



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 29 OF 2015

ERIC MUNGERA ISABWA ALIAS CHAIRMAN.....1ST ACCUSED

RAPHAEL KIMANI GACHII ALIAS KIM BUTCHER.....2ND ACCUSED/ APPLICANT

MUSTAFA KIMANI ANYONI ALIAS MUSTO.....3RD ACCUSED

SEPHEN ASIVA LIPOPO ALIAS CHOKORE.....4TH ACCUSED/APPLICANT

JANE WANJIRU KAMAU ALIAS SHIRO.....5TH ACCUSED/APPLICANT

MARGARET NJERI WACHIURI.....6TH ACCUSED

SIMON WAMBUGU GICHAMBA.....7TH ACCUSED

VERSUS

REPUBLICRESPONDENT

RULING

1. The seven accused persons in this case are facing four counts of murder contrary to section 203 as read with section 204 of the Penal code. In count one they are alleged to have jointly murdered Hon. George Mukuru Muchai on the night of 6th/7th February 2015 along Kenyatta Avenue within Nairobi County. In count 2,3 and 4, they are jointly charged with the murder of PC Samuel Kimathi Kailikia, PC Samuel Lekakeny Matanta and Stephen Ituu Wambugu respectively. All accused persons took plea on 19th March 2015 and denied the charges. They were remanded in custody.
2. On 11th June 2015 the 4th accused Stephen Astiva Lipapo *alias* Chokore filed his application through **Mutitu Thiongo & Co. Advocates**. On 10th July 2015, the 5th accused Jane Wanjiru Kamau *alias* Shiro filed her application through the firm of **E.B. Nyamongo & Co. Advocates**. The 2nd accused Raphael Kimani Gachii filed his application on 16th June 2015 through the firm of **Olando Odolo & Okello Advocates**.
3. **Cpl. Moses Otiu** one of the investigating officers filed a replying affidavit on 15th July 2015 opposing the application of the 4th accused. He subsequently filed another affidavit on 21st October 2015 opposing the release on bail of all 7 accused persons. His opposition is that the accused persons were involved in capital offences namely robbery with violence and murder and were likely to evade trial if released. Further his averments relate to fears that the accused if released may interfere with, intimidate or even eliminate witnesses in the case.
4. The court consolidated the 3 applications for hearing. This ruling therefore is in respect of the

applications filed by the 2nd, 4th and 5th accused only. This is because although the investigating officer filed an affidavit opposing bail for all 7 accused persons, there were no applications filed and prosecuted before me in respect of the 1st, 3rd, 6th & 7th accused persons as at the time of hearing.

5. In summary, all 3 applications are premised on the following grounds
 - i. The accused's constitutional right to bail
 - ii. Their right to the constitutional guarantee to be presumed innocent until proved guilty.
 - iii. The threat posed by incarceration to their livelihood and those of their families.
 - iv. An undertaking not to interfere with witnesses and to attend trial.
6. The grounds upon which the State opposes bail for the accused persons are as follows:
 - i. That the accused were likely to interfere with, intimidate, harass or even eliminate the key prosecution witnesses.
 - ii. That the accused were likely to abscond trial owing to their knowledge of the strong evidence against them.
 - iii. That the accused were facing multiple capital charges and if released would abscond trial to avoid the possible death penalty; and
 - iv. That the accused were a danger to the community.

All the averments in the 46 paragraph replying affidavit can be subsumed in the 4 grounds listed above. I will therefore consider the applications under the four grounds, the relevant constitutional guarantees and the principles governing such applications.

