



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 26 OF 2019

REPUBLIC.....STATE/ RESPONDENT

VERSUS

ALBERT OMWENGA ONSARIGO.....ACCUSED/APPLICANT

RULING

1. An application dated 18/09/2019 has been filed on behalf of the accused herein **Albert Omwenga Onsarigo** seeking for the release of the accused on bail/bond pending the determination of the case. The application is supported by the affidavit of the accused herein sworn on even date and grounds on the face of the application. The Applicants' case is that he is a person of high moral standing and incapable of absconding his trial and will present himself in court as and when required to do so. It is his case that he will not in any way interfere with the prosecution witnesses. It is further the Applicant's case that he is presumed innocent until proved guilty and that the right to bail can only be curtailed where there are compelling reasons.

2. The Application is opposed by the prosecution. One of the Investigating Officers No.81155 Corporal Marigu Kaiga filed a replying affidavit sworn on 26/09/2019 in which he deponed *inter alia*: that the accused herein had been an Administration Police Officer attached to Ruai AP. Camp; that the accused is likely to interfere with crucial witnesses specifically those who were well known to him prior to the offence namely **Josephine Monyenye** and **Denis Ongera**; that the accused is trained and able to use firearms which raises legitimate anxiety and apprehension on the part of the victims and witnesses if he was to be released on bond pending trial; that there are compelling reasons for denial of bond pending trial.

3. This court called for pre-bail report. The same is dated 28/10/2019. The accused is reported to be a responsible person whose workmates are ready and willing to stand in as his sureties. His superiors at Ruai DC's Office gave a positive report about him as he had been entrusted with the armoury and that he is not a threat to anyone at both his work place and surrounding area. The local administration also gave a positive response in that the accused was known to relate well with community members. However, the family of the deceased is opposed to his being released on bond. One of the uncles to the deceased resides near the accused's work place and is apprehensive that the accused might harm him if he is released.

4. Learned Counsels made oral submissions. It was submitted for the defence that the accused having denied the charges is presumed innocent until proved guilty and is thus entitled to bail. Counsel relied on the Bail/Bond policy guidelines which provide factors for consideration before the court and indicated that the accused meets the criteria. Defence counsel further submitted that the witness protection Act should be used to take care of concerns raised by the deceased's family as witnesses can be put into the protection program. Further it was pointed out that the concerned witnesses have not sworn any affidavits.

5. Learned counsel for the Prosecution opposed the bail application and submitted that there are compelling reasons to justify refusal of bond. Counsel submitted that there is real likelihood that witnesses will be interfered with. It was pointed out that the accused was expected to be a protector but instead turned out as a tormentor using the power of firearm because of greed. Counsel delved into the circumstances leading to the death of the deceased and explained that the accused had demanded for a bribe of Kshs. 100/= from the deceased and on being denied shot him. He went on to add that prosecution is mostly concerned with the witnesses who are likely to be interfered with. Finally, counsel urged this court to reject the application and only grant it once the key witnesses will have testified.

6. I have considered the application and the rival affidavits plus the oral submissions. I have also considered the pre-bail report. The only issue for determination is whether the court can grant the bail/bond sought.

7. Article 49(1) (h) of the Constitution provides that an accused person is entitled to be released on bond pending a charge or trial unless there are compelling reasons not to be released on bond. Once the accused has denied a charge the presumption of innocence pursuant to Article 50 of the Constitution must take effect and hence forth the accused is presumed innocent until he is proved guilty at the end of the trial. The said presumption of innocence entitles the accused to be released on bond pending the trial. The prosecution now has the onerous task of presenting the compelling reasons that would justify a denial of bond. **In the case of Danson Ngunya [2010] eKLR** Justice

Makhandia (as he then was) held as follows:-

“If the state wants the accused deprived of his right to be released on bond, then it (state) must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.”

The investigating officer Cpl. Marigu Kaiga filed a replying affidavit in which he averred that the accused will interfere with witnesses some of whom include **Josephine Monyenye** and **Denis Ongera** and further added that the accused holds a position of influence and authority in society coupled by the fact that he is trained and can use firearms thereby raising legitimate anxiety and apprehension upon the victims and witnesses. However, I note that none of the persons named by the investigating officer have sworn affidavits detailing the manner in which the accused is likely to interfere or harm them if released on bond.

8. I have noted that the pre-bail report appears favourable to the release of accused on bond save only that the family of the deceased appear apprehensive. The primary consideration by this court regarding the bond application is whether the accused will avail himself to the court as and when required. The other relevant factors include nature of the charge, gravity of the punishment upon conviction, likelihood of interference with witnesses etc.

The only issue raised by the investigating officer is to do with witness interference and apprehension and safety of the deceased's family members. Even though learned counsel submitted that the accused's conduct during the incident might crop up and become a danger to the victim's family, I find that the accused being a police officer will not turn out to be a psychopath. Indeed the mental assessment report confirms that he is of good sound mental health. Hence I am not persuaded that the accused will become a danger to the witnesses. In any event the issue of security of witnesses and citizens as a whole rests upon the state to provide. The state is equipped with the necessary security apparatus including monopoly of violence should the need arise and will then be capable of neutralizing any such threats. To that extent, I find that threats if any emanating from the accused if released on bond would easily be contained. Besides the terms of bond are such as to put a leash on him together with his sureties with grave consequences in the event of non-compliance. Further, there is in force a witness protection programme in the country where vulnerable witnesses are taken care of during the pendency of the trial.

9. On the whole, I find that the prosecution has not presented compelling reasons to warrant a denial of bond pending trial. The case relied upon by prosecution's counsel namely **Machakos HCCR.No.34 of 2018 Republic-v-Alphonse Muthini** (unreported) is easily distinguishable from the present case in that the accused in that case was so much hated that the community burnt down his homestead as he was indeed a threat to the community and thus had no fixed place of abode and that no one was willing to come in as his surety. The accused herein has a fixed place of abode and even though interdicted will have to reside within the police lines (camp) where he will be monitored by his superiors as he undertakes the trial of his case. The pre-bail report is favourable.

10. In the result the application dated 18/09/2019 is allowed in the following terms:

a. The accused is hereby released on bond of Kshs.2 million plus two sureties of like sum.

b. The sureties to be approved by the Deputy Registrar of this court.

c. Upon release, the accused is directed to ensure he attends court on all dates without fail until the final determination of the case or until further orders.

d. In default to adhere to these conditions, the bond shall stand cancelled and he together with his sureties called to account.

It is so ordered.

Dated and delivered at Machakos this 31st day of October, 2019.

D. K. Kemei

Judge