



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CRIMINAL APPLICATION NO. 55 OF 2014

REPUBLICAPPLICANT/STATE

VERSUS

DIANA SULEIMAN SAID 1ST RESPONDENT/ACCUSED

MAHADI SWALEH MAHADI alias JESUS 2ND RESONDENT/ACCUSED

RULING

1. This is an application by the Prosecution for the review of bail granted to the 1st accused whose murder trial has been consolidated with that of the second accused in High Court Criminal Case No. 23 of 2014. By its ruling on an application for bail by the 1st accused who was initially charge alone with 12 counts of murder, the court granted bail to the accused upon terms. The charges were subsequently increased to 60 under a fresh Information against the two accused persons.
2. By Notice of Motion dated the 9th July 2014, the Prosecution the following specific orders:
 1. *That the matter be certified as urgent and heard ex parte in the first instance,*
 2. *That this court be pleased to suspend/stay its earlier orders granted in respect of Diana Said Suleiman, the 1st Accused person admitting him to bail, which is to take effect on the 14th July 2014 pending inter pates hearing of the application.*
 3. *That the 1st and 2nd accused persons be remanded at Shimo La Tewa G. K.*
 4. *Prison pending the hearing and determination of this application and further orders of the Court.*
 5. *That this Honourable Court be pleased to review its ealier orders admitting accused person Diana Suleiman Said to bail and substitute the same with an order denying both accused persons bail.*
3. The application was supported by the affidavit of the investigating officer, Police Constable David Kipkoros Chehelgo, sworn on 9th July 2014 and based on grounds set out on the body of the application as follows:
 - a. *THAT since the 1st accused was charged in Court, there have been investigations into the alibi notice given by 1st accused person, which investigations have resulted into evidence that wholly displaces his alibi, matters which were not within the knowledge of the investigators when the bail application was canvassed in the 1st instance.*
 - b. *THAT the 1st accused having availed himself the defence of alibi and the same having been investigated and displaced, the prosecution is now apprehensive than ever before, that he is now a*

- high flight risk for he cannot avail any other defence in law.
- c. *That since the 1st accused person was charged jointly with others not before court, and now with the arrest of the 2nd accused person, it is no longer in doubt investigations are ongoing and may lead to more arrests thus the risk of compromising those investigations remains tremendously high.*
 - d. *THAT since the arrest of the 1st accused person, further acts on violence leading to mass murders and massive destruction of property have been committed in the style and fashion of the incidences of 15th and 16th June, 2014 and it is believed that the perpetrators of those crimes are the same ones who perpetrated the initial attacks.*
 - e. *THAT to release the two accused persons on bond would avail them an opportunity to rejoin the murderous gang and perpetuate the commission of further crimes.*
 - f. *THAT these criminal acts have led to the displacement of persons and therefore the risk of witnesses being targeted for elimination is real.*
 - g. *THAT the incidence giving rise to these crimes, from an investigative and prosecutorial perspective, have acquired a character of International crimes thus the need to obviate the danger of impeding the complex and sensitive investigations by releasing suspects back to society before investigations are complete.*
 - h. *THAT whereas the charges filed against the accused persons are not brought under the International Crimes Act, the offence of murder is undoubtedly an offence recognized under that Act and once investigations are complete a prosecutorial decision will be taken based on evidence on whether or not to substitute the charges with crimes under the International Crimes Act.*
 - i. *THAT investigations the world over on situations such as they were in Lamu have been undertaken with extreme caution by the Courts, tribunals, investigative and prosecutorial agencies to avoid situations where high value suspects may be lost through conditional release or grant of bail.*
 - j. *THAT where a decision has been taken to charge as the case in this Court, the need to exercise serious caution becomes even higher to avoid accused persons from avoiding trial.*
 - k. *THAT even where suspects have voluntarily surrendered to the investigative, prosecutorial and judicial authorities that have not been a guarantee they would return and face trial on a further date.*
 - l. *THAT the prosecution has evidence directly pointing at the accused persons and therefore the prayer for them to be denied bail is not borne out of fear, suspicion or mere presumptions, but on actual evidence.*
 - m. *THAT such persons should not be released on bail/bond pending trial since there is a real likelihood they will continue to perpetrate such offences while out on bond and are a threat to National security and Public safety.*
 - n. *THAT the latest attacks in LAMU for which the two accused persons and others are being investigated were gruesome to the extent of flushing out suspect in Police Custody, murdering them in cold blood, killing Police Officers and setting other suspects free, thus underscoring the need to bring all persons behind such atrocious and rather callous acts to justice promptly.*
 - o. *THAT the Public Interest in this matter demands that justice must not only be done but seen to be done to the victims, witnesses and the accused persons as well.”*
4. The application proceeded on the basis of the review of the bail granted by this court to the 1st accused without consideration of the bail with respect to the 2nd accused for whom the court directed that it be considered by the Judge in charge of the Criminal Division who was seized of the conduct of the trial. Counsel for the parties – Dr. Khaminwa with Mr. Olaba for the accused and Mr Warui with Mr. Muteti for the Director of Public Prosecution made oral submissions and ruling was reserved.
 5. Counsel for the Prosecution presented the application for review of bail on the ground of changed circumstances and emphasized the heinous nature of the Lamu attacks which formed the basis of the murder charges against the accused and urged that the object of the attacks was to cause massive displacement of persons and widespread massacre of innocent Kenyans and serious economic sabotage against certain section of residents of Lamu county. Counsel submitted that the prosecution was investigating the cases as crime against humanity and the accused persons and

