



IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL CASE NO.18 OF 2013

REPUBLIC PROSECUTOR

VRS

BARASA NYONGESA MAMATI

alias TALIBAN 1ST ACCUSED

LEORNARD SITUMA 2ND ACCUSED

RULING

1. On 22nd January, 2014, Barasa Nyongesa Mamati and Leonard Situma (hereinafter “*the Accused*”) were arraigned in court with a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code. It was alleged that on the 28th June, 2013, at Nalondo Village, Bungoma South District, within Bungoma County, the Accused together with others not before court murdered George Masinde Murunga. They pleaded not guilty to the charge.

2. The court ordered that bail/bond assessment reports in respect of the Accused be prepared. On the reports being submitted, the Court declined to grant bond on 17/2/2014 and observed as follows:-

“Whilst I appreciate the accused's constitutional rights, however in view of the contents in the reports, I do not consider it advisable or proper to admit the accused to bond at the moment. They may renew the application at a later date once circumstances alluded therein change.”

3. On 01/08/2014, the Accused made a formal application by way of a Notice of Motion of even date. They sought an order that they be released on bond or bail pending trial on reasonable conditions. The application was brought under Articles 49 (1) (h) and 50 (2) (a) and (c) of the Constitution of Kenya.

4. The application was grounded upon the grounds on the face of the Motion and in the Supporting Affidavits sworn by the Accuseds. These grounds were that; the accused were arrested on 23/8/2013, and 2/9/2013 respectively; that they are entitled to be released on bail on reasonable conditions unless there are compelling reasons; that unless admitted to bond, they will not be able to have adequate time, facilities and access to evidential material to prepare their defence; that the allegation of interference of witnesses is far fetched as the accused do not know who the prosecution witnesses are; that the 1st Accused who was involved in a near fatal accident is in need of specialized treatment which is not available in remand prison.

5. In his Affidavit in support, the 1st Accused swore that he is married to three wives, one of those wives lived with him at Nalondo area whilst the other two were settled in Saboti, Transnzoia; that the bail assessment report only considered the circumstances prevailing at Nalondo area where the alleged murder occurred and not at the aforesaid Saboti area; that he was involved in a Road Traffic accident on 5th July, 2013 and he requires specialized treatment not available in remand prison; that if released on bond he will cooperate with the court.

6. On his part, the 2nd Accused swore that he lives in Turbo in Lugari District, that he had obtained information from his relatives that the Probation Officers who prepared the bail assessment report did not visit his home; he denied that he had any capacity to interfere with any of the prosecution witnesses whom in any event he did not know.

7. Mr. Ikapel, Learned Counsel for the Accuseds submitted at length on the foregoing grounds and statements of oath by his clients. He elaborated that his clients' rights are enshrined in the Constitution under Articles 49 (I) (h) and 50 (2) (a) and (c) and cannot be denied unless there are compelling reasons; he attacked the Replying Affidavit of P. C. Omwamba stating that the same did not disclose where and when the said officer visited the ground and the circumstances thereon; that the Accuseds were not apprehensive of their own safety if released on bond; that through H. C. CR. Misc. Appl. No.27 of 2014, the state had applied to hide its witnesses who are now unknown to the Accused and the issue of interference with them by the accused cannot arise. Counsel urged that the application be allowed.

8. The application was opposed through the Replying Affidavit of P. C. Kennedy Omwamba sworn on 5th August, 2014. He deponed that he is the Investigations officer; that upon the commission of the alleged offence, the Accused disappeared and were only arrested after two months; that the members of the public burnt the 1st Accused's motor vehicle Reg. No.KUN 011 because of being enraged by the alleged offence; that when he visited the ground upon being directed by the court to investigate the destruction of the Accused's properties, he established that the members of the public are still hostile and the safety of the Accused can only be guaranteed by their remaining in custody; that some of the prosecution witnesses are close relatives of the accused who are known to them and there was a likelihood of the Accused interfering with them; that it was because of constant threats by the Accuseds on the witnesses that the state applied for some witnesses to be put under protection by the relevant agencies.

9. Mr. Kibellion, Learned State Counsel submitted that there were compelling reasons to warrant the refusal to grant bail in this case; that there was eminent threat to the lives of the Accused; their right to life should be safeguarded by the court; that the 1st Accused had himself complained in court that his houses and motor vehicle had been destroyed; that the court ordered for investigations in June, 2014 when the Investigations Officer discovered the hostility on the ground; that it was the Accuseds' constant threats to the witnesses who are close relative of the Accused that led to the filing of H. C. Cr. Misc. Appl. No.27/14 seeking witness protection; Counsel urged that the application be declined.

10. I have considered the Affidavits on record and the submissions of counsel. The right to bail/bond is a Constitutional right of every accused person. There is no serious offence that can deny an accused of this right. This right cannot be curtailed unless there are exceptional circumstances. The basis of this right in my view is that an accused person is at all times to be presumed to be innocent until proved guilty. It is only upon being proved as such, that his liberty is to be curtailed or interfered with.

11. The framers of the Constitution however, were alive to the fact that whilst the accused is entitled to enjoy this right, that right must be weighed against the public interest, that offences must be punished for, that the Accused must be present throughout the trial of his case and that nothing should interfere with or hinder the smooth trial of an accused. This is why the Constitution put a rider or an exception to the right. That the same will only be interfered with if there are compelling reasons.