The law and practice

7. The Constitutional basis of the applications is not contested. The applicants have asserted their right under Article 49(i) h of the Constitution. The State acknowledges this right both in the Replying affidavit of **Cpl. Moses Otiu** and the submissions of **Mr. Kemo** the learned prosecution counsel. The State however argues that the right is not absolute and that there were compelling reasons for the court to deny the applicants bail.
8. Other than **Article 49**, the applicants cite **Article 50 of the Constitution** which underscores the right of an accused to be presumed innocent until proved guilty. They argue that pre-trial custody works against this right and that the evidence relied on by the prosecution were mere allegations yet to be proved at trial. The prosecution on the other hand invites the court to look at the nature of the evidence available as constituting sufficient compelling grounds to deny the applicants bail.
9. As stated above, the right to bail under the Constitution is specifically provided for under Article 49(i) h. For clarity it states "*An arrested person has the right...to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released.*" The wording of the Constitution shows that while an accused has a right to bail, such right is not absolute but is circumscribed by the existence of compelling reasons. See **R. V. Ahmad Abolafathi Mohammed & Sayed Mansor Mousavi Nairobi Criminal Revision No. 373 of 2012**. It is now settled in our jurisprudence that the duty of demonstrating the compelling reasons rests with the State. See **Republic Vs. Danson Mgunya & another [2010] eKLR**.
10. The question as to what can be considered compelling reasons under the Constitution has often featured in bail applications. It is instructive that the Constitution left the determination of what amounts to compelling reasons to the discretion of the court aforesaid. Courts have however time and again fallen back on the criteria used traditionally to deny or grant bail. In the Mgunya case cited above, Ibrahim J (as he then was) cited the Nigeria Supreme Court decision in **Alhaji Mujahid "Dukulo –Asari Vs. Federal Republic of Nigeria S.C. 20A/2006** which lists the following criteria.
 - i. *The nature of the charges*
 - ii. *The strength of the evidence which supports the charges*
 - iii. *The gravity of the punishment in the event of conviction*
 - iv. *The previous criminal record of the accused if any*
 - v. *The probability that the accused may not surrender himself for trial*

- vi. *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him*
- vii. *The likelihood of further charges being brought against the accused*
- viii. *The probability of guilt*
- ix. *Detention for the protection of the accused*
- x. *The necessary to procure medical or social report pending final disposal of the case.*

11. The Supreme Court of India in **Sanjay Chandra V. CBI [2011] NSC 1149** summarized their criteria in the following words:-

“The overriding considerations in granting bail are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of jeopardizing his own life being faced with a grim prospect of possible conviction in the case; or tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds which, in my view of so many valuable facts, cannot be exhaustively set out.”

12. In **Republic V. Ahmad Abolafathi Mohammad and Sayed Mansour Mousari** cited above Achode J, while deciding on the issue of public interest deferred to the South African Criminal Procedure Act which sets out clearly circumstances under which it would not be in the interest of justice to grant an accused bail. These are that the accused person, if released on bail would:-

- a. Endanger the safety of the public, or any person, or will commit a certain specified offence;
- b. Attempt to evade trial;
- b. .Attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- c. Undermine or jeopardise the objectives or the proper functioning of the criminal justice system, or,
- d. Where in exceptional circumstances, there is the likelihood that the release of the accused would disturb the public order or undermine public peace or security.

13. The Bail and Bond Policy Guidelines published in March 2015 by the National Council on the Administration of Justice, Kenya lists the following factors as some of the considerations in bail/bond evaluation:-

- a. *The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.*
- b. *The strength of the prosecution case.*
- c. *Character and antecedents of the accused person*
- d. *The failure of the accused person to observe bail or bond terms*
- e. *Likelihood of interfering with witnesses.*
- f. *The need to protect the victim or victims of the crime*
- g. *The relationship between the accused person and potential witnesses*
- h. *Child offenders*
- i. *The accused person is a flight risk*
- j. *Whether accused person is gainfully employed*
- k. *Public order, peace or security*
- l. *Protection of the accused person*

14. From the above, it is apparent that various jurisdictions apply more or less the same criteria or considerations. What is key is the judicious exercise of judicial discretion and that each case is decided on its own peculiar facts and circumstances. See **Watoro Vs Republic (1991) KLR 220**. It is important that Judicial discretion in bail/bond applications is exercised judiciously particularly because it is an issue that touches on an accused person’s fundamental right to liberty. The court as a state organ, is enjoined to interpret the Constitution in a manner that promotes fundamental rights. As aptly stated by Ibrahim J (as he then was) in the **Mgunya** case cited above, “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.”
15. With the above elucidation of the applicable law and principles I now proceed to examine the reasons presented by the State in objecting to the release of the 3 applicants from custody.

Likelihood of the accused interfering with witnesses

16. The first ground raised by the State was that the accused know the key witnesses and were likely to interfere with them. This ground is deponed upon by the investigating officer and emphasized by Mr. Kemo counsel for the respondent in his submissions. Both state that the witnesses D2, D3 and D15 were likely to be intimidated if the accused were released on bail. Further the investigating officer has annexed the statement of D15 one Morris Njuguna Waruiru in which he states that one of the accused persons specifically warned him not to report anything he had seen or heard and that he would be killed in two days if he spoke about it. The defence on the other hand strongly opposes this ground. They state that there was no demonstration that any of the accused had threatened, intimidated or interfered with witnesses. I have keenly considered the opposing averments and submissions.
17. In considering this ground, this court is well aware that it must carefully weigh the facts in the case to satisfy itself that the stated fear is real and demonstrated and not merely speculative. As stated in the celebrated case of **Jaffer V. Republic 1973 EA 39**, the court cannot be called upon to speculate. In this case the 3 key witnesses of the prosecution are said to have experienced robbery at the hands of the accused. The same witnesses went ahead to identify the accused in an identification parade; and, one of them was warned not to talk about the incident by one of the accused as detailed above. I find these facts to be demonstrative of a scenario where the witnesses would be intimidated and experience fear were the accused to be released on bail. The antecedent that the 3rd accused had clearly warned one of the witnesses is also demonstrative that they would interfere with the witnesses if released. This court holds the view that demonstrated interference with witnesses is a compelling reason within the meaning of **Article 49(i)h of the Constitution** [See **Patius Gichobi V. R. HCCR.No. 45 of 2012**

