

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MISC. CRIMINAL APPLICATION NOS. 84 OF 2014, 85 OF 2014, 86 OF 2014, 137 OF 2014, 175 OF 2014 & 191 OF 2014

PATRICK MWENDA MUSILI & OTHERSAPPLICANTS

VERSUS

REPUBLIC RESPONDENT

RULING

These applications are consolidated. The applicants are facing two counts of the offence of kidnapping with intent to confine contrary to Section 259 of the Penal Code. They all denied the offences before the lower court and upon an application for bail Hon. E. Nderitu made an order that each applicant could be released on cash bail of Kshs. 2,000,000/= with one surety of like amount.

Subsequent applications to review the said order before Honourable L. Mbugua and H. Ndungu have been declined. These applications are yet another move by the applicants to review the said order. Before the applicants moved the court in their respective applications two of their co-accused, in particular accused No. 7 and No. 8, applied to this court vide Miscellaneous Criminal Application Nos. 436 of 2013 and 43 of 2014 for the review of the said order.

This court in an order made on 6th February, 2014 allowed the applications by maintaining the cash bail order, but ordering that in the alternative the applicants could be released by each executing a personal bond of Kshs. 1,000,000/= with one surety of equal sum. The present applicants have been accused of riding on the wings of that order to justify their applications for review.

By making an order for release of the applicants, Hon. E. Nderitu complied with Article 49 (1) (h) of the Constitution. Bail terms under the said Article are expected to reflect reasonable conditions and under Section 123 (2) of the Criminal Procedure Code, bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

The applicants have failed to meet the terms set but that does not mean that such terms were not reasonable. It would appear however that, they were excessive and as a result the applicants have remained in custody from the time they first appeared in court on 16th October, 2013.

The applications are opposed by the state which by an affidavit sworn by P.C. Alex Makoma of the flying squad unit, it is feared that the applicants may interfere with witnesses. It is stated in the said affidavit that after the valuation of the bail terms in relation to the 8th accused Mark Stephen Oduk, the key witness has been threatened and ran away. It is therefore feared that if the bond terms of the applicants herein are varied the applicants are likely to interfere with other witnesses.

It has also been submitted that the 1st accused in the lower has a pending case before a Kibera court involving robbery with violence. I appreciate that the applicants are facing grave and serious charges. However, their innocence has to be presumed until proven otherwise. When there is an allegation of witnesses being threatened or interfered with, tangible evidence has to be presented and attributed to the applicants.

That the key witness has been threatened and ran away cannot be attributed to the eighth accused because this has not been specifically stated in the affidavit, and up to now there is no application that has been made to cancel his bond on that ground. Where accused persons have been jointly charged with an offence or offences based on the same provisions of law and particulars, bail terms should be uniform.

The original order by Hon. E. Nderitu met that standard. However, the order of this court made on 6th February, 2014 presented different terms for accused persons in the same charge. I have not been persuaded that the present applicants should not be given the same terms as the 7th and 8th accused persons whose applications succeeded.

In view of the foregoing, the terms set by the lower court in respect of the applicants herein are hereby reviewed so as to be in tandem with those of the 7th and 8th co-accused. Accordingly, in the alternative to posting a cash bail of Kshs. 2,000,000/=, each of the applicants herein may be released on executing a personal bond of Kshs. 1,000,000/= with one surety of equal sum. The sureties shall be approved by the Deputy Registrar of this court.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of August, 2014.

A. MBOGHOLI MSAGHA

JUDGE