12. Neither the Constitution nor the Criminal Procedure Code has defined what compelling

reasons are. In the Case of Republic -vs- Rasto Wanyama Masinde alias David Alukoye Chesoni & Anor BGM Cr. Case No.24/14 the court observed as follows:-

“The Constitution has not given what those compelling reasons are. These in my view can only be deduced from the very purpose for which the right to bail exist. Bail or bond enables an accused person to secure his liberty and continue with his normal life in society or community in which he lives during the pendency of his trial. Bail or bond is therefore meant to secure the accused's attendance during the trial.

In this regard, any reason or circumstance that may affect the attendance of the accused at his trial may in my view be termed as a compelling reason. Some of these may be; the disappearance of the accused; personal security or health of the accused; the likelihood of interference with the administration of justice such as influencing the witnesses. Others may be, the personal conduct of an accused such as one is a habitual offender or where an accused has previously broken his bond terms or jumped bail..... ”

13. The foregoing observation endears itself to me. I will therefore hold that a compelling reason may be that reason or circumstance that may adversely affect the trial of the Accused such as the inability of the Accused to attend court or any adverse interference with the trial.

14. The State has advanced three (3) reasons which are alleged to be compelling reasons. These are; that the security of the accused is not guaranteed; that the Accused disappeared for over two months after the commission of the offence and they may never turn up for the trial of their case and that the Accused may interfere with witnesses.

15. On the first ground, that the Accused may never turn up for the trial of their case, the State contended that since the Accused disappeared to some hide out for over two months after the commission of the alleged offence, it was unlikely that they will turn up for their trial. Although the Accused did not deny this allegation, I have considered the fact that they are still innocent until they are proven guilty. The Investigations Officer did not state what difficulties if any, the State had in tracing the Accused after the alleged incident. He never disclosed that they were arrested from an unlikely location or while they were hiding. I do not think that it was established that the Accused will abscond if granted bail. I reject this ground.

16. The second ground is that the Accused's life will be jeopardized or will be at risk. That their right to life should be upheld by having them held in remand during trial. Mr. Ikapel for the Accused submitted that there was no evidence that the security of the Accused was at stake. That the Affidavit of the Investigations Officer did not disclose where the hostility of the public was towards the Accused.

17. When the matter first came up for plea, this court ordered for bail/bond assessment reports on the Accused. The same were negative and the court declined to grant bond to the Accused. Once again before the current application was argued, the court directed that a second bail/bond assessment report on the social inquiry on the accused be prepared as to their residences in Trans nzoia and Turbo. These reports were prepared and are dated the 5th and 6th August, 2014, respectively. Whilst the report on the 2nd accused remained the same as the one prepared in February, 2014, the report on the 1st Accused disclosed that there was no hostility on the ground as against him in Siboti Trans nzoia.

18. It may be true that the properties of the 1st Accused were destroyed in his Nalondo home where the alleged offence was committed, but there is no evidence that the same position entitles in his other homes in Trans nzoia. Whilst the personal security of the Accused is a serious ground to be considered when assessing whether to grant or decline bail, it must be shown that the danger is real based on the circumstances on the ground. This is so because if the life of an accused is at risk, the court

must guard against not having an Accused before it when the trial comes up. In this case, I am not satisfied that the 1st Accused faces any security risk at his home in Trans nzoia. I therefore reject the second ground.

20. The last ground is the fear that the Accused may interfere with the prosecution witnesses. The State contended that it is due to the continued and constant threats that the State had to lodge H. C. Misc.Cr. Appl. No.27 of 2014 for orders of witness protection. Before the hearing of this application, I directed that Mr. Ikapel, Counsel for the Accuseds do look at the said file to be able to respond to this allegation.

21. It was Mr. Ikapel's submission that there were no known witnesses who could be threatened. In both paragraphs 8 of their Supporting Affidavits; the accused stated:-

“8. That the State Counsel further alluded to possible interference with witnesses. I neither know who the prosecution witnesses are nor have the capacity to interfere with witnesses; so the issue of interference has no basis.”

22. In his Replying Affidavit, P. C. Kennedy Omambia swore that:-

“10. That similarly, the witnesses in the case are persons known to the applicants, some of whom are close relatives who are apprehensive that should the applicants be released then their safety would be jeopardized.

11. That it is due to the apprehension and content (sic) threats by the applicants that some witnesses have been put under protection by the relevant agencies.”

23. From the foregoing, it is clear that the State alleges threats to its witnesses. Although no specific names were provided, it is common knowledge that under H. C. Misc. Cr. Appl. No.27/2014, orders for witness protection were sought and granted. The basis for that application and consequent orders was that the Accused were constantly interfering with and had threatened the witnesses. Although there was a firm statement on oath by the Investigations Officer that the Accused threatened his witnesses, the Accused did not deny that fact. They only stated that they did not know who the witnesses were and that they were incapable of threatening the said witnesses. The statements in paragraph 8 of their respective Affidavits, in my view, are not convincing.

24. I have noted from BGM H. C. Misc. Cr. Appl. No.27/14 that it is not all the witnesses in this case that were put under protection. I have also noted that on 22nd January, 2014 this court directed that witness statements be supplied to the Accused. It was not suggested that the witness statements had not been supplied. I am also not convinced that the Accused do not know who the witnesses in this case are. I have also considered the allegation that, some of the witnesses are close relatives of the Accused persons which has also not been denied.

25. In my view, I am satisfied that the evidence on record is sufficient to show and buttress the fear of the Investigations Officer and therefore the State that, there is a likelihood of the Accused interfering with the witnesses if released on bond.

26. In the circumstances, I am satisfied that there is a compelling reason why not to admit the Accused to bond. Accordingly, I dismiss the application. The Accused shall remain in remand during the pendency of their trial.

DATED and DELIVERED at Bungoma this 22nd day of September, 2014.

A. MABEYA

JUDGE

