REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL MISC. APPLICATION NO. 48 OF 2019

LAVENDER AKINYI.....1ST APPLICANT

VINCENT ODHIAMBO.....2ND APPLICANT

WILSON MUTUA KITHEKA.....3RD APPLICANT

STEPHEN NJANGIRU KURIA.....4TH APPLICANT

ELIZABETH AKINYI ABUTO.....5TH APPLICANT

QUINTER ADHIAMBO ONYINO.....6TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON BAIL

1. The six applicants have been charged before the Chief Magistrate's Court at Kajiado in **Criminal Case No. 704 of 2019**, **Republic versus Lavender Akinyi & 5 others** with the offences of robbery with violence contrary to section 295 as read with section 296(2) of the Penal Code and preparation to commit a felony contrary to section 308 of the Penal Code. The 4th applicant is also separately charged with the offence of handling suspected stolen property contrary to section 322(1)(2) of the Penal Code, while the 6th applicant is also separately charged with the offence of being in possession of an identity card belonging to another person contrary to section14(1)(4) of the Registration of Persons Act.

2. The offences were allegedly committed on 14th May 2019, 18th May 2019, and 19th May 2019 within both Nairobi and Kajiado Counties. The applicant pleaded not guilty before the Chief Magistrate's court and immediately applied for bail pending trial. The application was opposed by the prosecution. In a ruling delivered on 18th June, 2019, the trial court declined the applicants' application for bail prompting this application.

3. The applicants took out a motion on notice dated 1st August 2019 and filed in this court on 2nd August, 2019 seeking a review of the trial court's decision declining to release them on bail pending trial. The motion is based on the grounds on its face and the affidavit of the 1st applicant sworn on 1st August 2019; her supplementary affidavit and another affidavit by Vincent Odhiambo, the 2nd applicant.

4. They depose that the trial Magistrate misdirected herself by considering extraneous matters; that the court did not consider material facts placed before it including cross-examination of the investigating officer and that the court failed to consider binding authorities cited before it. They therefore assert that they were denied bail without basis; that they have families that are dependent on them and that there is no compelling reason not to release them on bail.

5. The respondent opposed the application through a replying affidavit by Sgt. Simon Kifani of DCI Kitengela, sworn on 22nd July 2019. I need to mention here that the applicants had earlier filed a motion dated 16th July, 2019 and filed in court on the same day seeking the same order of bail pending trial. That application was however withdrawn and the present motion filed. The affidavit of Sgt Kifani had been filed in response to that motion but the respondent retained it for purposes of the present application.

6. Sgt Kifani deposes that applicants have been linked with a series of cases of house breaking and stealing and robberies within Kitengela in Kajiado County and Kilimani in Nairobi County. He also deposes that the applicants have been captured on different CCTV footages at scenes of crime; that the police have been trailing them for some time and that after committing offences, they fly out of the county. He also states that the applicants are in some instances armed.

7. According to Sgt Kifani, assorted items were recovered from the applicants upon their arrest and that they have a number of cases pending in Kibera and Milimani law courts, similar to the one they are facing at the Chief Magistrate's court Kajiado. He states that the applicants operate in the company of foreigners and for that reason they may escape if released on bail. He also contends that the applicants may intimidate civilian witnesses if released and that while on bond, they have continued to commit offences thus breaching bond terms.

8. Mr. Swaka, learned counsel for the applicants moved the motion and urged this Court to review the orders of the trial Court declining to release the applicants on bail, and grant them bail on reasonable terms. Learned counsel faulted the trial court for declining to release the applicants on bail arguing that there were no compelling reasons to decline the application for bail.

9. According to counsel, although the trial court conceded that there was no evidence that the applicants were a flight risk, it still declined to grant them bail. He submitted that the applicants will not interfere with witnesses and that the trial court was in error to hold that the applicants will remain in custody until all civilian witnesses testify after which they could renew the application for bail.

10. Learned counsel argued that although the 1st applicant has cases pending at Kibera law courts, she has been released on bail in those cases and she had been dutifully attending court; that the 2nd, 3rd and 4th applicants have no other cases and that the 5th applicant has two cases and she has also been released on bail in those cases.

