



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYAMIRA
HIGH COURT CRIMINAL CASE NO.75 OF 2015

REPUBLICSTATE

-VERSUS-

FREDRICK OMONYWA ONYANGO.....1ST ACCUSED

ALFRED OMARIBA ONDIEKI.....2ND ACCUSED

R U L I N G

Following an application for bond for the accused person on 19th 2015, this court gave its ruling on 17th December, 2015 granting the accused persons personal bond of Kshs.1,000,000 with two sureties of similar amount, which ruling applied *mutatis mundandis* to **Criminal Case No.75 of 2015** in respect of the other accused person, **Fredrick Omonywa Onyango**.

The state made an application to stay the ruling pending a review by the state. After respective arguments by both parties, the court granted the stay of the said ruling for 60 days to enable the state to make a formal application for review.

The state, subsequently filed their affidavit for review, on the 8th February 2016, the deponent being on **P.C., Peter (No.81052) Malimali, a D.C.I.O** at Keroka. The affidavit is sworn on 5th February 2016.

He averred as follows:

3. **THAT** during my investigation, it came to light that there were deep-rooted family feuds which can be closely linked to the murder of the deceased.
4. **THAT** the investigations point an accusing finger to family members who hired hit-men to murder the deceased.
5. **THAT** the investigations further revealed that potential witnesses were being threatened and thus the delay in witnesses coming up to record statements with the police.
6. **THAT** the threats have continued even after the arrest of the two accused persons. These threats have been reported to the police and attached herewith are O.B. extracts evidencing the same.
7. **THAT** most of the witnesses are close relatives of the accused persons and therefore raising the likelihood of interference.

8. **THAT** not all suspects have been apprehended and the two accused persons are likely to interfere with further investigations which may lead to the apprehension of the other suspects.
9. **THAT** there is a need to protect the victims of the crime who now leave in fear and have in fact re-located from their home and moved into hiding.
10. **THAT** the antecedents of the second accused person are indicative of him being a flight risk having escaped several attempts of his arrest.
11. **THAT** I swear this affidavit in opposition of the accused persons' application to be released on bond pending the hearing and determination of the case against them.

These attached to the said affidavit were three extracts from the police O.B. at Manga Police Station, involving threats to kill the witnesses.

1. **In OB 8/3/1/2016 at 0950AM**

A report was made of Panda Ongoro Omonywa, the first accused person of his plan to kill the reportee.

2. **In OB11/01/2016 at 11.45hrs,**

A report of the plan to kill Alexander Mogeni Moseti was made to the Police Station.

3. **In OB NO.11 of 2nd march 2012 AT 1110hrs Sgt Atemi and P.C. Muchira** are informed by Saul Mosebi Oriku that he was threatened on 17/02/2012 by Zakayo Onyango and Fredrick Omonywa, the threat was to mobilize people to lynch him.

In reply to the affidavit of **P.C., Peter Malimali, Fredrick Omonywa Ongao** and **Pamela Moraa** have filed their respective affidavit denying the allegations contained in **P.C. Peter Malimali's** affidavit.

SUBMISSIONS

(a) By the State:

Learned Counsel Malesi for the State states as follows:

1. As per the affidavit of P.C. Malimali, the accused persons are likely to interfere with the witnesses, as the 1st accused is a family member of the deceased person and by extension to several of other prosecution witnesses.

He cites **Republic –vs- Lucy Njeri Waweru and other**, as the legal authority where it was **held that** where prosecution witnesses are related with the accused persons, there arises, from that relationship, a natural flow of sympathy, even if no overt threats are issued, that natural sympathy would influence the witness either to retreat or not to appear at all.

2. I refer to bail/bond policy guidelines, more particularly **paragraph 49 (e)**, it says where there is a likelihood that the accused will interfere with the prosecution witnesses if released on bail/bond, he she may be denied bail/bond, if released the accused person purports to negotiate as a settlement. This is obstruction of justice. The interference of witness constitutes a compelling reason for denial of bail. See **Republic –vs- Joseph Wambua Mutunga & 3 Others [2010] eKLR.**
3. That the feuds exemplified in **paragraph 3** of the affidavit is what made very difficult to apprehend the suspects herein. The breakthrough came only when one of the stolen items from the deceased was traced to the 2nd accused. This then led to his arrest.

