



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

CRIMINAL CASE NO. 3 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

1. LUCAS NYANDIGA OJENGE

2. BEN OMONDI ODEGA

3. JOSEPH OGILO OJOWI

4. MARY SCHOLASTICA AUMA

5. JANE ANYANGO NYANDIGA.....ACCUSED

RULING

1. Arising from an attack and setting up on fire of a homestead in Kolouch village in Rongo Sub-Location, the police commenced investigations and eventually charged the accused persons herein with five counts of murder.

2. The accused persons denied the charges and pleas of not guilty were entered. The prosecution opposed the granting of bail to the accused persons and it was directed to file an Affidavit to that effect. The prosecution complied and **No. 82722 PC John Pilale** attached at the DCI Rongo swore the affidavit on 25/03/2019.

3. The case came up for the hearing of the bond application on 01/04/2019 where **Mr. Kisia** Counsel appeared for the first, third and fourth accused persons whereas the second and fifth accused persons were represented by **Mr. Marvin Odero**, Counsel.

4. The prosecution relied on the affidavit in opposition to the plea to grant bond to the accused persons. **Mr. Kimanthi**, Learned Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions raised several issues in his address. He contended that the offence occurred just less than one month ago and the situation on the ground was still very volatile such that if the accused persons are released on bond there were high chances of retaliatory attacks on them. He submitted that this Court has a duty to protect the lives of the accused persons and one way of doing it is to hold them in custody until such an appropriate time.

5. Counsel further submitted that the matter involved juvenile witnesses who escaped from the torched houses by the grace of God but had identified the attackers. That, such witnesses are vulnerable and are likely to be easily intimidated by the presence of the accused persons in the village. He proposed that it will be prudent that the juvenile witnesses do first testify before the accused persons are considered for bond. Counsel further called upon this Court to look at the gravity of the case and the circumstances under which the offences were committed as narrated in the Affidavit.

6. The application was opposed by the Defence Counsels. Mr. Kisia submitted that bail is a fundamental right to an accused person who is presumed innocent. That, under **Article 49(1)** of the **Constitution** the accused persons are entitled to be released on bond on reasonable terms unless there are compelling reasons to act otherwise. Counsel referred to the decision in **R. vs. Jackson Maunde & 4 Others Bungoma High Court Criminal Case No. 55 of 2009** on the threshold of a compelling reason.

7. In demonstrating that there were no compelling reasons to deny the right to bond, Counsel submitted that the Affidavit of John Pilale was based on beliefs and not on concrete facts and that there was no evidence backing such beliefs. He further submitted that even the allegation of interference with witnesses was a bare allegation and that the Country has a defined witness protection system in such cases. He further submitted that denying an accused person bail terms is tantamount to forcing that person to serve a sentence before one is found guilty which is an act in contravention of the Constitution.

8. **Mr. Marvin Odero** Counsel echoed and associated himself with the submissions by Mr. Kisia. He further restated that the accused

persons are presumed innocent unless proved guilty under the Constitution and that unless there are exceptional circumstances no one is to be denied bond. On the alleged witness interference, Counsel submitted that the Witness Protection Scheme in Kenya is working and that ought not to be a consideration in denying bond. On the alleged retaliatory attacks, Counsel submitted that this Country has in place very good laws and machinery to deal with lawlessness.

9. Counsel reminded this Court that the accused person had been in custody for one month and investigations were long completed. That, the accused persons were separately charged with arson in Migori Chief Magistrates Court Criminal Case No. 196 of 2019 and were granted bond of Kshs. 200,000/= and yet the witnesses are the same. He prayed that the accused persons be released on bond.

10. In a rejoinder, Mr. Kimanthi urged this Court not to lose track of its duty to protect all citizens especially in instances where life is at risk. He also submitted that there is an elaborate process on a witness to be admitted for protection under the Witness Protection Act and pursuing that option now will defeat the purpose of the application in this case. He also submitted that charges of arson were far less minor to the murder charges herein. He urged this Court to allow the accused persons to remain in remand until a further date.

11. It is on the foregone background that this Court is now called upon to render itself on the issue.

12. The foundation of bail and bond in Kenya is the **Constitution** and the **Criminal Procedure Code, Cap. 75** of the Laws of Kenya (hereinafter referred to as '**the CPC**'). **Article 49(1)(h)** of the **Constitution** states that: -

An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or a trial, unless there are compelling reasons not to be released.

13. **Section 123(A)** of the **CPC** sets out exceptions to the right to bail. It provides that: -

(1) 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 relevant circumstances and in particular -

- a) the nature of 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 fulfilment of obligations under previous grants of bail; and
- d) the strength of the evidence of his having committed the offence.

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person-

- a) has previously been granted bail and as 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.