11. Counsel submitted that the 5th applicant is sickly and requires treatment; that all applicants are parents and have families to take care of and that being in custody denies them this responsibility. He argued that Article 49(1) (h) of the Constitution grants every person charged with a criminal offence the right to be released on bail on reasonable terms and, therefore, urged the court to release the applicants on bail.

12. Mr. Meroka learned Principal Prosecution Counsel opposed the application for release of the applicants on bail pending trial. He submitted that the application is premature in that the trial court directed that the applicants renew their application after all civilian witnesses had testified but instead they have decided to seek a review of that decision. According to counsel, the restriction under Article 49(1)(h) is a procedural condition that the trial court relied on.

13. He also argued that under the Bail and Bond policy page 25 paragraphs (d), (e), (f) and (i), it is in the interest of a trial to preserve evidence before admitting one to bail to avoid suppression of such evidence. He contended that the applicants have similar criminal cases pending in other courts and it is risk to release them on bail at this stage.

Determination

14. I have considered this application, the response and submissions by counsel to the parties. I have also considered the authorities relied on and perused the decision of the trial court, the subject of this application.

15. I must state from the outset that bail is a constitutional right and should only be denied where there are compelling reasons. In ***Republic v Godfrey Madegwa & 6 others*** [2016] eKLR, the court expressed this view thus:

> ***"[6] Bail pending trial is a constitutional right and the only limitation is when there are compelling reasons not to release the accused on bond or bail. The consideration when the court is considering whether or not to release an accused person on bond or bail is primarily, whether the accused will attend court at and during the trial. An accused person is required to be present during the hearing of his case and while granting bail the court should be satisfied that he will be present. That is to say the accused is not a flight risk, one who will get outside the jurisdiction of the court and therefore fail to honour his bond terms to attend court during trial."***

16. In ***Nganga v Republic*** [1985] KLR 45, the court stated:

> ***"[A]dmission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused, there are a number of matters to be considered. Even without the constitutional provisions...generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless there are substantial grounds…The primary purpose for bail is to secure the accused person's attendance to court to answer the charge at the specified time."***

17. The applicants denied the charges before the trial court and applied for bail, which was declined. After analyzing the fact of the charges and submissions by counsel for the parties, the learned Magistrate observed quite correctly, that:

> "***[T]he Court must seek to strike on balance between protecting liberty of the individual and safeguarding the proper administration of justice and that the fact of the seriousness of the offence or that it attracts a heavy penalties alone is not reason to deny bail***"

18. The learned Magistrate then referred to Bail and Bond Policy guidelines which deal with considerations to be taken into account in determining whether or not to release on bail and then stated:

> ***"In determining whether the prosecution has on a balance of probability proved compelling reasons, I take a wholestic*** (sic) ***view of some of the reasons put forth. That these are people who have pending criminal cases before other courts and in fact one of these cases warrants of arrest have been issued against them. They have been captured on CCTV footage in various occasions. It is in the public interest that the concern by the prosecution is taken into account as we prepare for hearing of this case.***

I will deny the accused persons bail until all the civilian witnesses testify when they may renew the application"

19. What is clear from the above statement is that the primary reason why the applicants were denied bail was because they had other cases; that in one case warrants of arrest had been issued against the applicants and that the applicants had been captured in CCTV footages at scenes of crime.

20. At page 2 of the ruling, the trial Magistrate however observed that the investigating officer had admitted in cross examination that he did not have names of complainants in the various occurrence books and that he did not have the CCTV footage or an inventory of the things the applicants had when they were arrested. The Court further observed that the investigating officer had admitted that the applicants had been released on bail in the other case.

21. It is therefore a fact that the trial court had no evidence placed before it to show that there were warrants of arrest and in which cases, against who and when such warrants were issued. There was also no evidence on whether or not the warrants related to all the applicants before court or only some of them. If the warrants were not against all the applicants that reason could not be used against all the applicants. The court could have isolated the applicant it considered not entitled to bail and deal with the application by the rest.

22. Most importantly, the learned Magistrate did not conclude as a fact, that the applicants would threaten witnesses as a basis for upholding the prosecution's contention. Although at the outset, the court clearly appreciated that bail can only be denied if the prosecution establishes compelling reasons there was no definitive determination that the prosecution had met this threshold.