their compatriots eventually be charged under the International Crimes Act. On this basis, the prosecution relied on several authorities of the International courts while dealing with the issue of bail in international crimes. The prosecution also submitted based on the affidavit of the Investigating Officer that it had been established that ‘as a matter of fact that his purported alibi is a concoction of false hoods that will be wholly displaced by the prosecution during the hearing’ and that the accused ‘knew the persons who he carried on his motor vehicle having organized for them to be picked from Mombasa and Malindi’ and that two of the victims were executed in his presence by his accomplices. The prosecution offered to present to the court for consideration during the writing of its ruling on the review application of witness statement implicating the accused.

6. For the defence it was objected that the prosecution did not raise any new matter as compelling reason to warrant the reconsideration of the bail already granted by the court; that the statements of witnesses who alleged identified the accused persons had been disclosed by affidavits and that it would be prejudicial for the court to rely on such statement which have formally been put in evidence. It was also contended that the charge was defective for overloading 60 counts of murder in the same charge, and the new charge could not therefore be a basis for the review of bail sought by the prosecution. The defence opposed the reliance on decisions of the International Criminal Court and other international courts on the basis that the Kenya Constitution is supreme and its provisions at bail were clear and designed to create a new democratic society in Kenya.

Issues

7. The issues for determination in considering the application for review of bail are
 - a. Whether the court has jurisdiction to review bail on account of changes in circumstances.
 - b. Whether there exists changed circumstances to justify review of bail.
 - c. What principles to adopt in considering the review or cancellation of bail.
8. The issue whether the discredited alibi of the accused, being a false alibi, just as a false defence, may amount as held in ***Dominic Okumu Ogalo and Ors v. R***, Court of Appeal Criminal Appeal No. 141 of 1981 to corroboration, is a matter for the trial court. The decision of the international tribunals for Yugoslavia and Rwanda in respectively the cases of ***Zoran Kupreskic and Ors*** IT-95-16 and ***Casimir Bizimungu et al.*** ICTR-99-50-T relied on the prosecution are not directly useful guides in this matter, in that they relate to interpretation and application of Rule 65 of the international courts which makes provisions for provisional release of an accused on grounds, which in reverse of our Constitution provisions require, *inter alia*, that the accused to show exceptional circumstances justifying his provisional release. On the issue of overloaded charge, the trial court may put the prosecution, in accordance with the decision ***Peter Ochieng v. Republic*** (1985) KLR 252 to election at the inception of the trial as to the number of counts upon which it wishes to proceed with and the court cannot at this stage act on the basis that the charge of 60 murder charges is defective. See also ***Eliphaz Riungu v. Republic***, Misc Application No. 472 of 1996. The court did not consider it appropriate to receive witness statements which have not been formally presented by affidavit before the court, and therefore not responded to by the accused.

