



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO. 96 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

CHARLES SURVEY MANINI.....1ST ACCUSED

RICHARD OMBUI MANINI.....2ND ACCUSED

GILBERT MAKORI MINYONGA.....3RD ACCUSED

JOSEPH MANDEL MANINI.....4TH ACCUSED

SAMUEL KAMWANA MORENA.....5TH ACCUSED

RULING

1. Through an oral application made by Miss Mbelete, counsel for the state on 19th September 2017, the prosecution (applicant) herein seeks orders that the bond granted to the 1st accused herein be cancelled on the grounds that the 1st accused has been interfering with witnesses who had, as a result, declined and/or become reluctant to attend court to testify every time the matter was listed for hearing despite numerous summons being issued to them. She relied on the affidavit of the investigating officer, one PC Damaris Ngina, sworn on 19th September 2017 wherein she avers that she had received information from key witnesses namely; Jared Ambrose Opopo and Patrick Mayanga Kirera to the effect that the 1st accused had been contacting them and bribing them every time the case comes up for hearing so as to induce them not to turn up in court to testify.

2. The investigating officer further states that the said key witnesses had informed her that the 1st accused would facilitate their relocation to Kisumu County every time the case comes up for hearing so as to prevent them from being summoned to attend court to testify and that in fact, as at the time that the case came up for hearing on 19th September 2017 the said Jared Opopo had already relocated to Kisumu at the 1st accused's prompting while Patrick Mayanga had declined to relocate.

3. In his sworn affidavit dated 20th September 2017 in response to the application, the 1st accused denied all the allegations made by the investigating officer and specifically denied bribing or facilitating the witnesses to leave the court's jurisdiction.

4. In his oral response to the application, Mr. Sagwe advocate for the 1st accused opposed the application while arguing that the investigating officer had not tendered any evidence in support of the allegations of

bribery and facilitation. According to Mr. Sagwe, the officer's affidavit consisted of mere words and allegations not backed by any tangible evidence.

5. On the request of Mr. Sagwe, the court directed that the said investigating officer P.C.Ngina, who was at the time present in court, be cross examined by Mr. Sagwe to confirm the averments contained in her said affidavit. On cross-examination, the investigating officer repeated the contents of her affidavit dated 19th September 2017 under oath and added that even though she did not witness the 1st accused offering bribes to the witnesses, she had reason to believe the information that the witnesses had relayed to her because the said witnesses came to her on their own volition to explain to her why they had not been attending court despite numerous summons. She added that one witness, Patrick Mayanga, was present in court and was ready to confirm that he had made the complaint of attempted bribery by the 1st accused to her.

6. I have considered the application made by the prosecution, the affidavits filed by both parties, the submissions by counsel and the oral evidence presented in court by the investigating officer herein. The issue for determination is whether the prosecution has proved, on a balance of probabilities, that there are compelling reasons to warrant this court's exercise of its discretion against the 1st accused by denying him his constitutional right to bond as guaranteed by **Article 49 (1) (h) of the Constitution**.

7. This court is of the humble view that contrary to the defence counsel's argument that P.C Ngina's affidavit consisted of mere words, the said averments cannot be dismissed as empty words or rumors because they were words uttered on oath and which were tested on cross examination in the said affidavit were not mere assertions since the said affidavit was sworn on oath and the investigating officer accepted to testify on oath, in court when called upon to do so. My take is that an investigating officer is a neutral party in these proceedings whose duty is to avail witnesses in court where she is also expected to testify on her role during the investigation. It is against this backdrop that I find that is most unlikely that the said officer could swear a false affidavit in court in a matter in which she has nothing to gain or lose. My own observation of the demeanor of the investigating officer, when she appeared in court for cross examination, was that she was candid, consistent and appeared committed to her duties. Her affidavit and testimony was convincing and I am persuaded to believe that indeed the 1st accused has been interfering with the said key witnesses going by the claim that he has been organizing for their travels and accommodation in Kisumu every time the case comes up only for them to resurface after the hearing date.

8. My findings on the issue of witness interference is further bolstered by the fact that this is not the first time that the prosecution is making an application for the cancellation of the accused person's bond on the grounds of witness interference. A perusal of the court file shows that a similar application was made by prosecution on 20th January, 2016 when Mr. Otieno, then the state counsel on record, informed the court of the mysterious death of one of the key prosecution witnesses under circumstances that were strongly suspected to be related to his being a potential key witness in this case. Later on in the proceedings of this case, this court on 25th May, 2016 rejected an application for bond made by the 3rd, 4th and 5th accused following vehement objection to their application for bond from the prosecution on grounds of witness tampering that was backed by a sworn affidavit of one P.C. Fred Okoth who was then the investigating officer.

9. From the above foregoing history of this case, it is abundantly clear to me that the issue of interference with witnesses is not a new matter in this case but has arisen time and again in which case the various and different investigating officers have sworn and filed affidavits before this court to seek court's intervention over the same. It is in this regard that I find that the issue of interference with witnesses is a serious matter that this court can no longer turn a blind eye to. In this respect, the court takes this opportunity to advise the prosecution to submit their witnesses to the witness protection program, if possible, in order to preserve their lives.

10. In the case of **Republic vs. Danson Mgunza & Another [2010] eKLR**, it was observed that;

“Liberty is precious and no one's liberty should be denied without lawful reasons and in

accordance with the law. Liberty should not be taken for granted.”

11. In the instant case, it is apparent to me that the 1st accused has taken the liberty granted to him by this court for granted, despite the fact that he is facing a capital charge of murder, by repeatedly interfering with witnesses in a bid to stop them from testifying in court.

12. Accordingly, this court finds and determines that the application for review of the bond granted to the 1st accused on 22nd May 2015 is merited. Consequently, the said bond is hereby cancelled with the result that the 1st accused will remain in custody pending the hearing and determination of his case. As a rider, this court sends a stern warning and reminder to the rest of the accused persons that this court will not hesitate to review and/or cancel their bonds should sufficient evidence of witness tampering be presented to this court.

13. I further direct that the case be set down for hearing on priority basis and the prosecution is urged to line up all their witnesses in this case for priority hearing.

14. It is so ordered.

Delivered, dated and signed in at Kisii on 21st of September 2017.

W.A. OKWANY

JUDGE

In the presence of:

- Miss Mbelete for the State
- Mr. Ondari for the Accused
- Omwoyo Court Clerk