The same arguments of interfering with the witnesses relates to the 2nd accused persons the prosecution has witnesses related to the family of the 2nd accused.

4. In the victims protection **Act, no.17 of 2014**, invites the court to consider the submissions of the victims and prosecution witnesses.

In this regard the family of the deceased have since reallocated their abode for fear, deep rooted fear of the 1st accused and his family.

5. The prosecution has engaged the witness protection Agency with view of having witness protection in this case.
6. That I urge the court to set the case for hearing on priority basis by availing witnesses that are of risk of threats before considering the bond applications for the two accused persons.

(b) By the defence:

Learned counsel, Nyagaka, learned other counsels, Nyamwange and Bwonwong'a respectively for the defence Nyagaka being the lead counsel stated as follows:

1. That they rely on the affidavit of Fredrick Omwonywa Onyango dated 11th February, 2016 and the affidavit of Pamela Moraa Ongoro dated 11th April, 2016, respectively.
2. In filing their affidavit on 11th February, 2016, the defence reads malice in the delay.
3. The defence cited **Republic –vs- Gerald Mutuku Nyalita and Jackline Musende Mutua alias Jackline mwende Kithome, Criminal Case no.44 of 2015, Justice Edward .M. Murithi on 03/12/2015.**

The court, in that case, held: “the prosecution must, in my view, demonstrate a more than whimsical probability of interference [not a mere assertion]. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of the age or the mental acuity of the witness may be a factor to be considered in the determination as to the likely hood of interference. The nature of the testimony of the witnesses – as eye witness or circumstantial – is also relevant.

That the prosecution did not provide details as to the ages of the witnesses and the control relationship with the accused persons, in the case under consideration.

4. The defence also relied on **Criminal Case No.399 of 2012 Job Kenyanya Musoni –vs- Republic Judge C.W. Githua**, cited the case of **Republic –vs- Mohamed Hagar Abdirahiman & Another [2012] eKLR.**

Where the statement “***compelling reason***” was defined as such a reason that is forcefully convincing to persuade this court to believe that something is true”.

The judge also referred to the case of **Republic –vs- Danson Mgunya & Another [2010] eKLR** where judge Ibrahim [as he then was] said:

“Liberty is precious and no one’s liberty should be denied without lawful reasons and in accordance with the law. Liberty should be taken for granted”.

Therefore the defence urge the court to exercise its “**innermost**” discretion to grant the two accused person bond and decline the prosecution’s reviewing that grant granted on 17th December, 2015.

Issue for determination, has the prosecution proved on balance of probabilities that there are compelling reasons do infact exist to warrant the court's discretion against their accused persons by denying them their constitutional right to bail/bond as guaranteed by **article 49 (i) (h) of the constitution?**

Findings and determination

I have read the extensive submissions of both parties. I have also read their respective affidavits in support thereof. I have also read the legal authorities cited by both counsels.

The affidavit of Peter Malimali is has not only asserted the likelihood of interference with witnesses, it has attached extracts from the O.Bs on three occasions where reports of the plan to kill witnesses has come out, the threats to witness has been also been reported.

This fear is so real that the victim family has relocated from their previous family abode.

The prosecution taking cognizance of this threat as real, have contacted the victim protection Agency by their letter dated 9th February, 2016 to the prosecution shows the threats are real. It is not gimmick stuff.

This is not a mere assertion, it is real, and real fear, this therefore is a compelling reason to deny bond, it is also forcefully convincing to persuade this court to believe that something [the likelihood of interfering] is true”.

Accordingly, this court finds and determines that the application for review of the bond granted to the accused persons on 17th December, 2015 be and is hereby reviewed and cancelled.

The case be set for hearing on priority basis by the prosecution by lining up all, almost all the witnesses for priority hearing.

Orders accordingly.

Dated and delivered at Nyamira High Court this 29th day of April 2016.

C.B. NAGILLAH

JUDGE

In the presence of:

Bwonwong'a for 2nd accused person

Bwonwong'a hold brief Nyagaka for 1st accused

Nyatundo watching brief for the family of the bereaved

Konga for the State

Court clerk