



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISCELLANEOUS CRIMINAL APPLICATION NUMBER 468 OF 2017.

ELPHALET YOUNEY MUGANZI.....APPLICANT.

VERSUS

REPUBLIC.....RESPONDENT.

RULING.

1. By Notice of Motion dated 28<sup>th</sup> July, 2017 prays to this court to review the bond of Kshs. 1,000,000/-, granted to him Chief Magistrate's Court at Kibera Criminal Case No. 65 of 2017, to preferably a bond of Kshs. 100,000/- with an alternative cash bail of Kshs. 10,000/- or free bond which he can afford. The application was supported by a supporting affidavit dated 28<sup>th</sup> July, 2017 in which he deponed that he cannot raise the amount the bond to secure his release as he comes from a poor background. Further, that he was a widower after his wife died of a heart attack while he was in custody and this had led to his children to suffer due to his continued detention. He swore that he was brought up by a single mother who is aging and also depending on him. That he was also aware that if his bond terms were more favourable he would continue attending court proceedings until the case was concluded. He urged the court in considering the application to be cognizant of the fact he was a responsible person with no foreign links which would compel him to jump bail and abscond the trial.

2. The application was canvassed before me on 16<sup>th</sup> May, 2018 with Mr. Gichuki acting for the Applicant while Ms. Kimiri represented the Respondent. Mr. Gichuki in addition to what the Applicant deposed urged the court to take into account that the weight of the evidence was too weak to warrant a conviction. He pointed to some inconsistencies in the prosecution witnesses' evidence. That the evidence so far on record did not meet the threshold of proof of the case. As such, the Applicant stood no chance of fleeing or absconding the trial. He also stated that the Applicant was arrested four months after the trial, a pointer that the prosecution had no evidence against him.

3. Ms. Kimiri submitted that the Applicant was charged in November, 2015 although the offence was committed in June, 2015. She stated that the delay was explained by the investigating officer who testified that they could not trace the Applicant at his former residence. She continued that taking into account the seriousness of the offence, the bond terms were reasonable; after all the Applicant had not been denied bond. Further that a surety was necessary so that it could be ascertained that the Applicant would attend court at all times. She prayed that the application be dismissed.

DETERMINATION.

4. In deliberating whether to grant the review this court called for the original lower court file wherein it stumbled upon a report of a complaint filed by Mrs. S.A, the complainant, vide O.B. No. 48/28/7/2016. Pursuant to the report the investigating officer, PC Otach wrote a report to the court persuading the court not to grant bond to the Applicant. PC. Othach in his report states that the complaint stems from pressure that was being applied on the complainant to withdraw the matter and a threat was passed to the complainant from the Applicant's mother through a church member. The officer states that he called the parties, the Applicant's mother and a church member and warned them against interfering with the dispensation of justice. That the pressure on the complainant had to do with the reputation of a church. That the members stated **"that they were organizing bail for the Applicant and they will deal with the complainant"**. He states that although the two backed down before him he suspected that the threat posed a danger to the life of the complainant. He stated that the Applicant had a previous accusation of a similar nature but that the complainant disappeared without the matter being taken to court due to threats and intimidation. The officer felt compelled to ask the court that the Applicant remain in custody under special order so that justice can be served fairly unlike in the previous case.

5. This report is a serious factor for consideration and calls into question the need for the court to protect victims under the Victim Protection Act, 2014; particularly in ensuring that they are not subjected to any victimization of any kind (Section 4(2)(l)) or secondary victimization(Section 4(2)(f)). The court is under a duty to ensure that victims are protected from any kind of intimidation as clearly set out in Section 10 of the Act.

6. In reaching a decision as to what kind of protection to accord a victim the court is guided by exterior sources which may be more privy to the circumstances in question, in this case, the investigating officer's report. When the report was produced in court the trial court only warned the Applicant. This was on 1<sup>st</sup> November, 2016.

7. It is the view of the court that a mere warning did not take the full regard of the content of the report. And it is clear that should the Applicant afford the bond, the threat to the life of the complainant abound. This court should then take appropriate measures for purposes of safeguarding the security of the witness.

8. I therefore suspend the bail terms granted to the Applicant by the trial court on 8<sup>th</sup> November, 2015. The learned trial magistrate shall have to hear the victim of the threats before readmitting him to bail on reasonable terms. The Applicant shall be at liberty to reapply thereafter. This ruling shall be served upon the learned trial magistrate for compliance. The Application is accordingly dismissed with no orders as to

COSTS.

**DATED and DELIVERED this 31<sup>st</sup> day of May, 2018.**

**G.W. NGENYE-MACHARIA**

**JUDGE**

***In the presence of:***

1. *Mr. Gichuki for the Applicant*
2. *Miss Sigei for the Respondents.*