The test of changed circumstances

9. Counsel urged that the concept of changed circumstances is foreign to our law and a creation of the International Criminal Court statute. Indeed, Article 60 (3) of the Rome Statute of the International Criminal Court provides for review of bail in these terms:

“The pre-trial Chamber shall periodically review its ruling on the release or detention of the person, may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to the detention, release or conditions of release, if it is satisfied that changed circumstances so require.”

See also decision of Pre-trial Chamber II in the case ***The Prosecutor v. Jean Pierre Bemba Gombo*** ICC-01/05-01/08.

10. With respect, I do not agree that the review of bail on the ground of changed circumstances, or changes in the circumstances of the case, including circumstances of the accused, witnesses, victims or the society affected by alleged crime is a strange phenomenon. I would say our courts do it every day when we sit to consider renewed applications for bail such as when volatility on the ground is established to have ceased or for the cancellation of bail on account of accused's refusal to attend court while on bail, when sureties withdraw or for other reasons.
11. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.
12. I find nothing in the provisions of Article 49 (h) of the Constitution or section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes *functus officio* or that the issue of bail becomes *res judicata* upon decision to grant or refuse bail. Article 49 (h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail ***until and unless*** compelling reasons are demonstrated. If compelling reasons arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person ***“is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.”***

Whether changed circumstances exist

13. What changed circumstances have been demonstrated? The Prosecution invited the court - I accepted the invitation pursuant to section 60 (o) of the Evidence Act - to take judicial notice of the worsening situation on the ground in Lamu. I have noted from media reports the exponential growth in the attacks over a period now spanning one month since the first attacks on the 15th June 2014 with which the accused is charged and which has left 87 persons dead and many families displaced from their homes with both physical and emotional injuries, disruption of their social service and activities of health, education, arable and livestock farming, and loss of property, all creating a humanitarian crisis in the Lamu and Tana River regions of the Country. The affidavit of Police Constable David Chelelgo deposes that “the pattern of attacks in Lamu threatens to degenerate into widespread massacre of innocent Kenyans and serious economic sabotage against certain sections of residents of Lamu county.”

The principles in considering review or cancellation of bail

14. Relying on Supreme Court of India decision in ***Gulabrao Baburao Deokar v. State of Maharashtra and Ors.*** Criminal Appeal 2113 of 2013, the prosecution urged the grounds for cancellation of bail broadly as interference or attempt to interfere with due course of administration of justice or evasion of abuse of concession granted to an accused; where there is a clear possibility of the accused intimidating witnesses; and where the interest of the society in general outweighs the right of the accused. Counsel for the accused urged the court not to follow the decision of the Supreme Court of India based on Constitution of India which was promulgated in the 1940s. I however find the principles enunciated in the case to accord to our own position having regard to the Article 24 limitation of rights in the interests of others. The Supreme Court of India in the ***Deokar*** case cited its previous decision in ***Masroor v. State of Uttah Pradesh and Anor.*** 2009) (14) SCC 286 as follows:

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The

valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”

15.I consider that the principles generally of the accused’s ability or propensity to interfere with the due administration of justice having regard to the circumstances of the case and the considerations of the society or public interest are matters to be considered in considering a review of bail. See also ***Aboud Rogo Mohamed & Another v. R.***, Nairobi HCCR.C. No. 793 of 2010 and ***The Defence Forces Council & 6 Others v. Gabriel Kirigha Chawana & 26 Others***, Court of Appeal Civil Application No. 9 of 2014.

Balance of Individual and Public Interest

16.Counsel for the accused, Dr. Khaminwa, in opposing the review of the accused’s bail urged the court to give effect to the constitutional values of a civilised democratic without regard to public opinion and cited a passage in the book ***Interpreting Constitutions, A Comparative Study*** edited by Jeffrey Goldsworthy where the learned editor in discussing the South Africa Constitutional Court rejection of the death penalty notwithstanding the public opinion on the matter, writes:

“The Constitutional Court’s blunt dismissal of public opinion was, however mediated by a second line of argument which appeared in a number of the concurring opinions. Here the court justified its rejection of the death penalty, despite opposing public opinion, by recognizing a national will to transcend the past and to uphold the standards of a ‘civilised democratic’ society’. Society’s will to break with its past and to establish a community built on values antithetical to the maintenance of capital punishment is evidenced according to the court, in the adoption of a new constitution and a Bill of Rights.”