Likelihood to abscond trial

18. All three applicants in this case have deposed in their affidavits that they are not a flight risk and will not abscond trial. Their respective counsel also submitted at length that there was no likelihood that any of them would abscond trial.
19. In prosecuting the application on behalf of the 2nd accused, **Mr. Olando** submitted that the applicant was a family man and had no intention of running away. He submitted that he was a religious man and that no complaint had been raised against him concerning interference with witnesses. Mr. Olando referred the court to several authorities in which the court had granted bail to persons charged with murder. He urged the court to interpret the constitution in a manner that enhances freedom. He dismissed the averments of the investigating officer that the applicant was facing multiple charges stating that the said charges were still mere allegations which were yet to be proved.
20. For the 4th accused, **Mr. Chege** submitted that the applicant was a family man and the breadwinner of his young family and therefore posed no flight risk. Counsel submitted that there was no evidence linking the applicant to the murder of the deceased. He prayed for reasonable bond terms.
21. For the 5th accused, **Mrs. Nyamongo** submitted that the applicant was a law abiding citizen who was arrested while attending to a birthday party. She underscored the applicant's right to bail allowed by the Constitution unless there were compelling reasons. She submitted that there were no compelling reasons to deny the applicant bail. Counsel further submitted that other cases referred to by the State had not been proved against the applicant.
22. The state on its part considers that all the applicants were likely to evade trial if released. This opposition is contained in various averments of the investigating officer in the replying affidavit as well as submissions of the prosecution counsel. The State's submission is that the accused were likely to abscond trial for reasons that there was strong and overwhelming evidence against them which would most likely lead to a conviction. That a likelihood of conviction would make it

attractive to the applicants to abscond. For the 2nd accused – Raphael Kimani Gachii *alias* Kim Butcher, **Cpl. Otiu** deposed at paragraph 13 of the replying affidavit that he was positively identified by prosecution witnesses D2 and D3 as one of the persons who robbed them of their motor vehicle on the night of 6th February 2015. The identification parade forms were annexed to the replying affidavit as MO 2.

23. All the applicants in this case have deposed in their supporting affidavits that they will attend trial. The State has in opposition stated that they were likely to abscond. It was then upon the State to prove that they were likely to abscond. The issue is whether the State has discharged its duty. In **Patius Gichobi Njagi –Vs- Republic**, cited above this court emphatically stated thus:-

“Further, in my view, where the State opposes bail on account of any of the often-cited and commonly known fears which it routinely expresses including, but not limited to the likelihood of the accused absconding and failing to attend trial; likelihood of interference with witnesses; the possibility of hostile and even violent reception of the accused by the community upon release, the State must do more. It must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail”.

24. In the present case the investigating officer has postulated that the applicants were likely to abscond because the nature of the evidence against them was overwhelming. The evidence described though yet to be tested at trial alleges that the accused persons robbed D1 & D2 of a motor vehicle which they then used to commit the murders that are the subject of the trial. The investigating officer displayed identification parade forms in which the 2nd, 4th and 5th accused persons were identified by D2 and D3. Secondly, it is deposed upon by the investigating officer and strongly submitted by the prosecution counsel that there was clear evidence linking the accused persons to the 4 counts of murder. Prosecution Counsel submitted that a Ceska pistol firearm was recovered from the 2nd accused’s house. According to the police firearms register, the said firearm had been issued to PC Samuel Kairegia who was the bodyguard of Hon. Muchai and the subject of Count 2 in the charges against the accused. Counsel displayed to court both the firearms register and the inventory of items recovered from the 2nd accused both being annexures to the replying affidavit of **Cpl. Otiu**.

