



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL CASE NO. 27 OF 2013

REPUBLICPROSECUTOR

VERSUS

IRSHAD ABDUL RAHAMANI Alias BABUSHEE

HASSAN NASRULLAH MUSA alias NGUTI.....ACCUSED

KAYUNI HATIBU HAMIS

RULING

Mr Magolo, counsel for the 2nd accused person has applied that he (2nd accused) be released on bond. He indicated that the 2nd accused person was the first one to be charged with the offence of murder contrary to section 203 as read with section 204 of the penal code vide criminal case No. 48 of 2013, whereby he was released on a bond of Ksh 1 Million with one surety of a similar amount.

In the course of that year, there was an attempt on the life of the then DCIO and he was charged with the matter before the magistrate's court. Following this, his bond in this case was cancelled on grounds that other persons who were being sought for the matter had not been charged and that investigations were still ongoing. Another reason was that one Hassan Nashula was killed while on bond. Mr Magolo submitted that circumstances have changed since.

M/s Mutua for the state opposed his application for the 2nd accused's bond to be reinstated on grounds that after being released on bond in criminal case No 48 of 2013, he was later arrested and charged with attempted murder of the former DCIO Mr Ngumbe Thangalahi. He was later charged with murder in Criminal Case No 2 of 2015.

M/s Mutua invited court to take judicial notice that there are protected witnesses in Criminal Case No 2120 of 2014, a programmed necessitated by the 2nd accused threatening these witnesses.

She prayed that the 2nd accused remains in custody until the hearing and determination of this case.

In response thereto, Mr Nabwana, while reiterating Mr Magolo's submissions on 15.8.2016, added that the prosecution has not demonstrated by way of evidence that any witness has been threatened. What there are mere allegations. He also submitted that the number of cases one has does not determine whether a court can grant him bond since bond is only to ensure that the accused attends court.

He urged the court to grant the 2nd accused bond with conditions as he is innocent until proven guilty.

Furthermore, Mr Nabwana has pointed out that the fears raised by the prosecution can be allayed by stringent condition set out by the court. He also says that it has not been proved that the 2nd accused is a flight risk.

In considering the 2nd accused person's application to be released on bond reference is made to the provisions of Article 49 (1) (h) of the Constitution, where the right of the accused person to be released on bond pending charge or trial unless there are compelling reason for refusing, is entrenched.

This means that an accused person is constitutionally entitled to bail but the right is not absolute as it may be denied or withdrawn where compelling reasons are demonstrated.

The primary consideration in releasing him on bond is whether or not he/she will attend court on trial when he or she is required.

In applying for 2nd accused to be released on bond, Mr Magolo his counsel pointed out that the circumstances for which his bond was cancelled had changed since the suspects who were said to be at large at the time had been arrested and charged alongside the 2nd accused.

In objecting to the 2nd accused being released on bond, the prosecution indicated that the witnesses in the case had been placed on the witness protection programme because of being threatened by the 2nd accused. She also said that the 2nd accused was facing two other serious charges.

I have perused the record and established that the 2nd accused person's bond was cancelled in 2014 after he was arrested for this case. And so the question that springs up in my mind, is how or in which way has he been threatening the witnesses while in custody?

Clearly, prosecution has not demonstrated in which way the 2nd accused has been threatening the witnesses.

In the case of *Aboud Rogo Muhamed and Another vrs Republic (2011) e K L R*, it was held that;

“ mere allegations or suspicions will not be sufficient. According to the courts, where the prosecution opposes bail, it must support its objection with cogent reason and facts, and it is not enough to make bare insinuations”

The primary consideration in granting one release on bond being the ability to attend court whenever he/she is required, then the number of cases one may be charged with would not be an issue unless there is evidence of having absconded.

However, so that justice is seen to have been done and that interest of justice is not undermined, I refer the case to the probation office for a social inquiry to confirm the allegations/claims by the prosecution.

Mention on 14.10.2014 for a pre- bail report.

RULING SIGNED, DATED AND DELIVERED ON 30TH SEPTEMBER 2016.

D. O. CHEPKOWNY

JUDGE

In the presence of:

Mr Ayodo for the state

Mr Magolo for the 2nd accused

C/clerk- Kiarie