



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO

MISC CRIMINAL APPL. NO.4 OF 2017

REPUBLIC.....PROSECUTOR

VRS

JOSEAH NGENO & MATHEW LANGAT (*alias* KIBET).....ACCUSED

RULING

1. The applicants were charged with the offence of malicious damage to property contrary to section 339 of the Penal Code, and assault contrary to section 251 of the Penal Code. They were charged before the Senior Resident Magistrate in Kericho in Criminal Case No.148 of 2017. They applied to be released on bail, but upon hearing the investigating officer on oath, the trial court declined to release them on bail and directed that the applicants be held in custody until 30th March 2017 when the court would review the matter. The applicants then filed the present application.

2. In their application dated 22nd March 2017, the applicants seek the following substantive orders:

1.

2. *That this Honourable Court be pleased to call for the record of proceedings in Kericho Criminal Case No.148 of 2017 for the purpose of reviewing the correctness, legality and/or propriety of the findings in the ruling delivered on the 15th day of March 2017 by the learned trial magistrate Hon. C. K. Mungania (SRM).*

3. *That this Honourable Court does give such reasonable bail/bond terms as it may deem fit given that the offence alleged to have been committed is bailable.*

...

3. The applicants allege that the trial magistrate misdirected herself by denying them bail on the grounds that the police were still conducting investigations and would be arraigning other suspects who were allegedly involved in the crime with which the accused are charged; that she usurped the rights of the under Article 49 of the Constitution by denying them bail, that she erred in law and fact in totally relying on the testimony of the police without giving a chance to the accused person to be heard, and in concluding that the atmosphere on the ground was tense without ascertaining the truth and before hearing the accused person.

4. The application was supported by an affidavit sworn on 22nd March 2017 by their Counsel, Mrs. Alice

Chepngetich Bett. Mrs. Bett avers that the accused were charged with the offence of malicious damage to property and entered a plea of not guilty when they were presented in court on 15th March 2017. They sought to be released on bail but the DCIO Kericho Police Station swore an affidavit dated 15th March 2017 indicating that the ground was hostile, that the police were still conducting investigations and intended to charge other suspects in relation to the same matter. The trial court then ruled that there were compelling reasons to deny the accused persons bond/bail, and she therefore directed that the accused be remanded at the G. K. Prison in Kericho pending an anticipated report from the police.

5. It is her deposition that the denial of bail on such grounds as were relied on in this case is a total contravention of the applicant's constitutional rights, arising as it does from speculation and apprehensions not supported by evidence.

6. The application, which was opposed by the state, was argued on the 30th of March 2017.

7. In his submissions, learned counsel, Mr. Mwitia, reiterated the prayers sought in the application and the averments in the affidavit sworn by Mrs. Bett. He submitted that the accused persons, who have denied the charges against them, have been denied their constitutional right to be granted bond or bail on grounds that cannot be substantiated. Further, that the trial magistrate erred in wholly depending on the affidavit of the DCIO, Kericho that there was hostility on the ground. His submission was that the ground of hostility cannot be used as a basis for denying the accused bail. He placed reliance for this proposition on the decision in **Titus Kimathi Murea & another vs R** in which the court, faced with a similar situation as is currently before the court, emphasized the guiding principles with respect to the grant of bail set out in the case of **Ng'ang'a vs R (1985) KLR 495**.

8. According to Mr. Mwitia, one of the grounds to be considered was whether the accused person will turn up for his trial. His submission was that from the social inquiry report filed in court, the accused were law abiding citizens who have never been charged with any offence and have fixed abodes. They would therefore attend trial. It was further submitted that the hostility on the ground was due to the fact that the accused persons are in custody.

9. Counsel further submitted that the charge the accused were facing, which is the second consideration in determining whether or not to grant bail, is not a serious charge to warrant their being denied bail. Finally, Counsel submitted that the character and antecedent of the accused persons were a factor to be taken into consideration. The accused persons had never even been questioned on any wrong doing, and their families and community were willing to accept them back should they be granted bail.

