



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 84 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

NAHASHON MUCHIRI MUTUA.....ACCUSED

RULING

The accused, Nahashon Muchiri Mutua, has approached the court through a Notice of Motion dated 8th December 2015 seeking review of this court's orders issued on 23rd November 2015. The application is supported by the affidavit sworn on 8th December 2015 by the accused and three other affidavits sworn on the same date by John Maina Njiri, Gilbert Kapule and Boniface Kutosi respectively all remand prisoners. The application is supported by grounds found on the face of it and in the supporting affidavits as follows:

- a. That the accused's medical condition continues to deteriorate while in remand prison.
- b. That new evidence has emerged that the accused did not commit the offence for the reason of which he is before this court.
- c. That the accused is not a danger to the witnesses.
- d. That the accused's life is in danger while in custody because of other prisoners who are facing charges preferred against them by the accused.

In his submissions in court Mr. Mwangi, counsel for the accused, told the court that the accused's medical condition has continued to worsen while in custody; that the accused has brought up new evidence in support of his innocence and the court should be reluctant to deny the accused bond in the light of the new evidence; that the Director of Public Prosecutions (DPP) has not responded to the issues raised in the affidavits and that the least the DPP could have done is to investigate the new evidence. Mr. Mwangi submitted that the prosecution has not advanced compelling reasons to deny the accused bond. He urged the court to review its earlier orders and admit the accused to bond.

Mr. Mwangi cited Article 49 (1) (h) of the Constitution and submitted the following three authorities in support of the application, namely:

- a. **Criminal Application No. 399 of 2012 Job K. Musoni v. Republic [2012] eKLR**
- b. **Aboud Rogo Mohamed v. Republic [2011] eKLR**
- c. **Misc. Criminal Application No. 55 of 2014 R v. Diana Suleiman Said and Another [2014]eKLR**

The application is opposed. Ms Macharia, the prosecution counsel, submitted that the circumstances of this case have not charged to warrant review of the orders of this court; that the accused is being held at

remand prison, a government institution and can attend medical services in Kenyatta National Hospital and that the accused has not demonstrated that he has been denied such services. Counsel submitted that the three affidavits have not been verified through cross examination and should not be admitted in this application. Counsel asked the court to decline granting this application until such time after the witnesses under protection have testified.

Mr. Kironji for the victim family also opposed the application stating that there are no new facts to warrant review because the court considered the medical history of the accused before making its determination to deny the accused bond; that the documents attached to the application are dated before the orders being sought to be reviewed were made and that bail is not an absolute right and can be limited to protect the rights of others. Counsel cited **The Republic v. Gorman and Others [2004] AHRLR 141 (GhSC 2004)** in his submission that presumption of innocence has nothing to do with right to bail and that by being denied bail does not mean that an accused person has been denied right to be presumed innocent.

Mr. Kironji further submitted that the accused has not reported the alleged threats to his life while in custody to any authority and to bring such allegations before the court in the manner in which he has is an abuse of this courts process. Counsel raised issue with the competence of the doctors whose reports on the accused's medical condition are attached to the application as deposited in the affidavit of Ann Karimi Manyara.

In response, Mr. Mwangi submitted that the accused has no say in respect of the competence of doctors and that any issues on their competence ought to be directed at the relevant Licensing Board. Counsel further submitted that the presumption of innocence of an accused person is the very basis for admission to bail. He submitted that the prosecution counsel has not made a formal application to expunge the affidavits from record.

I have carefully read and considered the application and the supporting affidavits, the replying affidavits and the oral submissions made in court by all the counsels for all the parties. I have noted that, and this escaped attention of the court, Mr. Mwangi, advocate brought this application on behalf of the accused. He did not address the court as to the change of representation given that during the previous hearing of the earlier application for bail, the firm of Ms Wasonga Kimakia & Associates represented the accused. For completeness of the record, I believe the accused or his advocate will clear the air as to the issue of representation.