14. From the onset I must state that the rationale behind the bail and bond in Kenya is premised on the constitutional imperative that an accused person is presumed innocent until the contrary is proved (**Article 50(2)(a)** of the **Constitution**). In such a case an accused person must be accorded an opportunity to attend the hearing of the case with such freedom as contemplated under the **Constitution** unless there are otherwise compelling reasons.

15. The **Constitution** does not define what '**compelling reasons**' are. Likewise, the **CPC** is silent. **Section 123(A)** of the **CPC** calls upon a Court dealing with an issue of bail and bond to consider all the circumstances of the case and that a Court ought not to be necessarily limited to the circumstances stated therein. The wording of **Section 123(A)** of the **CPC** (which was an amendment meant to align **the CPC** with the **Constitution**) seems to suggest instances where bail and bond can be denied. Those can therefore be said to be some of the examples of the compelling reasons contemplated under **Article 49(1)(h)** of the **Constitution**. But what does the term '**compelling reasons**' mean? The term has been used in other jurisdictions to mean '**exceptional circumstances**' or '**unusual and extraordinary circumstances**'. Having gone through various statutes, scholarly writings and decisions within and outside our jurisdiction, it appears that the term '**compelling reasons**' (or as the case may be) is not settled since what may amount to such a reason in one instance may not be so in another.

16. The terms '**compelling reasons**' or '**exceptional circumstances**' are hence subject to various opinions. The 10th Edition, Black's Law Dictionary defines '**extraordinary**' as "*beyond what is usual, customary, regular or common.*

" It also defines '**a circumstance**' as "*an accompanying or accessory fact, event or condition such as a piece of evidence that indicates the probability of an event*". The dictionary goes ahead to define "**extraordinary circumstance**" as "*a highly unusual set of facts that are not commonly associated with a particular thing or event.*"

17. In Kenya, Courts have as well dealt with the issue (See **Republic vs. Joktan Mayende & 3 Others (2012) eKLR**, **Mohamed Abdurrahman Said & Another vs. Republic (2012) eKLR**, **Wilson Thirimba vs. DPP (2012) eKLR**, among others). In the foregone decisions my Lordships and Ladyships reverted to the meaning of the word 'compelling' as defined in the *Concise Oxford Dictionary, 9th Edition* which is defined as '*rousing, strong, interest attention, conviction or admiration*'.

18. Admitting the challenge in the term ‘**exceptional circumstances**’, the Constitutional Court of South Africa in **Liesching and Others v S (CCT304/16) [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) (29 August 2018)** quoted with approval the definition in **S v Petersen 2008 (2) SACR 355 (C)** and had this to say;

Meaning of “exceptional circumstances”

[39] The phrase “exceptional circumstances” is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as “ordinary” in one case may be treated as “exceptional” in another. For instance, in Petersen a Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High Court) observed in relation to an application for bail under section 60(11) (a) of the Criminal Procedure Act:

“On the meaning and interpretation of ‘exceptional circumstances’ in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking ‘exceptional’ is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.”

19. Defining the term, the South African Court in **S v Bruintjies 2003 (2) SACR 575 (SCA)** said;

What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant fact.

... If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

18. In **S v Rudolph 2010 (1) SACR 262 (SCA)** at 266 g-h the court dealt with what exceptional circumstance are and reiterated that the Applicant in bail application must, on a balance of probability, demonstrate that “exceptional circumstances” in his or her case, indeed, do exist and that they “in the interests of justice permit his release”. This, according to the Court, involves the balancing “between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown by the accused to exist”.

19. In the case of **Antonio Jacobie Snyders –vs- The State (A455/2015) 2015 ZAGPPHC 618**, the High Court in South Africa dismissed an appeal against denial of bail on the basis of the fact that the community was up in arms as it found it necessary to voice its opinion regarding the conduct of the Appellant. The Appellant’s concessions relating to his safety meant that it would not be wise to release the Appellant on bail. Indeed, the Appellant conceded that the community would not accept him back with open arms and that there existed some enmity between him and the community.

20. Given the amorphous nature of the terms ‘**compelling reasons**’ or ‘**exceptional circumstances**’, a Court in dealing with a bail and bond application must ‘*consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release*’ and must also balance “between the liberty interests of the accused and the interests of which”, society in denying the accused bail, will be resolved in favour of the denial of bail, unless “exceptional circumstance” are shown....”. In Kenya those ‘compelling reasons’ or ‘exceptional circumstances’ must be demonstrated by the prosecution.

21. The prosecution in this case gave two reasons. The first one was that it is in the interest of the accused persons’ safety that they be held in remand and the second one was the likelihood of the accused persons interfering with some juvenile witnesses.

