



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 67 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PHILIP MANYURA MAROKO2ND ACCUSED

RULING

1. The 2nd accused together with 2 other persons face one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code Cap.63 Laws of Kenya**. It is alleged that:

“All the three accused persons on the 7th day of May 2015 at 6:30 pm at Nakumatt Supermarket, Mombasa road within Nairobi County murdered James Karanja Maina”

2. The applicant **PHILIP MANYURA MAROKO** is facing trial for the alleged murder of one James Karanja Maina. He is alleged to have shot and killed the deceased on 7th May 2015 at Nakumatt Supermarket, Mombasa road in Nairobi. He was arraigned in court on 10th July 2015, where he denied the charge and was remanded in custody pending trial. Subsequently on 1st October 2015 through his Advocate Mochere, he applied to be released on bail pending hearing of the case. The bail application was opposed by Mr. Keino Counsel for the State. I heard and disposed of the application vide a ruling that was delivered on 29th October, 2015.
3. The accused now seeks a review of the said ruling hence the present Notice of Motion application dated 2nd December 2015 brought under **Articles 49, 50(2) and 51(1), Articles 28 and 29(d) and (f) of the Constitution of Kenya and section 123 of the Criminal Procedure Code**. It seeks the following orders;

- i. **That the application be certified as urgent and be heard as a matter of urgency.**
- ii. **The applicant be admitted to bail/bond pending the hearing and determination of the criminal case.**
- iii. **The Honorable Court be pleased to make any such orders as it deems fit, fair and just in the circumstances.**

4. The review application is brought on the grounds *inter alia* that there are new, special, exceptional, and compassionate circumstances in the case that have arisen to warrant the accused to be granted bail pending the hearing of the case. These circumstances include the fact that:

- i. **The applicant has recently been diagnosed with serious and severe health problems and his**

condition is deteriorating such that continued confinement in prison imposes a risk to his life and severely punishing him.

- ii. That the applicant recently had a CT scan performed on his head a ‘*solitary lucent calvarial bone lesion*’ in the right parietal bone of his head and the medical consultants have said it requires surgical operation, which will need substantial care and management.
- iii. The applicant recently collapsed in the washroom at the remand prison and was semi-conscious for some time and had to undergo medical tests and observations before they discovered his problems. The applicant also suffers from myriad conditions including fainting episodes, convulsions, severe temporal headache, hypertension/high blood pressure, insomnia, blurred vision, neck pains, inflamed tonsils, painful swallowing, vomiting on and off, dizziness, fever, sleeplessness and other conditions.

5. The application is supported by the affidavit of **PHILIP MANYURA MAROKO** dated 2nd December 2015. The gist of that affidavit is that the applicant’s health is deteriorating and that his health condition and illness cannot be adequately managed or properly treated while he is in remand prison and keeping him in remand will not only worsen the situation but also risk his health and life.
6. In view of the applicant’s deteriorating condition and the challenge posed, Mr. Ogada submitted that the Medical Officers both in the prison and Kenyatta National Hospital had recommended that the applicant goes for surgery.
7. Mr. Ogada urged that the statements of witnesses did not mention the applicant neither did they connect him to the offence. He urged that the applicant’s name had been mentioned by two officers for planning and involvement, and that the allegation of interference was a mere allegation that was not proved in court.
8. Mr. Ogada cited the case of **Republic vs. Carl Gary Singleman 2015 KLR** where the trial Judge in dismissing the issue of interference of witnesses observed:

“It has not been demonstrated to the court whether any of the witnesses was a vulnerable witness who could easily be intimidated or if any enjoyed a special relationship with the accused which would make it possible for the accused to influence and/or interfere with their testimony. I am not persuaded that the applicant would interfere with and/or influence witnesses. I dismiss this ground as a mere speculation on the part of the prosecution.”

