



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 1 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

SULEIMAN ALI CHIPHORO alias DIMAU

ALI SULEIMAN CHIPHORO.....ACCUSED PERSONS

RULING

1. The accused persons were charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 10th day of January, 2019 at Kikonde village in Kwale County, within Coast Region murdered Josephat Karuga Wainaina.

2. After the plea was taken, Mr. Chimera Advocate applied for the release of the accused persons on bond pending the hearing of the case against them. He submitted that under the provisions of Article 49(1)(h) of the Constitution of Kenya, they are entitled to being released on bond pending trial. He stated that the 1st accused suffers from high blood pressure and needs urgent medication.

3. Ms Ogwen, Principal Prosecution Counsel opposed the release of the accused persons on bond pending trial and relied on the affidavit of the deceased's wife, Jacinta Karuga and that of the Investigating officer, No. 50865 PC John Mbinda which were sworn on 14th February, 2019. The depositions in the two affidavits are almost similar. The accused persons filed replying affidavits expressing their rights under the Constitution of Kenya. The two affidavits are almost similar in substance.

4. In her affidavit, the deceased's wife deposes that her family and the family of the accused persons have been having a boundary dispute spanning over 13 years. She states that it was the two accused persons who assaulted the deceased on 10th January, 2019 after which he succumbed on 13th January, 2019 to the injuries he had sustained. In paragraphs 6 and 7 of her affidavit, she deposes that the accused persons herein are father and son respectively and that after the incident, 2 other sons of the 1st accused person ran away from Lungalunga to an unknown place and the Police were still looking for them. She also avers that the release of the 2 accused persons on bond will jeopardize the arrest of the other 2 suspects who had escaped the Police dragnet for a month as at the time she swore her affidavit. She therefore expresses the fear that the accused persons are likely to be a flight risk if they are released on bond pending trial.

5. The deceased's wife deposes in paragraph 10 of her affidavit that she has been receiving emissaries from the family of the accused persons who have been informing her of their willingness to negotiate for compensation, if she would agree to reduction of the charge of murder to manslaughter.

6. She further states that an eyewitness who had been employed as a guard in their homestead, one Erick Nzomo Martin, took flight after fearing for his life when it appeared that the accused persons were out to scuttle the trial process.

7. She further deposes that she feels that she is being intimidated and that the presence of the accused persons in the neighbourhood will instill fear in her, of reprisal from the accused persons' family.

8. The accused persons filed their replying affidavits on 19th February, 2019 in which they state that they are entitled to being released on bond pending trial under the provisions of Article 50(1)(h) of the Constitution of Kenya. In their affidavits, they disclose that they have a fixed abode in Kikonde village, Kwale County where they will continue to reside during the hearing of the case herein. They undertake to attend court at all times. They have denied being flight risks and that they had sent emissaries to the deceased's wife.

9. In paragraph 6 of their affidavits, the accused persons indicate that the Prosecution has had sufficient time from 11th January, 2019 to investigate the allegations made by the deceased's wife and members of her family about being threatened by the family of the accused

persons. They further state that the Prosecution should have produced a report in court of the investigations as to the veracity of the allegations being made against them so that necessary legal action can be taken, if it is proved that indeed members of the accused persons' family had threatened them in an attempt to scuttle the trial process.

10. The accused persons further indicate that the burden of proving that there are compelling reasons not to release them on bond is entirely on the prosecution which has failed to produce evidence linking them to witness tampering/interference and/or intimidation.

DETERMINATION

11. The release of an accused person on bond pending trial is a Constitutional right which is provided under Article 49(1)(h) of the Constitution of Kenya. The said right is however curtailed when compelling reasons exist to deny the release of an accused person on bond. In **Republic vs Joktan Malende and 3 Others** Criminal Case No. 35 of 2009, the court held as follows:-

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

12. I have considered the application by the accused persons and their right to be released on bond pending hearing of their case under the provisions of Article 49(1)(h) of the Constitution of Kenya. I have also considered the Bail and Bond Policy Guidelines that guide the Police and Judicial Officers in the application of bond terms to suspects and accused persons. The guidelines are similar to the considerations that should be taken into account, which are set out under **Section 123A of the Criminal Procedure Code**, namely:-

(i) the nature or seriousness of the offence;

(ii) strength of the prosecution case;

(iii) character, antecedents, associations and community ties of an accused person; and

(iv) failure by the accused person to observe previous bail or bond terms.

13. Other considerations that a court takes into account are:-

(i) witness interference or the possibility of witness interference;

(ii) protection of the victim;

(iii) relationship between the accused and potential witnesses;

(iv) whether the accused is a child offender;

(v) whether the accused is a flight risk;

(vi) if the accused is gainfully employed;

(vii) public order, peace and security;

(viii) whether there is need for the protection of the accused person; and

(ix) The sentence that is likely to be imposed if an accused person is convicted.

14. In the present instance, the release of the accused persons on bond pending trial was opposed by the Director of Public Prosecutions. Their pre-bail reports were however favourable to them being released on bond. This court must however look at all the relevant circumstances to arrive at an informed decision. Inasmuch as the accused persons have denied the contents of paragraphs 10 to 14 of the affidavits of the deceased person's wife and the Investigating Officer, I have no reasons to doubt the depositions contained in the affidavit of the deceased person's wife on the incidents that have unfolded since the accused persons were arrested.

15. The investigating officer has deposed to the fact that 2 sons of the 1st accused took flight after the offence was committed and have not been apprehended to date. Inasmuch as the accused persons have assured the court that they are not a flight risk, there exists the danger that they too will take off if released on bond pending trial.

16. It is my finding that the averments contained in the affidavits of the deceased person's wife and the Investigating Officer comprise compelling reasons for denying the accused persons bond pending trial. I have no reason to doubt that the deceased person's wife feels intimidated in her quest for justice by attempts that are being made to negotiate for compensation if she agrees to reduction of the offence the accused persons are charged with from murder to manslaughter. The foregoing also amounts to witness interference. I believe that she is fearful of what might befall her if the accused persons who are her neighbours, are released on bond pending trial. For the said reason, the accused persons shall remain in prison remand until the hearing and determination of their case.

DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms S. Maina holding brief for Mr. Chimera for the 2 accused persons

Ms Marindah for the DPP

Accused person- present

Mr. Oliver Musundi - Court Assistant