



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 29 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

ERIC MUNGERA ISABWA *alias* CHAIRMAN.....1ST ACCUSED

RAPHAEL KIMANI GACHII *alias* KIM BUTCHER.....2ND ACCUSED

MUSTAFA KIMANI ANYONI *alias* MUSTO.....3RD ACCUSED

STEPHEN ASTIVA LIPOPO *alias* CHOKORE.....4TH ACCUSED

JANE WANJIRU KAMAU *alias* SHIRO.....5TH ACCUSED

MARGARET NJERI WACHIURI.....6TH ACCUSED

SIMON WAMBUGU GICHAMBA.....7TH ACCUSED

RULING

1. This is the third time the applicants have approached the court to be released on bond pending trial. By way of background the 2nd, 4th and 5th accused persons made applications to be released on bond which were determined by a ruling dated and delivered on 29th February 2016 by Justice Lagat Korir. The 1st, 3rd, 6th and 7th accused thereafter made similar applications before me and by a ruling dated 12th day of October 2017 I dismissed their applications and stated that the finding of fact by Justice Korir had not been reviewed and/or set aside and identified the following compelling reasons:-

a) The facts that their trial before the Magistrate's court has advanced and several witnesses have testified in the presence of the accused persons who now know the nature of their testimony and therefore there is real likelihood of the applicants interfering with them should they be released on bond.

b) The nature of the offence and the seriousness of the punishment likely to be meted out should the accused persons be found guilty raises the possibility of and incentives for the accused persons to abscond.

c) The fact that the other accused persons charged with the same offence together with the applicants before me have been denied bail taking into account similar circumstances of the commission of the offence.

d) The fact that the trial herein has now commenced before me and is likely to proceed to conclusion in the shortest time possible.

2. By an application dated 6th November 2018 and filed under Certificate of Urgency in court on 30th January 2019, the 6th accused person sought an order that the Honourable Court varies, reviews and or revises its order issued on 12/10/2017 denying her bail and consequently admit the same to bail on such terms it deems fit. It was grounded on the grounds that she was not aware of any compelling reasons to necessitate her denial of bond/bail as she is not in any way going to interfere with witnesses besides undertaking to abide by any bond terms set by the court.

3. The application was supported by her affidavit in which it was deponed that the trial had commenced and nine (9) witnesses had testified

with numerous witnesses remaining. It was deponed that a period of three (3) years having passed the trial could not be concluded within the shortest time as anticipated by the court taking into account the multiple accused persons in the case and the numerous witnesses. It was stated that none of the witnesses who had so far testified had expressed that she had either directly or indirectly attempted to reach or even eliminate them. The evidence of witnesses stated to be vulnerable had been secured.

4. It was deponed that whereas there was a pending trial before the Magistrate court, this court was called upon to make its determination on bond restricted to its own facts and merits. The presumption of innocence cannot be substituted with imputation of guilt solely because she was facing other charges before another court. It was stated further that court should not rely on witnesses' statement that had not been interrogated by way of cross-examination in line with her right to a fair hearing.

5. All the accused persons supported the said application by way of supporting affidavits. The 1st accused on 11/4/2019 filed a replying affidavit in which he deponed that the matter was now four (4) years old with only eleven (11) witnesses out of a possible forty four (44) having testified and therefore will take long time to conclude owing to trial logistics. He stated that he was not a flight risk and there was no evidence directly connecting him with the crime.

6. On behalf of the 2nd accused it was deponed that he was innocent and was determined to prove his innocence before the court with no intention to flee the jurisdiction of the court. He stated that his absence had affected the running of the family business and that so far fourteen (14) prosecution witnesses had testified out of over thirty (30) witnesses leaving only police officers to testify.

7. On behalf of the 3rd accused it was deponed that the matter will take long to conclude owing to trial logistics as the remaining and possible additional witnesses are called. It was contended that he was not a flight risk and his relatives were ready and willing to provide security for his attendance to court. The 4th accused deponed that he was the sole breadwinner to his wife and child and that vulnerable witnesses had testified. He stated that he undertook not to interfere with any of the remaining witnesses and that he had apprehension that he will continue being incarcerated for a long period in violation of his rights.

8. The 5th accused and the 7th accused person did not file any affidavit in support as was the State which relied upon their affidavit filed at the initial stage.

