



**REPUBLIC OF KENYA**

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

**CRIMINAL REVISION CASE NO. 28 OF 2020**

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

**VERSUS**

**SJI.....ACCUSED**

**JUMA HAMISI KINYANJUI.....ACCUSED**

**JUMA HUSSEIN MOHAMMED OMAR ALIAS MACHO.....ACCUSED**

**RULING**

The 2<sup>nd</sup> and 3<sup>rd</sup> accused herein **JUMA HAMISI KINYANJUI alias KAKA** and **JUMA HUSSEIN MOHAMED OMAR alias MACHO**, have both made an application for bail pending the conclusion of their case. It was submitted by Mr. Wakaba, that both the accused have been in custody since June and there is no compelling reason good enough to make them be denied bail. It was also maintained that they are not flight risks and their places of abode are well known.

The prosecution, through Ms. Kimani, opposed the release of the 2 accused on bail. First that the 2 accused are likely to interfere with witnesses and investigations, since some of the accomplices are yet to be arrested. That they are likely to interfere with or intimidate the witnesses who are well known to them.

Secondly, that accused 2 and 3 have no known places of abode or income, and so are likely to abscond if released.

The prosecution also objected to their released on the basis of safety and security of the accused. That at least 1 of their members of the public and that tension is till high in Kibera and the 2 will be attacked if released on bond.

And lastly, that the 2 are again flight risks who would be untraceable since they do not have any in identity cards.

In a further reply, counsel for the applicants denied there being any lick with the said Abubakar.

I have considered the submissions herein made both the defence and prosecution sides. Under Article 49(1)(h) of the constitution of Kenya, it is a right of every arrested or accused to be released on bail on reasonable terms. However, this right to bail is not absolute. It may be denied upon proof of existence of compelling reasons that would justify denial of the right.

The Bond-Bail policy guidelines at paragraph 4.9 gives guidelines on what would generally constitute compelling reasons. Indeed the courts have applied the same guidelines in determining whether or not an accused person may be released on bail pending trial. Amongst the accepted considerations are the follows:-

- **The nature of charge and the seriousness of the sentence incase of conviction.**
- **Whether the accused is a flight risk**
- **Character and antecedents of the accused.**
- **Likelihood of interference with witnesses or investigations.**
- **Strength of the prosecutions case**
- **Public order, peace and security.**

**- Accused's own safety.**

In this particular case, the prosecution has opposed bail on a number of grounds. I shall deal with their individually as follows:-

i) **Likelihood of interference with witnesses and the investigations:**  
it was submitted that the accused know the prosecution witnesses well and are likely to interfere and or intimidate them if released on bail. This allegation was not proved in any way. This court has severally ruled that for this ground to stand as a compelling reason, the prosecution must show evidence of actual interference, direct or indirect. And that in the absence of any such proof, then the ground of objection remains an unproved allegations that falls short of being a compelling reason good enough to justify a denial of the right to bail (See HCCR No. 62/2019, Republic Versus Joseph Wainaina Ngigi).

Similarly the allegations that the accused are likely to interfere with the investigations in view of the fact that some of the alleged accomplices of the accuseds are yet to be arrested was not proved.

For lack of sufficient proof of this ground, this objection lacks merit and cannot be held to be a compelling reason in this matter.

**ii) Lack of fixed places of abode or gainful employment**

It was claimed by the prosecution witnesses that accused 2 and 3 have no known places of abode. With respect, I cannot reconcile this objection with the fact that it is the same prosecution who also claims that accused 2 and 3 know the prosecution witness well as they stay in the same neighbourhood. If they indeed stay in the same neighbourhood as the witnesses, it can only mean that their place(s) of aboard should be known even to the investigating officers.

As to whether they are gainfully employed, I am not persuaded that this alone can be a compelling reason. Same as the claim that they are a flight risk simply for the reason that they have not shown their identity cards, a fact the defence have given an explanation for.

**iii) Safety and security of the accuseds**

The prosecution has submitted that if released on bail, the safety and security of the accused would be at stake. The submissions were based on the fact that members of the public almost lynched the accused's at the time of their arrest, and that at least 1 accomplice, was lynched. It was further submitted that the neighbourhood is still volatile and tension remain high though the defence has denied any link between the said accomplice lynched called Abubakar and accused 1 and 2, this court gives weight to the evidence on oath by the investigating officer sergeant Vincent Bitanya, and submitted on by learned counsel, Ms. Kimani, that indeed this is the position. If the neighbourhood was such volatile to the extent of a suspect being lynched, this court is convinced that the situation may not have changed in the 6 or so months passed. I therefore find that for their own safety and security, accused 2 and 3 be remanded in custody pending determination of their case.

In total, I am in this matter convinced that the prosecution has established at least 1 compelling reason good enough as to justify the denial of the right to bail to accused 2 and 3 (ground iii). The applications of the accused 2 and 3 for bail are accordingly dismissed. They are ordered to be remanded in custody pending hearing and determination of their case.

**HON. JUSTICE D. OGEMBO OGOLA**

**17<sup>th</sup> November 2020**

Court:

Ruling read in open court (online) in the presence of Mr. Wakaba and also holding brief for Mrs. Gulenywa for accused, the accused and Mr. Naulikha for the state.

**HON. JUSTICE D. OGEMBO OGOLA**

**17<sup>th</sup> November 2020**

Court:

A hearing date to be given. Hearing 26<sup>th</sup>/27<sup>th</sup> January 2021.

**HON. JUSTICE D. OGEMBO OGOLA**

**17<sup>th</sup> November 2020**