23. A contention that the applicants would interfere with or threaten witnesses who will testify in the case during the hearing is serious. Such a possibility would inform the court's decision whether to grant bail or not. A threat to witnesses impacts negatively on the fair trial of the case and where this is shown to the satisfaction of the court to exist, the possibility of releasing an accused on bail may be minimized. Bail pending trial being a constitutional right should only be denied where the requirement set by the Constitution and supplemented by the Bond and Bail Policy has been met. That is; there must be compelling reasons and it is the duty of the prosecution to demonstrate to the court satisfactorily that there are compelling reasons not to grant bail.

24. In opposing the application, the learned prosecuting counsel alleged without proof, that the applicants are a flight risk. He also alleged that the applicants fly out of the country after committing crimes but tendered no evidence of such movement outside the country. The allegation that the applicants are a flight risk was not therefore proved. So was the claim that they will interfere with witnesses.

25. As was emphasized in ***Watoro v Republic*** [1991] KLR 220 ***"the paramount consideration in bail application is whether the Accused will turn up for his trial.*** In that regard, bail should not be denied as a matter of course since it is a serious issue of rights and fundamental freedoms.

26. Facts of the case, including whether the applicants would interfere with, threaten witnesses or abscond would amount to compelling reasons only if there is evidence to support such a contention. The learned Magistrate correctly cited the decision by ***Odunga, J*** in ***Grace Kanana Namulo v Republic*** [2019] eKLR for the proposition that in deciding what compelling reasons are, the court would consider any facts or circumstances brought to its attention by the prosecution which would convince it that release of the accused would not auger well for the trial at hand.

27. Whereas that is a sound proposition in law, the prosecution must demonstrate to a reasonable degree that this is the case. By merely stating that the applicants will interfere with witnesses or abscond, was neither proved before the trial court nor this court. The facts brought to the court's attention must be factual and capable of proof. It is not mere statements or allegations since compelling reasons have been accorded a constitutional standard.

28. Secondly, the prosecution simply stated that warrants of arrest had been issued against the applicants without satisfying the court against which applicant(s); in which cases; when they were issued and under what circumstances. Before this court counsel for the applicants countered that a warrant had been issued against only one person and that it had since been lifted and further that the criminal case at Milimani Law Courts had been withdrawn. Mr. Meroka neither disputed nor affirmed this fact.

29. The trial court denied the applicants bail stating that they should renew their application once all civilian witnesses had testified. I note that the court did not set timelines within which those witnesses were to testify. The prosecution did not even state how many civilian witnesses it would call to enable that court determine how long it would take before the applicants renewed their application for bail. Before this court the learned prosecution counsel was also unable to tell how many civilian witnesses they would call to testify against the applicants. He was also unable to confirm that indeed the applicants committed this offence after they had been released on bail in the other cases.

30. I have perused the trial court's record and noted that the hearing had not started by the time of hearing this application. I have also perused the charge sheet and noted that it names only 3 witnesses and that other would be stated. From the record, this court, just like the trial court, is unable to determine when the civilian witnesses will have testified to enable the applicants renew their application for bail.

31. Taking all these into account as well as the circumstances of this case, the argument by the prosecution that the present application is premature has no basis. The applicants challenged the trial court's decision because they did not agree with it. I also do not think it would be constitutionally acceptable to impose a blanket denial of bail on the basis that civilian witnesses must first testify without setting achievable timelines within which those witnesses should testify. That, in my respectful view, amounted to indefinite denial of bail to the applicant.

32. The applicants are presumed innocent until proved guilty. Similarly liberty of an individual should not be curtailed without compelling reasons as demanded by the Constitution. It was not in vain when ***Ibrahim, J*** (as he then was), observed in ***Republic v Danson Mgunya &***

another [2010] eKLR, that " ***liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law and it should not be taken for granted."***

33. From what I have stated above, it is clear that the reasons why the applicants were denied bail did not meet the constitutional thresh hold of compelling reasons.

34. Consequently and for the above reasons, the decision of the trial court dated 18th June, 2019 declining to grant the applicants bail pending trial is hereby reviewed and set aside. The application dated 1st August 2019 is allowed as follows;.

a) Each of the applicants is hereby released on a bond of Kshs 200, 000/= with one surety of a similar sum.

b) Applicants do attend court without fail whenever required until conclusion of their trial

Dated Signed and Delivered at Kajiado this 25th Day of October 2019.

E C MWITA

JUDGE