



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 23 OF 2014

MAHADI SWALEH MAHADI APPLICANT

VERSUS

REPUBLICRESPONDENT

RULING

The Applicant above mentioned and one **DIANA SULEIMAN** (1st Accused) have been charged with sixty (60) counts of murder which relate to the attacks in Lamu which left scores of people dead between the period of 15th and 17th day of June, 2014.

The issue of bond for the first Accused was dealt with by my brother Justice Mureithi in his ruling dated 18th July, 2014.

Before me is an application for bond in respect of **MAHADI SWALEH MAHADI** (2nd Accused).

Lead Counsel for the Applicant Mr. Taib has urged this Court not to be swayed and or influenced by public opinion and the great government pressure exerted on the Judiciary which is being blamed for releasing suspects connected with Terrorism related activities.

Further it is contended that the Court should not be the overseer of security related matters if the state has failed in its duties.

Article 49(i) (h) of the Constitution 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”.

Counsel contends that the onus of proving the existence of compelling reasons is with the State and which same is on a balance of probability.

That its not a compelling reason that the charges are capital offences whose mandatory Sentence is death.

Further that public opinion is not a compelling reason. Pressure from the state is said also not to be a compelling reason that if the state cannot cope with the security situation, it doesn't have the necessary

resources to so do, its not the duty of the Court to come to its help because there is separation of powers between the three arms of the Government, Executive, Legislature and the Judiciary.

Lead Counsel Mr. Taib further submits that article 50(2) (a) of the Constitution provides for a fair trial in the following manner,

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

It is submitted that refusal of bond amounts to a breach of the presumption of innocence as guilt or innocence can only be determined through a hearing.

On the issue of compelling reasons Counsel has cited the case of **Mombasa High Court Criminal Appeal No. 66A and 66B of 2011 MOHAMED ABDULRAMAN SAID and Another and the case of WILSON THIRIMBA – Vs- Director of Public Prosecution (2012) eKLR** where an endeavour was made to define the term compelling and adopting the concise oxford Dictionary definition as ***“rousing, strong, interest, attention, conviction or admiration”***.

Further that compelling reasons should be forceful and convincing so as to make the Court feel very strongly that the Accused should not be released on bond.

Lead Counsel for the applicant further relies on the case of **Republic –Vs- Danson Mugunya** where Justice Ibrahim cited with approval the decision of the Supreme Court of Nigeria in **Alhaji Mujahid Dukubo –Vs- Federal Republic of Nigeria SC 20 A/2006** where Justice Ibrahim Tanko Muhamed rendered himself thus,

“When it comes to the issue of whether to grant or refuse bail pending trial of an Accused by the trial Court, the law has set some criteria which the trial court shall consider in the exercise of its Judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this Court. Such criteria include among others, the following;

- I. The nature of the charges.***
- II. The strength of the evidence.***
- III. The gravity of the punishment in the event of Conviction.***
- IV. The previous criminal record of the Accused if any.***
- V. The probability that the Accused may not surrender himself for trial.***
- VI. The likelihood of the Accused interfering with witnesses or may suppress any, evidence that may incriminate him.***
- VII. The probability of guilt.***
- VIII. Detention for the protection of the Accused.***
- IX. The necessity to procure medical or social report pending final disposal of the case”.***

It is contended that the main reason for bail is to ensure the Accused attendance in court when so required.

Counsel also relies on the decision in the case of **Nganga –Vs- Republic (1985)KLR 451** which spelt out factors to be observed before granting bail.

The learned Judge had this to say,

“Admittedly, admission to bail is a Constitutional right of an accused person if he is not going to be tried reasonably soon, but before the right is granted to the Accused there are a number of matters to be considered even without the Constitutional provisions. Generally in principal, and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an Accused person who has not been tried

should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:

(a) The Accused will fail to turn up at his trial or to surrender to custody, or

(b) The Accused may commit further offences, or

(c) He will obstruct the course of Justice.

The primary purpose for bail is to secure the Accused persons attendance at court to answer the charge at the specified time. I would therefore, agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the Accused is likely to attend trial.