9. The application is opposed by the State. The prosecution counsel relied on the affidavit sworn on 19th January, 2016 by PC. Julius Kiema who deponed that circumstances had not changed much since the applicant was denied bail on 29th October 2015 and no new evidence had been adduced.
10. Mr. Kemo, Learned Prosecution Counsel urged that the gist of the affidavit by P.C Julius Kiema was that the Hon. Lady Justice Lesiit in her ruling on 29th October 2015 declined to release the applicant and his co-accused persons on bail having taken note of the Prosecution’s vulnerable witnesses and the likelihood of the applicant and his co-accused intimidating them. He urged that there was real fear that if released the applicant would inflict fear on the witnesses as he was aware of the kind of evidence they would tender since he had their statements.
11. I have carefully considered the application and the Supporting Affidavit, the Replying affidavit and the oral submissions by counsels on opposing sides.
12. I have considered the cited cases. In the case of **Republic vs. Carl Gary Singleman 2015 KLR**, the court denied the application on grounds that the accused was a flight risk. **In Republic vs. Danson Mgunya & Another 2010 KLR**, the application was allowed for want of compelling reasons to continue detaining the applicant. **In Republic vs. Erastus Ngura Odhiambo 2015 KLR**, the initial application was declined for reasons *inter alia* that the accused was likely to intimidate witnesses; however, when the landscape changed in the accused person’s favor after the key witnesses had testified, the renewed application for bail was allowed. In **Republic vs. Pascal**

Ochieng Lawrence 2014 KLR, the application for bail was allowed for lack of compelling reasons to deny the applicant bail. In the case Watoro vs. Republic 1991 KLR, bail was denied for the reason that the accused person was likely to abscond.

13. It is now settled that the paramount consideration in a bail application is whether an accused person will attend court during the hearing of his case. The right to bail is a constitutional one and therefore, denying bail to an accused person, is a serious matter as it denies them their liberty. That right is not absolute. The grounds upon which it can be denied include compelling reasons shown on such basis as threat to witnesses' safety or interference of witnesses or their intimidation. The prosecution should establish the basis of the denial on sound facts, not whimsical or baseless allegations.
14. I rendered myself clearly on the issue of interference of witnesses and pronounced myself on the same in the ruling delivered on the 29th October 2015 in this case.
15. The main reason advanced in the application for review is the deteriorating health condition of the 2nd accused, Mr. Ogada Counsel for the 2nd accused/applicant submitted that the applicant has been advised to go for surgery. I have looked at paragraphs 7 to paragraph 14 of the Supporting Affidavit and medical reports attached and I noted the recommendation by Dr. Obunga of Kenyatta National Hospital that the accused attends clinic regularly without failure in order to enhance his speedy recovery while out of custody. I am surprised by the emphasis by the doctor that the applicant can only attend clinic while outside of the lawful custody he is currently in. On the other hand, it has not been demonstrated that the applicant has been denied such opportunity to attend clinic regularly while in custody.
16. I have taken note that this case has been scheduled for hearing from 29th February to 10th March 2016 which is a period of six days from today. That is not far from today.
17. As I observed in the initial application for bail, this is no ordinary case going by the little facts which have been disclosed in the affidavits before the court. The evidence appears to have a propensity of being intricate and therefore the need to preserve it is of utmost importance.
18. **Article 24 of the Constitution** provides for the limitation of rights and fundamental freedoms in the interests of others thus:

“1. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
 - a. **The nature of the right or fundamental freedom;**
 - b. **The importance of the purpose of the limitation;**
 - c. **The nature and extent of the limitation;**
 - d. **The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
 - e. **The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”**
19. The denial of the application to grant bail to the applicant is based on both reasonable and justifiable grounds as expressed in my earlier ruling. Those reasons still hold strong. I was satisfied then that the witnesses in this case were vulnerable; their safety was a concern and the danger of interference and intimidation reasonable and real. The circumstances remain the same. The reasons for the dismissal of the first application are well set out in my ruling of 29th October 2015 which include the finding that the fear of retaliation or attack was not far-fetched or based on figments of imagination. The State demonstrated that some of the witnesses were in the process of being enlisted for protection and the process was underway. Further, some of the witnesses were related to the accused persons and were therefore well known to them. That alone is reason to

cause witnesses apprehension if the applicant were to be released at this stage.

I still find that the likelihood of interference with witnesses and the risk they is real and far outweighs the 2nd accused's right to be released on bail/bond.

20. I agree that the right to liberty is paramount. The Supreme Court of India in its decision in **Masroor v. State of Uttah Pradesh and Anor. 2009) (14) SCC 286** rendered itself as follows:

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”

21. That case is persuasive to this court. I have balanced and weighed the right of the 2nd accused person to be released on bail/bond as against the interest of the witnesses and find that for now the interest of the witnesses far outweighs the applicant's right to liberty.

22. I am still persuaded that there exists compelling reasons to deny the 2nd accused/applicant bail/bond at this stage. Consequently, his application for bail is hereby declined. The same can be reviewed after the key witnesses have testified.

23. The application for review of the ruling on the application for bail/bond pending trial by the 2nd accused is consequently dismissed.

DATED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2016.

LESIT, J.

JUDGE