



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
CRIMINAL CASE NO. 9 OF 2014

REPUBLICPROSECUTOR

VERSUS

HARRISON NJUE NJOGU ACCUSED/APPLICANT

RULING

This application is brought under Articles 49(1) (h) and 2 of the Constitution of Kenya seeking the following prayers;

- i. That the Accused person/Applicant JAMES KARIUKI DAVIS herein be released on bail pending the hearing determination of this case.
 - ii. That in the alternative Accused Person/Applicant herein be released on bond and surety pending the hearing and determination of this case.
1. The Notice of Motion is supported by several grounds, affidavits of Jane Munene advocate and the Accused/Applicant which actually speak about the same facts.
 2. In his further affidavit the Accused/Applicant has deponed to the following facts;
 - He is a resident of Ngurubani Town of Kirinyaga South District and has good relations with neighbours.
 - He is the proprietor of Roka Preparatory Primary School where he has been residing since he started it.
 - He is morally upright and a family man with a wife and children.
 - He took himself to the Police Station and has co-operated with them ever since.
 - He is willing to co-operate with the Court and observe all conditions given if released on bond.
 - He is aged 63 years and suffers from High Blood Pressure and this condition is not conducive for prison condition. (JKDI).
 3. The State filed a replying affidavit by SP Boaz Obeto who is the investigating officer based at Wanguru Criminal Investigation Department.
 4. He opposes bond for the reason that there is strong evidence against the accused and that there is a likelihood of interference with witnesses by the Accused /Applicant.
 5. When the application came for hearing both Mr. Wamwayi and Mr. P.J. Otieno for the Accused/Applicant orally submitted. Mr. Wamwayi told the Court that the Court was not at this stage required to look at the strength of the Prosecution case, because an accused person was presumed innocent until proved guilty (Article 50 (2) (a) of the Constitution.
 6. He further submitted that it was the duty of the Prosecution to demonstrate why the Accused/Applicant should not be admitted to bail. To his mind no such reason had been given to the Court.

7. Mr. Wamwayi asked the Court to disregard paragraph 3, 5 and 8 of the Replying Affidavit as they were based on bias and the merits of the case. The said paragraphs also gave wrong dates as the dates of incident.
8. He further submitted that since the investigations were complete and even plea taken the Court should release the Accused/Applicant on bond.
9. In furthering their submissions Mr. P.J. Otieno contended that it was the duty of the Prosecution to avail to the Court a compelling reason for denial of bail. And that paragraph 9 of the replying affidavit appeared to be shifting that burden.
10. He further submitted that the threshold for the release had been covered well by Justice Ibrahim (as he then was) in the case of **REPUBLIC – VS- DANSON MUGUNYA & ANOTHER MOMBASA HIGH COURT CRIMINAL CASE NO.26/08**. He further submitted that if the approach taken by the investigating officer were to be adopted then Articles 24, 25 and 59 of the constitution would be violated.
11. He reiterated that there was no real fear explained by the Prosecution. What the Prosecution was alleging was perceived fear, and he finally submitted that the Accused/Applicant had promised to keep away from his school.
12. Mr. Omayo the learned State Counsel opposed the application and relied wholly on the replying affidavit of Superintendent of Police Boaz Obeto. He referred to paragraph 3 of the replying affidavit and submitted that the witnesses of this case were pupils and teachers of Roka School whose proprietor is the Accused/Applicant.
13. He therefore submitted that there was a likelihood of the Accused/Applicant interfering with the said witnesses. He distinguished the facts of this case to those of Mombasa High Court Criminal case where majority of the witnesses had testified, yet in the present case no witness had testified. He assured the Court that the Prosecution would fast track the hearing of the case, saying the Accused/Applicant should remain in prison for his own safety.
14. Mr. Wamwayi in reply submitted that this Court had a duty to uphold the rights of the Accused/Applicant and that his safety was the responsibility of the State.
15. I have considered all these submissions and the filed affidavits.
16. The application before me is anchored on Article 49(1) (h) of the 2010 Constitution. It provides;

“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”.

17. Further Article 50 (2) (a) of the Constitution provides;

“Every accused person has the right to a fair trial which includes the right – to be presumed innocent until the contrary is proved”.