I would agree that the court must strive to give effect to the Constitution and its Bill of Rights as a character of a civilised democratic society and I consider that the Bill of Rights in this case is not necessary inconsistent with the public interest as opposed to public opinion. Article 24 of the Bill of Rights recognises a limitation on the rights of a person based on conflict with the rights of others, as is reasonable and justifiable in an open and democratic society.

17.The issue of public interest in national security and public safety as a compelling reason in consideration for bail is incontestable based both on the spirit of the Article 24 limitations in the interests of others justifiable in a open and democratic society. When national security and public safety are threatened the very existence of the open and democratic and civilised society is also jeopardised. It must then become an matter of proper balance between the individual rights and the rights of the society so that the individual is entitled to enjoy the greatest extent of his rights consistent with the rights and interests of others or the public interest in the particular matter.

18.The justice of the case appears to lie in the balancing of the accused’s right to bail against the society’s interest. On the one hand, there is the accused person’s right to be presumed innocent and to be released on bail emphasized by his health condition as a diabetic and, on the other hand, there is the Lamu people’s public interest in the emotional peace without fears of further attacks, backed by the recent experiences of multiple repeated attacks, that an arrested attacker has been released on bail giving him an opportunity to organize for more attacks. Without the confidence of such security, the affected people of Lamu will refuse to go back to their homes and continue to live as internally displaced persons thereby prolonging the period for return to normalcy and escalating the humanitarian problems associated with IDP situation. When the Court considers the prospect even one more death that may be occasioned by the accused’s release from custody, its choice is clear as to which side of the balance to err on. It must facilitate quick restoration of the public safety, security and maintenance of law and order and the rule of law, and, based on these pillars, the return to normal life for the people of Lamu and Tana River regions of the country as is reasonably expected in a free, open, democratic and civilised society.

19.I consider that it is in the interest of justice for both the accused and the public that the criminal

prosecution of the accused be conducted expeditiously. The Court in ***Eliphaz Riungu v. Republic*** Misc. Criminal Application No. 472 of 1996 emphasized the public interest in administration of justice as follows:

“We think that public interest demands that whatever goes on in a criminal trial should be in the interest of justice. And the constitution which is the mother of all laws clearly states that the accused shall be afforded a fair hearing within a reasonable time. Justice demands that the guilty be appropriately punished and the innocent be let free. A long trial which is likely to lead into confusion of prosecution case as to result in an acquittal is certainly not in the interests of public interest and justice.”

The sentiments of the court with which I agree are also relevant in the issue of the numerous number of counts facing the accused, and the prosecution may at the hearing be required to elect on a reasonable number to proceed with in accordance to the Court of Appeal decision in ***Peter Ochieng v. Republic*** (1985) KLR 252.

20. As an aid in the collective effort for the restoration of peace, safety, law and order in the regions, I respectfully urge His Lordship, the Hon. the Chief Justice of the Republic of Kenya, to consider setting up a special criminal bench of judges to deal with the increased number of criminal cases that may continually be filed resulting from the recent killings. This way, the court will be able to render swift justice in the matter with a view to punish the perpetrators of the violence, restore peace in the region and deter future attacks while acquitting the innocent suspects who may have been arrested in the course of on-going investigations, including the accused herein whose innocence must be presumed by the court at this point.
21. Accordingly, I review the bail order on the accused in terms that the accused will be held in custody at the G. K. Prison, Shimo La Tewa Mombasa during hearing of the criminal case or until further orders of the court in line with the court's power to review accused's bail from time to time. For purposes of such review, and in view of the accused's stated medical condition, the matter shall be reviewed every 30 days pending trial and determination. The accused's doctor will be at liberty to visit the accused at the prison as necessary and to make report on the accused for consideration at the review date. The accused's family will have access to the accused for purposes of availing him suitable diabetic diet as necessary.

Dated, signed and delivered this 18th day of July, 2014.

EDWARD M. MRIITHI

JUDGE

In the presence of: -

Mr. Olaba for 1st Accused

Mr. Taib with Mr. Olaba for 2nd Accused

Mr. Muteti with Mr. Jami for the State

Ms Linda - Court Assitant