In considering whether or not the Accused will attend his trial the following matters must be considered;

(a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty. Where the charge against the Accused is more serious and punishment heavy, there are more probabilities and incentives to abscond. Whereas in case of minor offences there may be no such incentive.

(b) The strength of the prosecution case. The court should not be wiling to remand the Accused in custody where the evidence against him is tenuous, even if the charge is serious, on the other hand where the evidence against the Accused person is strong it may be justifiable to remand him in custody.

(c) The character and antecedents of the Accused, where the court has knowledge of the Accused persons previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.

(d) Accused failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.

(e) Interference with prosecution witnesses.

Where there is a likelihood of the Accused interfering with the prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the Court cannot impose conditions to the bail to prevent such interference.

The application for bond is opposed. Lead Counsel for the State Mr. Okello contends that a careful reading of article 49(i)(h) of the Constitution indicates that compelling reasons are those that the court can take judicial notice and not necessarily those that can be demonstrated by the prosecution.

Further that bond is not an automatic right and that the issue of public safety is germane to this application.

Counsel submits that if the Accused person is released this act will greasly embolden the other suspects out there and the court ought to balance the rights of an individual against the rights of the society. The prosecution relies on the grounds spelt out in the affidavit of the investigating officer IP Chelelgo who depones that;

- 1. He is the investigating officer in this matter.**
- 2. That each of the two Accused persons are charged with sixty counts of murder.**
- 3. That the Accused persons are subject to investigations relating to the attacks at Mpeketoni on 15th and 16th of June,2014. Kaisari on 16th June, 2014 and 17th June, 2014 , Witu on 18th**

- June, 2014, Gamba on 5th July, 2014 and Hindi on 5th July, 2014 which are areas within Lamu County and Tana Delta County that are still ongoing.*
- 4. That the investigations have revealed that the attacks were well planned, carefully organized and were executed systematically by the Accused persons and their accomplices who are still at large.*
 - 5. That the investigations into these incidences are intricate and call for a very consistent and holistic approach to avoid exposing witnesses to danger of being eliminated by the Accused persons and their accomplices.*
 - 6. That, the pattern of attack appears to target police stations, police officers in the line of duty, suspects held in custody and the general public, particularly in police stations within Lamu county and beyond.*
 - 7. That they have established that out of the attacks police officers have been killed alongside suspects in custody in cold blood and two other suspects released from custody.*
 - 8. That the murders to which the two Accused persons have committed are bent on causing massive displacement of persons, wanton destruction of property and massive killings in the areas concerned.*
 - 9. That there is credible information that the perpetrators of this crime are to be found in Mombasa and Malindi and the larger Lamu County, therefore making it necessary to consider holding the Accused persons in custody as they await trial.*
 - 10. That the pattern of attacks in Lamu threatens to massacre of innocent Kenyans and serious economic sabotage against certain sectors of residents of Lamu County.*
 - 11. That this is clearly a matter of national security which by its very nature is a compelling reason to justify the holding into custody of the Accused persons or any of their associates.*
 - 12. That there is a high possibility of the Accused persons and their compatriots being charged under the international crimes Act with crimes against humanity.*

That the affidavit is sworn on the strength of the evidence gathered, intelligence, information in their possession and obtained from informers who cannot be named for fear of reprisals and their protection.

That in respect to **MAHADI SWALEH MAHADI alias JESUS** (the 2nd Accused) that there is evidence that he mobilized resources to organize the killings and displacement of persons.

That he was positively identified at the scene and for that reason there is reasonable cause to hold him in custody to avoid putting the lives of the witnesses at risk given the continuing attacks in Lamu.

That there are several witnesses who have recorded statements identifying the second accused and they are being considered to be placed under the witness protection programme and their statements cannot be disclosed at this stage.

Further that the Accused persons will face further charges under the prevention of organized crimes Act.

As regards affidavit, it is argued by Counsel for the applicant that it does not meet the standards required under the relevant Act in that it does not show that it was taken under oath that there are no basis made out for the allegations of elimination of witnesses. The sources of information are not shown and it is the contention of counsel that it should be expurgated from the record of proceedings.

I have perused the affidavit and it is noted that it is not specifically indicated that it was taken under oath and the sources of information are not shown.