During the previous application, the accused attached evidence in form of medical records and notes to support the issue of his medical condition. These included documents from Shalom Hospital, Aga Khan Hospital, GK Remand Prison Health Facility and Kenyatta National Hospital. All these show that the accused had been medically attended to in these hospitals due to his medical condition. This court also noted that at that time he walked with aid of crutches. The issue of the accused's medical condition is therefore not a new matter. This court made a determination of that application and pronounced itself in its ruling delivered on 23rd November 2015. The court specifically made reference to accused's medical condition and noted that this condition can and will be attended to while the accused is in custody. I have noted that the accused states that his deteriorating medical condition can be confirmed by Prison Authorities. He however did not attach any report to support this. I have seen a document dated 20th November 2015 from one Joshua Omboki of GK Remand Prison Medical Facility request "To whom it may concern" that measures are put in place to enable the accused manage his health by attending physiotherapy sessions while out of custody. I have also noted another letter dated 19th November 2015 from Dr. Abunga of Kenyatta National Hospital recommending that the accused be allowed to attend clinics on a non-restricted environment. These two documents were prepared before the court gave its ruling on 23rd November 2015. The issues of accused's medical condition had been presented to this court and the same had been considered and had informed the decision of this court. This court recalls, and this is on record, Counsel for the accused then informing the court that the accused was attending physiotherapy at Kenyatta National Hospital the only hitch being that the doctors were on strike at that time and therefore the accused could not access medical services. This court has not been given anything to show that there are difficulties in accessing physiotherapy at Kenyatta National Hospital or any other

health facility while the accused is in custody.

I note, too, that the other issues raised: that is accused's life be in danger due to inmates who were arrested and charged through accused's reference being held at the same facility and accused not being a danger to witnesses were canvassed during the hearing of the first application. This court considered them and determined the application with those issues in mind. This court has not been informed, either through a report from Prison, or any other means that indeed the accused's life is in danger while in custody.

The accused has brought in affidavits to support his discovery of new evidence tending to prove his innocence. This issue was canvassed during this hearing. I have noted the submissions of Mr. Kironji and Mr. Mwangi on the issue of presumption of innocence. I have also read the case of **Gorman case**, above, specifically paragraph 6, 7, and 8 on this issue. I understand the court in that case to be saying that the right to be presumed innocent until the contrary is proved is available to both the person being held in custody after bail has been denied as well as the one who has been admitted to bail. I disagree with Mr. Mwangi when he says that the presumption of innocence is the very basis for admission to bail.

The right to bail and the right to be presumed innocent are both rights under the Bill of Rights (Chapter 4 of the Constitution). The right to bail under Article 49 (1) (h) is a right available to an arrested person. It is not absolute. It can be denied where compelling reasons are advanced. The right to be presumed innocent under Article 50 (2) (a) of the Constitution is a subset of the rights available to an accused person to fair hearing. This right is available to both those being held in custody and those admitted to bail. One is not admitted to bail because they are presumed innocent. He/She is admitted to bail because there are no compelling reasons to deny him/her that right. The right to a fair trial cannot be limited (see Article 25 (c) of the Constitution).

As noted by Mr. Mwangi, the prosecution did not seek to expunge the three affidavits by the remand prisoners from the record. However, I will not dwell on their contents given my statements above on the issue of the right to be presumed innocent. At this stage of the trial the law presumes the accused innocent whether he is in custody or out on bond until the contrary is proved.

I think I have said enough to demonstrate that the accused has not persuaded this court that it ought to review its earlier order and admit him to bail. I therefore decline the application dated 8th December 2015 and direct that the accused remains in custody. In view of the need for physiotherapy, I hereby call for a detailed report from the doctor at Kenyatta National Hospital regarding the number of physiotherapy sessions the accused requires each week to inform this court in future requests by the accused to be escorted to Kenyatta National Hospital or any other facility that offers these services for sessions. Any other medical issues in respect of the accused shall be handled as and when they arise. The order declining to grant bail may be reviewed after the witnesses under threat and those under Witness Protection have testified. The application is denied. Orders shall issue accordingly.

Dated, signed and delivered in open court this 22nd February 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Macharia, for the prosecution

Mr. Mwangi, for the accused

Mr. Kironji, for the victim family

Ms Maina, for IPOA

Mr. Nahashon Mutua, the accused

Mr. Daniel Ngumbi, court clerk