



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 54 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SALIM MASHA GONA.....1ST ACCUSED

KINGI CHARO FONDO.....2ND ACCUSED

KATANA KAHINDI GONA.....3RD ACCUSED

AMINA SWINATON CHENGO.....4TH ACCUSED

RULING ON BAIL PENDING TRIAL

1. The 4 accused persons, namely, Salim Masha Gona, Kingi Charo Fondo, Katana Kahindi Gona and Amina Swinaton Chengo were on 24th December, 2018 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 11th November, 2018 at Kinanni village, in Kaloleni Location, Kaloleni Sub-County within Kilifi County jointly murdered Michael Sirya Mdigo.

2. After the plea was taken, Counsel for the accused persons applied for the release of their clients on bond pending trial. Ms Ogwen for the Director of Public Prosecutions opposed the release of the 1st, 2nd and 3rd accused persons on bond and filed affidavits to that effect. She did not oppose the release of the 4th accused person on bond pending trial and she was granted bond terms accordingly.

3. Mr. Mushele, Learned Counsel for the 1st accused person submitted that the release of his client on bond pending trial is a constitutional right under the provisions of Article 49(1)(h) of the Constitution. He stated that the said provisions provide for the release of an accused person on reasonable bond terms as such a person is presumed innocent under the provisions of Article 50(2)(a) of the Constitution, unless otherwise proved guilty.

4. With regard to the averment by the Investigating Officer that the situation on the ground is hostile, it was submitted that the persons who are hostile to the 1st accused were not pinpointed.

5. As for the allegation of likely interference with witnesses, Counsel for the 1st accused stated that there is a Witness Protection Agency which can house the witness who is likely to be interfered with. He prayed for the release of the 1st accused person on reasonable bond terms.

6. Ms Chala for the 2nd accused person made reference to the affidavit filed by the Investigating Officer to oppose the release of her client on bond pending trial as well as to the pre-bail report filed by the Probation Officer. She stated that the two documents were inconsistent for the reason that the affidavit by the Investigating Officer states that the community is hostile but the pre-bail report states that there are no major threats on the ground. She submitted that the 2nd accused person is the husband to the 4th accused person and that the two used to live together in the same place yet the pre-bail report states that the 2nd accused person refused to give the particulars of his home. She prayed for the release of the 2nd accused on bond pending trial.

7. Mr. Adala for the 3rd accused person submitted that the pre-bail report was not in tandem with the affidavit filed by Sergeant Salim Juma, who in paragraph 8 states that the safety of the 3rd accused person cannot be guaranteed, but no better particulars were given on the same. Counsel for the 3rd accused stated that on the other hand, the Probation Officer recommended the release of the said accused person on bond pending trial.

8. Ms Ogweni relied entirely on the affidavits filed to oppose the release of the 1st, 2nd and 3rd accused persons on bond.

9. The 3 affidavits were sworn by No. 44573 Sergeant Salim Juma attached to the DCI Kaloleni, Kilifi County. I have perused the same. He deposes that 6 out of the 9 witnesses lined up to testify against the accused persons are their neighbours. He averred that there is a strong likelihood of the 3 accused persons interfering with prosecution witnesses once they are released on bond pending trial, as they will be living with the mentioned witnesses in the same neighbourhood.

10. The said affidavit further states that the presence of the accused person in the neighbourhood is enough to instill fear in the witnesses who might take flight to unknown locations leading to the Investigating Officer having the arduous task of tracing them to bring them to court.

11. The Investigating Officer also deposes in his affidavit that the ground is still volatile and the safety of the accused persons may not be guaranteed and that they may threaten witnesses and/or lead to witnesses giving skewed evidence in court. The affidavit further states that public interest demands that justice be not only done but be seen to be done to the victim and witnesses.

DETERMINATION

12. The purpose of a pre-bail report is to guide the court in arriving at a fair decision on whether or not to grant bond pending trial. The Trial Court has to consider all the facts that have been placed before it in making such a decision.

13. I have also perused the pre-bail assessment reports of the 3 accused persons. One of the claims that stands out is that they were unwilling to give information about their next of kin to facilitate the Probation Officer in interviewing them.

14. The Probation Officer was of the view that the accused persons were not a flight risk and were unlikely to interfere with the trial if released on bond. The common factor that runs in the 3 the pre-bail reports is that during the home visits made by the Probation Officer, tension and animosity was detected through various leaders and people who were interviewed. It is therefore apparent that the 3 accused persons' lives may be at risk if they are released on bond pending trial, as the family of the victim and community members are angry with them due to the death of the deceased.

15. In **Republic vs Nuseiba Mohammed Haji Osman** [2018] eKLR, the court stated as follows:-

“Denial of a Constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the Constitutional right to liberty must not be made on speculation or conjecture.”

16. Section 123A(1) of the Criminal Procedure Code provides as follows:-

“Subject to Article 49(1)(h) of the Constitution and notwithstanding Section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular –

(a) The nature and seriousness of the offence;

(b) The character, antecedents, associations and community ties of the accused person;

(c) The defendant's record in respect of the fulfillment of the obligations under previous grants of bail; and

(d) The strength of the evidence of having committed the offence”. (emphasis added).

17. Sub-section 2 of Section 123(A) outlines the exceptions that may lead to denial of an order for release of an accused person on bond pending trial. These are if the person arrested or charged -

“(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) Should be kept in custody for his own protection”

(emphasis added)

18. Bearing in mind the provisions of Article 49(1)(h) of the Constitution of Kenya, Section 123A(1)(b) of the Criminal Procedure Code and the reports of the Probation Officer, it is clear that the antecedents, character, associations and community ties of the 1st, 2nd and 3rd accused persons work against them. The pre-bail reports state that the area Assistant Chief and some neighbours interviewed indicate that the accused persons are people of negative influence in the community and are feared by the community members.

19. The reports further state that if they are released on bond pending trial, their presence is likely to bring fear to majority of the community members in the place they reside. Coupled with the fact that the situation in the community where the accused persons live is volatile and that they are not assured of their safety, I find that compelling reasons do exist to deny them bond pending trial. The applications for the 1st, 2nd and 3rd accused persons for their release on bond pending trial are therefore dismissed.

DELIVERED, DATED and SIGNED at MOMBASA on this 27th day of March, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mushelle for the 1st accused person and holding brief for Ms Chala for the 2nd accused person and Mr. Adala for the 3rd accused person

Ms Marindah, Prosecution Counsel for the respondent

Mr. Oliver Musundi - Court Assistant