SUBMISSIONS

9. Mr. Ongaro made submissions on behalf of the 1st, 2nd, 3rd, 5th and 7th accused persons and stated that **Article 49 (1)(h)** applied to the accused persons. It was submitted that the cause was of 2015 with no indication as to when it would be concluded. He submitted that it was upon the State to show why the Accused should be denied their right to bail. Mr. Mathenge submitted on behalf of the 4th and 6th accused persons that in denying the accused bail, the court took into account the fact that the case would be concluded in the shortest time which was not the case going by the number of witnesses heard so far. It was submitted further that the circumstances under which Justice Korir denied the accused bail in 2015 had changed. It was submitted that the trial before the lower court was a separate trial.

10. On behalf of the State Mr. Naulikha submitted that the defence had not demonstrated any change of circumstances to enable the court review the order denying bail. It was submitted that the right to bail under **Article 49 (1)(h)** was not absolute and was limited under **Article 24**. It was submitted that the accused persons faces another charge before the Chief Magistrate Court where they had been denied bond for good reasons.

ANALYSIS AND DETERMINATION

11. The Supreme Court of India case of **MASROOR v STATE OF UTTAH PRADESH & ANOTHER [2009] 14 SCC 286** stated as follows:-

“13. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the Courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan, are quite apposite:

‘Liberty is to be secured through process of law, which is administered keeping in mind the interest of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution’.”

12. The above decision formed the basis upon which the court denied the accused persons bail. What the court now ought to consider and determine is whether there is a change in circumstances to enable it review the order denying the accused persons bond. Justice Muriithi in **REPUBLIC v DIANA SULEIMAN SAID & ANOTHER [2014] eKLR** had this to say on change of circumstances:-

“11. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful Applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail . . .

12. I find nothing in the provisions of Article 49(1)(h) of the Constitution or Section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49(h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail until and unless compelling reasons are demonstrated. If compelling reasons arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person is presented at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.”

13. At review stage the Applicant bears the burden to show cause on a balance of probability why the court order should be vacated, this can be established by showing either an error in principle in the order or material change in circumstances that would make it unjust not to vacate the order.

14. In this matter the only change in circumstances presented by all the accused persons is that the hearing and conclusion of this matter will take long taking into account the intended prosecution witnesses and the number of witnesses called and examined so far. Whereas it is true that the court has only heard the evidence of fifteen (15) prosecution witnesses, I am of the considered view that the accused interest and rights are protected under **Article 50(1)(e)** The right of speedy trial which provides that:-

50. (1) Every accused person has the right to a fair trial which includes the right -

(e) to have the trial begin and conclude without unreasonable delay.

15. Speedy trial means reasonably expeditious trial. The question which the court has to answer is whether the consequence of denial of this right means that an accused person who is in custody ought to be released on bond when court had found that there existed compelling reasons to deny bond which conditions have not changed or whether it means quashing of the charges/trial? I am not persuaded that the delay in concluding a trial in itself without more leads to release of an accused who has been denied bond from custody as the same still has an additional remedy to move the court appropriately on the charge should he consider the delay in determining the cause unreasonable, for enforcement of such right and this court when moved properly in discharging of its constitutional mandate has the power to give the necessary orders, which is not the case herein.

16. I am therefore not persuaded that the accused person, have demonstrated change in circumstances to enable the court review its order issued herein and therefore dismiss the application for review. The accused persons shall remain in custody pending the hearing and determination of this cause.

17. In view of the order herein and taking into account the number of witnesses to be called, I hereby order and directed that the cause be listed for hearing for a period of continuous seven (7) days so as to remedy the likelihood of violation of the accused constitutional right to speedy trial and it is so ordered.

Dated, delivered and signed at Nairobi this 30th day of May, 2019.

J. WAKIAGA

JUDGE

In the presence of:

Mr. Naulikha for the State

Mr. Ongaro for Wachira for the 1st accused person

Mr. Mathenge for Olando for the 2nd accused person

Mr. Ongaro for the 3rd accused person

Mr. Wakaba for the 4th accused person

Mr. Wakaba for Nyamongo for the 5th accused person

Mr. Mathenge for the 6th accused person

Mr. Wakaba for Nyamongo for the 7th accused person

Ms. Anyango for Khaminwa for the family

All the seven Accused persons present