18. The two rights i.e. right to bond and right to be presumed innocent go hand in hand.
19. The guilt of an accused person can only be established by the Court after hearing all the evidence. I therefore agree with Mr. Wamwayi that at the point of a bond/bail application after plea taking the Court would not have any evidence before it to enable it look at the strength of the Prosecution case.
20. The instant case is a fresh one and this Court has not had the chance of taking any evidence. If this Court were to go by the averments in paragraph 3 of the replying affidavit by the investigating officer it would completely be prejudiced against the Accused/Applicant.
21. The Law is clear that bond is a Constitutional right. That right is however not absolute. It may be limited by certain circumstances hence the words;

“UNLESS THERE ARE COMPELLING REASONS NOT TO BE RELEASED”

22. Why is bond/bail granted to an accused person? The main reason is to have an accused person conduct his/her case while outside the confines of Prison. The Court must therefore first and foremost be assured that the accused will appear whenever he/she is required in Court for the hearing of the case.

23. The Accused/Applicant has via the affidavits filed herein tried to prove this to the Court. The Prosecution has no issue with these averments by the Accused/Applicant. He has given his personal details.
24. When the Accused/Applicant first appeared before this Court on 3/4/2014 the State applied for him to be remanded in order for the Police to complete investigations. This request was granted to them. The plea was not taken until 16/4/2014. The State has confirmed that it has recorded statements from all potential witnesses and they appear to have all the material they need. They are not therefore complaining about the Accused/Applicant interfering with investigations.
25. The State has opposed the release of the accused on bond/bail. The burden is now upon it to bring itself within the proviso in Article 49(1) (h) of the Constitution which limits the accused person's right to bail. This burden is not on the Court or on the accused person. And the reasons must not just be any reasons, they must be "**compelling reasons**".
26. The reason that has been advanced by the Prosecution for the opposition of bond is the likelihood of the Accused/Applicant interfering with witnesses who are pupils and teachers of Roka Preparatory School. Since the word used is "**likelihood**" this Court was not given any evidence of actual interference of the witnesses by the Accused/Applicant. I agree with my brother Judge Ochieng in the case of **ABOUD ROGO MOHAMED & ANOTHER –V- REPUBLIC [2001]e KLR** and Judge Warsame (as he then was) in **REPUBLIC –V- MUNNER HARRON ISMAIL & 4 OTHERS [2010]** that the facts of each case have to be considered separately on issues of bond. In some cases bond may be allowed **on "strict and stringent conditions"**. However the bottom line is that when the State opposes bond/bail it must demonstrate that there are compelling reasons for the accused not to be released on bond.
27. What this Court has been treated to by the State is mere speculation, mere suspicion and unsubstantiated fear.
28. It is true that the accused is proprietor of the school whose teachers and pupils are some of the witnesses. That in itself is not a compelling reason for denial of bail. Curtailing of one's freedom must be well founded and within the Law.
29. The right to bail implements the basic presumption of innocence that the law assumes for every person. And for it to be taken away the Prosecution must show that the reasons it has for opposing bail are within the compelling reasons.
30. A submission was made to the effect that the Accused/Applicant should not be released on bond for his own safety. The State has a duty to provide security for all Kenyans, their property for the peace, stability and prosperity of this Nation. To say that persons should remain in custody/Prison in order to be safe would in other words mean our security forces have failed and there is no rule of Law in this Country. I would not want to take this to be the position as it is not.
31. This Court is alive to the fact that an innocent child lost his life in this case and his family is concerned. That by itself would not be a reason for this Court to curtail the Accused's/Applicant's constitutional right.
32. My finding therefore is that the Prosecution has failed to demonstrate the presence of or the appearance of any compelling reasons for denial of the Accused/Applicant's right to bail. I will therefore allow the application and have the Accused/Applicant released on bond on the following conditions;
 - i. He will execute a bond of shs.500,000/= with a surety in similar sum
 - ii. He will be reporting to the OCS KERUGOYA every first and last Tuesday of every Month until further orders of the Court
 - iii. He should not visit the Roka School without the express permission of the Court.

The deputy Registrar Kerugoya to satisfactorily assess the surety presented before any approval is made. He/she should fix mention dates for the Accused once he is released on bond. The hearing date remains as earlier stated by the Court.

DATED AND DELIVERED AT EMBU IN OPEN COURT THIS 24TH DAY OF APRIL 2014

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Sitati for State

Mr. Kathungu for Mr. Wamwayi, P.J. Otieno & M/s W. Munene for Accused/Applicant

Mutero/Kirong – C/c