22. On the first ground, **Section 123A(2)(b) of the CPC** expressly makes it a compelling reason to deny bail if the Court is satisfied that the safety of the accused person will be at risk on release. The investigating officer alluded to the safety of the accused persons in his Affidavit. The officer gave the genesis of the case which borders on suspected acts of witchcraft between the family of the accused persons and that of the complainants. It was deponed that one of the members of the accused persons’ family (Hesbon Omondi Otieno) was charged and convicted of grievously harming a member of the family of the complainants (Joel Awuonda) and is now still serving a 12-year jail term. It was further deponed that Joel Awuonda’s condition deteriorated and his family members took him to the family of the accused persons to be cured. The act provoked the family of the accused persons who allegedly in a retaliatory attack burnt houses of and left five members of the family of the complainants dead as others narrowly escaped. The officer in particular deponed in paragraph 13 of his Affidavit that ‘...the suspects [accused persons] due to the gravity of the offence committed, their lives are in great danger for the villagers have vowed to avenge...’

23. While I remain alive to the fact that the accused persons have denied the five murder charges and are constitutionally presumed innocent, I note that the facts as deponed by the investigating officer were not rebutted by the accused persons on oath. In other words, none of the accused persons or their relatives swore an Affidavit(s) countering the allegations. It was on *inter alia* that ground this Court, on its own motion, called for a Pre-Sentence Report on each of the accused persons. The reports were subsequently availed.

24. I have carefully perused the reports which were prepared by one Charles F. Ombugu, a Probation Officer, on 11/04/2019. The reports in particular indicated that the members of the families of the deceased persons were not opposed to the release of the accused persons on bail. That was contrary to the position taken by the Learned Senior Principal Prosecution Counsel **Mr. Kimanthi** and the Investigating Officer in this case.

25. Be that as it may, I must state that I have been in this Station for about three and a half years now. I fairly understand how the public handle suspects in this region. Generally, where a person's life is lost as a result of an act or omission of another person then unless the suspect seeks immediate refuge with the police or disappears from the area, high are chances that he or she is likely to be attacked and as well be killed by members of public and his or her homestead torched and property destroyed. The situation is mostly aggravated when several persons lose their lives in a single incident. However, as time passes the situation relaxes and the possibility of revenge attack diminish. These are matters which this Court is properly enjoined to take judicial notice of under **Section 60 of the Evidence Act, Cap. 80** of the Laws of Kenya. In this case five members of the family of the complainants lost their lives in the attack.

26. I am therefore fully convinced and satisfied that the circumstances herein are not an exception to the general norm around this region. The incident that led to the loss of the lives of five members of the same family happened barely two months ago. The memories are still very fresh and the urge of possible revenge real. It is highly possible that the members of family of the complainants expressed no objection to the release of the accused persons as they are well aware of what is most likely to visit the accused persons once out on bond or bail. As rightly submitted by **Mr. Kimanthi** this Court is under a legal duty to not only admit the accused persons on bond or bail but to protect their lives as well and in appropriate cases deny such admission to bail or bond. I find this as a perfect case where I must exercise caution in balancing between protecting the lives of the accused persons and admitting them into bail or bond. To me, the unique circumstances of this case tilts the scales of justice in favour of protecting the sanctity of the lives of the accused persons.

27. While each case must be dealt with on its own merit, I must also quietly say that the incident in this case occurred around Rongo area within Rongo Sub-County of Migori County and this Court is currently handling a murder case where both the accused persons and the family of the deceased hailed from the said Rongo area and upon release of the accused persons on bail, within no time three of the released accused persons had died in most likely revenge attacks.

28. As to the possibility of witness interference, this Court has always taken an approach of quickly taking the evidence of the witnesses in issue whenever this Court is satisfied of **reasonable** allegations of possible witness interference. Had the prosecution relied on this sole ground in opposing the bond or bail, I would have quickly taken the evidence of the three juvenile witnesses before admitting the accused persons on bond or bail. The reason being that I am satisfied that although the threats are not visibly manifest, considering the age differences between the accused persons and the juvenile witnesses, the mere sight of the accused persons back into the village and given that the juvenile witnesses miraculously escaped death during the incident, that is enough to terrify and intimidate them from giving evidence freely. I would further direct that in view of the animosity between the two families the prosecution considers applying for the protection of the three juvenile witnesses with the Witness Protection Agency for their lives even beyond this case.

29. I therefore find and hold that the prosecution has demonstrated a compelling reason why the accused persons ought not to be admitted to bail or bond at this point in time and in line with **Section 123A(2)(b) of the CPC**. The application may be renewed later.

30. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 30th day of April 2019.

A. C. MRIMA

JUDGE

Ruling delivered in open Court and in the presence of:

Mr. Kisia, Counsel for the Second, Third and Fourth Accused persons.

Mr. Marvin Odero, Counsel for the First and Fifth Accused persons.

Mr. Kimanthi, Senior Principal Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the State.

Evelyne Nyauke – Court Assistant