubt, for it has nothing to do with the alleged murder itself. The prosecution is expected to present a case on a balance of probability. I would expect, in such cases, that the prosecution would, at least, place before me a copy of the statements that had been recorded from the witnesses allegedly interfered with or contacted, or an affidavit sworn by them. I am not persuaded that an affidavit by an investigation officer would suffice. When subjected to cross-examination on the contents of his affidavit, such investigating officer would merely talk about what he was told of informed by the witnesses, which amounts to mere hearsay. More should be required. After all, the whole exercise is about denying an accused person his fundamental right to be released on bond pending trial, which is a right guaranteed in the Constitution. Denial of such right must be anchored on some concrete or credible evidence, of interference with witnesses.

14. I have gone through the affidavit of the investigating officer, and the evidence on record generally, and I find that his averments about the threats to witnesses lack proof. For a start, he did not place before me the occurrence book (OB) extracts of the complaints allegedly made by the witnesses, which could have assisted the court in getting more details of the alleged threats and the circumstances within and under which they made. Additionally, the contention by the investigating officer that the accused persons bragged to the witnesses that they had been released on bail does not qualify to be a threat to the witnesses to influence, compromise, induce or terrify them with the aim that the witnesses will not give evidence, or will give particular evidence in a particular manner. In the absence of credible evidence to support the investigating officer's allegations, the application by the prosecution, for the cancelling the accused persons' bond, ought to be denied for want of proof.

15. The prosecution and the victim's family made a lot of play, about the accused persons on the one hand, and the witnesses and family of the deceased on the other, being neighbours. That of itself is not a sufficient reason for cancelling bond. The fact that they are neighbours would only be relevant where there are claims of interference with witnesses, supported by credible evidence. I have noted that the alleged contact between the accused persons and the witnesses did not happen within their neighbourhood, but rather it was within the precincts of the court, on an occasion when the matter came up requiring the attendance of both. No allegations have been made at all that the accused persons ever came into contact with the witnesses within their neighbourhood, and in a manner suggesting an attempt or intent to influence or

interfere with or intimidate or compromise with witnesses.

16. The upshot is that I am not persuaded that the allegations made against the accused persons meet the standard, and I find, on a balance of probabilities, that the allegations are not made out. The application by the prosecution is accordingly dismissed. The accused persons have so far been faithful, in terms of attending court as and when required. Let them remain on the bond terms that were set earlier. I wish, however, to reiterate that the said bonds are liable to cancellation, should the accused persons fail to attend court when required to and without good reason, or threaten witnesses or interfere with them and there is credible evidence of such contact or interference or intimidation or threats.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 22<sup>nd</sup> DAY OF October, 2020**

**W MUSYOKA**

**JUDGE**