In criminal matters the sources of information may not be indicated and or disclosed reason being that by so doing (disclosing them) may expose the information to injury physical or otherwise.

As to whether it was under oath or not. It is clearly indicated that it was sworn by the Deponent before a commissioner of oaths.

Article 159(2) (d) provides,

“In exercising Judicial authority the courts and tribunals shall be guided by the following principles -

(d) Justice shall be administered without undue regard to procedural technicalities”.

Defects in the affidavit if any are curable. Guided by the principle above mentioned, I find no good reason to expurge the affidavit of IP Chelelgo from the record of proceedings.

It is common ground that the right to bond is not absolute.

Article 49(i) (h) of the Constitution 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”.

The Affidavit of IP Chelelgo is the one which spells out the reasons why the state is desirous of having the Accused person being detained and refused bond.

The issue for determination therefore is whether these grounds found in the affidavit of IP Chelelgo amount to compelling reasons.

The court was referred to the case of **Mohamed Abdulraman Said and Another Mombasa High Court Appeal No. 66A and 66B** and the case of **Thirimba –Vs- Director of Public Prosecution (2012) eKLR** where an endeavour was made to define what is the meaning of the term compelling. The judges adopted the meaning bribed by the Concise Oxford Dictionary as ***“rousing strong interest, attention , Conviction or admiration “.***

Further that compelling reason should be forceful and convincing so as to make the court feel very strongly that the Accused should not be released on bond.

Limitation of the right to liberty.

Section 24 of the Constitution provides,

“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 “.

Its incumbent upon the court to balance the rights of an individual with that of the larger society. What has been happening in Lamu cannot be treated casually as just another attack. Police officers have been killed while on line of duty. Suspects have been murdered while in police custody. Innocent

civilians have been butchered, property destroyed. These are not hollow allegations. This Court is cognizant of the presumption of innocence which is provided under article 50(2) (a) thus,

“Every Accused person has the right to be presumed innocent until the contrary is proved”.

A refusal to grant bail does not necessarily mean that the court has already made a decision that the Accused person is guilty as charged. Such a decision can only be made after a full hearing and determination.

I am satisfied that the grounds found in the Affidavit of IP Chelelgo are specific. This Court is satisfied that the charges facing the Accused person are indeed very grave and the punishment is death.

There is a very strong incentive to abscond if granted bond.

This court has taken judicial notice of the fact that some of the Accused persons charged with some of the terrorism related cases in Mombasa Law Courts and who were later granted bond have died in mysterious circumstances. An example being that of Aboud Rogo Makaburi and others. I am of the considered view that detention for the protection of the Accused is a compelling reason.

The gravity of the punishment in the event of conviction I also a compelling reason. By reason of the foregoing, I find the application for bond at this stage to be without merit and it is rejected. The Court is aware of the fact that hearing dates of this case have been fixed for the month of November, 2014.

I find these dates to be far considering that the Accused persons have been denied bail. It is therefore ordered that fresh hearing dates be taken in the month of September, 2014.

Ruling delivered dated and signed this 30th day of July, 2014.

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M. MUYA

JUDGE

30TH JULY, 2014

In open Court and in the presence of:-

Mr. Khaminwa and Olaba for 1st Accused.

Mr. Taib for 2nd Accused

Okello, Warui, Muteti, Monda, Kiprop and Mathangani for the State

M. MUYA - JUDGE

Mr. Khaminwa:

Okello this matter came up before Justice Mureithi. The Accused suffers from diabetes. Lately I am instructed that there has been deterioration. I am asking for an order.

Court:

Justice Mureithi did grant orders that the Accused to be seen by his own personal Doctor.

M. MUYA - JUDGE

Court: Hearing 8, 9, 10, 11 and 12th September, 2014.

1. **MUYA - JUDGE**

2.

Mr. Khaminwa:

I am praying for a mention date **12th August, 2014.**

M. MUYA – JUDGE

30/7/2014

Mr. Taib:

The prosecutor has not supplied us with documents.

Mr. Okello:

We will supply same.

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M. MUYA

JUDGE

30TH JULY, 2014