10. With respect to the contention by the state that the accused should be held in custody for their own security, the applicants submit that the security of the accused is guaranteed as the situation on the ground calls for their release. Mr. Mwitia cited the decisions in **R. vs Milton Bosire Oburi 2014) KLR**, in which the court cited the decision of Makhandia J in **R. vs David Nyasira Nyanuko Cr. Case No.50 of 2010** for the proposition that the court must bear in mind the principle purposes for grant of bail, which is to reinforce the cardinal principle of criminal law that an accused person is presumed innocent until proven guilty. He urged the court to grant the applicants' prayer to be released on favourable bond terms pending appeal.

11. The application was opposed by the state. Ms. Keli submitted that the application is premature as the court, in denying the applicants bail on 15th March 2017 on the basis that the ground is hostile and it was therefore not safe to release the accused on bail, had fixed the matter for mention on 30th March 2017 to review the bail terms. The applicants had however, filed the present application alleging that they had been denied bail. The state's position was that the lower court had not denied the applicants bail as it had stated that it would review the bail terms.

12. With respect to the application at hand, Counsel submitted that under Article 49 (1) (h), the accused persons have a constitutional right to bail unless there are compelling reasons for them not to be released on bail. According to the state, the compelling reason was that the ground was hostile, a fact deposed to

by the investigating officer. That according to the deposition of the investigating officer, after the arrest of the applicants in this case, there was a series of violent acts in which a sugar cane farm belonging to the complainant, measuring 50 acres and worth 20 million, had been burned, and the house of the Assistant Chief, Chelele sub-location and the Chief, Kapkuch Location, were also set ablaze. Ms. Keli's submission was that the situation on the ground is still very hostile, and the lives of the accused are at risk if they are released.

13. While conceding that the purpose of granting bail or bond is to ensure that the accused persons turn up for trial, the state submitted that the security of the accused if released on bail is not guaranteed, and there is therefore no guarantee that they will turn up for trial. While further conceding that it is the duty of the state to ensure security for all its citizens, Counsel submitted that it is in the interests of the accused that they stay in custody for their safety until the situation calms down.

14. Ms. Keli submitted that the accused are presumed innocent unless proven guilty, and that they should be granted bail unless there are compelling reasons for the denial of bail. However, the issue of their security was a compelling reason why they should not be granted bail: that there was hostility on the ground considering the charges facing the accused, which included the torching of a motor vehicle, two homesteads, a 50 acre sugar cane farm, and several counts of assault. All these, according to the state, are properties that people have invested in. Further, that there were people who have been assaulted and to avoid further crime and public disorder, it was safer for the accused to stay in custody until the situation calms down. The state cited several authorities for the proposition that hostility on the ground towards an accused person constitutes compelling reason not to grant an accused person bail. Ms. Keli therefore asked the court to dismiss the application.

15. In his response, Mr. Mwita observed, with respect to the issue of security on the ground, that the burden of proving volatility on the ground is on the state. However, the state had not placed any evidence before the court to show that the volatility on the ground is as a result of the alleged offences by the accused. Further, in reliance on **Kisii Criminal Murder (sic) No. 49 of 2013-Republic vs Erick Masega alias Madiaba** in which the court held that hostility on the ground cannot be a peculiar reason for denial of bond, the applicants asked the court to disregard the state's position, consider the social inquiry report which notes that there is hostility on the ground due to the incarceration of the accused, and allow the application

Determination

16. I have considered the application and the respective submissions of the parties with respect thereto. I have also read the record of the lower court. I note that indeed, as submitted by Counsel for the state, the trial court indicated on 15th March 2017 that the request for bond by the accused persons had been temporarily withheld until the DCIO Kipkelion had confirmed that the other six suspects had been arrested, and whether the situation on the ground had been maintained. The matter was then set for mention on 30th March, 2017, when this application was heard before me. That is now water under the bridge.

17. It is undisputed that under the Constitution, an accused person is entitled to bail pending trial. This is expressly guaranteed under Article 49(1) (h). An accused person can only be denied bail if there are compelling reasons, to be advanced by the state, why the accused person should not be released on bail.