25. With respect to the 2nd accused prosecution counsel further submitted that he had attempted to escape while being arrested. He referred court to the annexed statement of **Cpl. Sang** who was one of the arresting officers which stated that the 2nd accused was arrested only because an injury thwarted his escape. Counsel submitted that this was a clear indication that he would evade trial if released.

26. With respect to the 5th accused, **Mr. Kemo** submitted while referring to the replying affidavit that she was found with the mobile phone of one of the victims and that on the 13th May 2015 two rounds of live ammunition were found at the doorstep of her house. Counsel concluded his submissions by stating that the nature of the evidence which he had described to the court was so strong that the accused would be tempted to abscond trial.

27. In response to the State’s submission respecting the nature of the evidence, defence counsel objected by stating that the said submissions were only relevant for the trial and not at bail application stage. The issue that arises out of this submission is whether the court in dealing with a bail application can advert to the nature of the evidence where the State wishes to use such evidence to support the claim that the accused were likely to abscond trial to evade conviction owing to the strong evidence known to both the State and the accused persons.

28. Courts have approached this issue cautiously as strictly the merit of the evidence can only be determined at trial. In the **Mgunya** case cited above, Ibrahim J sounded this caution in the following terms:-

“I think that criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like

where there is statements that show that the accused was caught red handed or where there are lawfully admitted confession”.

29. I take the view however, that while the caution not to delve into evidence outside trial is sound principle, it is to be remembered that in a bail application each case should be treated on its own peculiar facts and circumstances. In this particular case, the circumstances which have been laid before the court are that the 7 accused persons in the case face 4 counts of murder and other cases of robbery with violence before the lower court. The prosecution has demonstrated to the court that it has evidence in the form of witness statements and documented records that the pistol issued by the police to PC Samuel Kimathi Kailikia (deceased) was recovered from the 2nd accused while a cache of ammunition was recovered outside the house of the 2nd accused. It has also displayed its evidence of identification of the accused persons in an identification parade. I find that the nature of this evidence is not tenuous and supports the state's contention that it is likely to tempt the accused to evade trial. This is not the same as saying that the court has made a finding on the veracity of the evidence, which finding would be the preserve of the trial court.

The likelihood of accused committing other offences

30. The State's submission is that the accused persons in this case have a criminal record and if released were likely to commit more offences. **Cpl. Otiu** deposed at paragraph 17 that the 2nd accused (Raphael Kimani Gachii *alias* Kim Butcher) had previously been charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code in Kibera Chief Magistrate's Case No. 54602 of 2009 and was convicted and sentenced to serve 4 years. With respect to 4th accused (Stephen Asitva Lipapo *alias* Chokore), the investigating officer deposed at paragraph 24 of the Replying affidavit that he had a criminal record whereby he had been convicted of the offence of preparation to commit a felony in Criminal Case No. 163/253/2007 and sentenced to serve 12 months imprisonment; and, also convicted of robbery (Criminal Case No. 163/235/2009) and sentenced to serve 4 years in prison. Other than the two convictions, the 4th accused has a robbery with violence case and theft case both pending before the magistrate's court in Kibera. Similarly for the 5th accused, the investigating officer displayed evidence of a criminal record showing that he had been charged and convicted with the offence of trafficking in Narcotic drugs in Kibera Criminal Case No. 121/256/2009. The criminal records displayed in court were not disputed by the accused persons.

31. From my consideration of the averments of the investigating officer and the displayed criminal records from the Directorate of Criminal Investigations, I am persuaded that there is ample evidence demonstrated by the prosecution that the applicants are not law abiding citizens and were likely to commit other offences. It has been demonstrated to the satisfaction of the court that the accused persons have a propensity to crime and if released were likely to commit other offences. I find this to be a compelling reason within the meaning of **Article 49(i) h of the Constitution**. I find further from my consideration of the material placed before me that the accused persons were a danger to the community given their criminal record and the gravity and multiplicity of charges they currently face.

32. In the premises and for the above reasons, I find that there exist multiple compelling reasons why each of the 3 applicants cannot be granted bail. Their respective applications are thus dismissed.

Orders accordingly.

Ruling delivered, dated and signed at Nairobi this 29th day of February, 2016.

R. LAGAT - KORIR

JUDGE

In the presence of:-

.....: Court clerk

1st Accused

2nd Accused/Applicant

3rd Accused

4th Accused/Applicant

5th Accused/Applicant

6th Accused

7th Accused

.....: For 1st Accused

.....: For 2nd Accused/applicant

.....: For 3rd Accused

.....: For 4th Accused/applicant

.....: For 5th Accused/applicant

.....; For 6th Accused

.....: For 7th Accused

.....: For the State/Respondent