18. As I understand the state's case to be, the situation on the ground in Chelele sub-location, Kapkwen location within Kipkelion district of Kericho county (where the offence with which the accused are charged was allegedly committed) is volatile, and that there is hostility on the ground. The state's position is that the security of the accused is not guaranteed, and consequently, it is not guaranteed that they will turn up for trial. It is also the state's position, as emerges from the proceedings before the trial court on 15th March 2017, that the state is yet to arrest some other six suspects, and the accused should therefore be denied bail until the other six have been arrested.

19. The position of the applicants is that they are entitled to bail, that hostility on the ground is not a

reason to deny them bail, nor is the fact that the state still has to arrest other persons suspected of the same offence as the accused a basis for denying them bail.

20. The starting point in a matter such as this is the constitutional guarantee to bail under Article 49. Unless I am satisfied that the state has compelling reasons why the accused in this case should not be released on bail, then I am under a constitutional duty to safeguard that right and grant them bail or bond on reasonable terms. The question I must therefore ask is whether the state has placed before me reasons that are compelling enough to displace the accused persons' right under Article 49.

21. A "compelling reason" has been defined as ***"such a reason that is forcefully convincing to persuade this court to believe that something is true"***. – See **R vs Mohammed Hagar Abdirahiman & Another [2012] eKLR**.

22. In **Bungoma High Court Criminal Case No.55 of 2009 R vs Joktan Mayende & 3 Others**, the Court stated as follows:

"...the phrase 'compelling reasons' would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution."

23. I have considered the authorities relied on by the parties in this matter. In **Republic vs Milton Oburi Bosire Kisii High Court Criminal Case No. 101 of 2013**, the court, after considering the report filed by the probation officer in the matter, found that there was no justification for the allegation that the applicant's community was hostile against him. Further, it took the view that the responsibility was on the state to prove that compelling reasons existed for the accused person not to be released on bail or bond. In the said decision, the court relied on the decision of the High Court in **Ng'ang'a vs Republic (1985) KLR 451** in which the guiding principles on the grant of bail were set out. These are whether the accused person will turn up for trial, the seriousness of the charge, the character and antecedents of the accused, and whether the security of the accused will be guaranteed if released.

24. In **Meru Criminal Case No. 55 of 2011-Republic vs Moses Mbaabu & Others** relied on by the state, the court considered the pre-bail report and noted, among other things, that the likelihood of the applicants re-offending while on bail were high, that they were involved in questionable activities of a criminal character, and that even their own families did not recommend their release on bail and had made it clear that they would not avail themselves to stand surety for the accused.

25. In **Eldoret Criminal Case No. 43 of 2015-Alex Kipchirchir vs Republic**, the High Court declined to release the applicant on bail for his own safety. It noted that the accused had been charged with the murder of his stepbrother, and that the community was hostile and his safety was not guaranteed.

26. Finally, the state relied on the decision in **Republic vs Erick Masega alias Madiaba** (supra). As in the present case, the state opposed the release of the accused, who had been charged with murder, on bond on the basis that the ground was hostile and his safety was not guaranteed. The accused in that case had been charged with the murder of his own father, and the environment at home and in the community was hostile. The family was also reluctant to have him back home, and nobody was willing to stand surety for him. In the circumstances, the court found that an order for release of the accused on bail would be an order in vain.

27. In the present circumstances, it is apparent that the two accused persons are not known to have committed any criminal offence prior to the present charge. The hostility in the community and the destruction of farms appears to have arisen following the arrest of the accused persons. Their families are willing to welcome them home, and there is nothing before me that suggests that their security is at risk.

28. In the circumstances, I am not satisfied that there is a compelling reason for denying the applicants bail. Accordingly, I direct that the accused persons be released on a bond of Kshs.300,000 each together

with a surety of a similar amount.

Dated, Delivered and Signed at Kericho this 12th day of April 2017.

MUMBI NGUGI

JUDGE