



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 8 OF 2014

REPUBLIC.....RESPONDENT

VERSUS

- 1.PAUL WAINAINA BOIYO ALIAS SHEKI.....1ST ACCUSED/APPLICANT**
- 2.CHRISTOPHER LUMBAZIO ANDIKA alias LUMBA.....2ND ACCUSED/APPLICANT**
- 3.ANDREW KARANJA WAINAINA.....3RD ACCUSED/APPLICANT**
- 4.SAMUEL KURIA NGUGI Alias VISI.....4TH ACCUSED/APPLICANT**
- 5.ESTHER NDINDA MULINGE.....5TH ACCUSED/APPLICANT**
- 6.RUTH WATAHI IRUNGU Alias ATLANTA.....6TH ACCUSED/APPLICANT**

R U L I N G

The application before me seeks a review of the court's earlier rulings denying all the accused persons bail. The oral application was (by consent) argued on 28th October 2014 by **Dr. Khaminwa** on behalf of respective counsel for all six accused. In arguing the application, **Dr. Khaminwa** recalled that the court had stated in its previous rulings that some of the prosecution witnesses who were employees of Porkies Club (scene of crime) were likely to be influenced in their testimony by the accused persons. In consideration of that possibility the court directed that the said witnesses be presented to testify before a consideration could be made for the review of the accused's bail application. Counsel argued that the prosecution was yet to present the said witnesses. He further argued that there were no compelling reasons for the continued denial of bail since the prosecution had failed to present the witnesses on priority basis.

In opposing the application, **Dr. Maingi** for the State submitted that there was no new material placed before the court to warrant a review of the earlier rulings. He further submitted that interference with the scene and possible interference with witnesses was still an on-going possibility. He admitted that the prosecution had not called the witnesses from Porkies Club as they had arranged to call the witnesses in accordance with the prosecution strategy for the case. Counsel referred the court to Article 157(10) of the Constitution which grants the Director of Public Prosecutions the exclusive authority in prosecution. In this particular case, Counsel urged the court not to compel the prosecution to alter the order in which it had planned to present its witnesses. He stated that there were 14 witnesses from Porkies Club who were yet to be called and that it was only fair that the court allows the calling of those witnesses before considering releasing the applicants on bail.

In response, **Dr. Khaminwa** submitted that Article 157(10) of the Constitution was not in issue as the court was not trying to direct the Prosecution Counsel but was only exercising its procedural powers in the conduct of the hearing. He urged that since the prosecution was not ready to comply with the directions of the court contained in its ruling, then it was not fair for the court to deny the applicants bail. Further, Counsel invited the court to look at the witness statements of the witnesses in question as the same could not be altered stating that should the witnesses attempt to alter their statements, then the prosecution would be at liberty to cross-examine them.

I have considered the application. In so doing, I have had recourse to the ruling dated 20th March 2014 in respect of all six accused; the ruling dated 26th June 2014 in respect of the 1st, 2nd and 6th accused; and, the ruling dated 22nd September 2014 in respect of the 1st accused. In the ruling dated 20th March 2014, I found that the prosecution had demonstrated to the court on a balance of probability that the nexus between the applicants and the prosecution witnesses was one that not only placed them in close proximity but also placed the 1st and 3rd accused in a position of influence over the employees of the club who are witnesses; and, in respect of the 4th and 5th accused that they stood in a collegial position likely to attract sympathy. Further, the court found that the applicants were likely to interfere with investigations having been accused of interference with the scene of crime. In balancing the scales of justice, the court denied the applicants' bail to allow for completion of investigations and for the identified witnesses to be presented to court. In the subsequent rulings referred to above, the court reiterated the need for the prosecution to present the witnesses identified as vulnerable.

From the record, a period of six months has lapsed since the court delivered its first ruling. It is the view of the court that the investigators have had sufficient time to complete the investigations. It has also had sufficient time to bring charges (if any) respecting interference with the scene and destruction of evidence as earlier intimated by prosecution counsel. Further the court considers that the prosecution has had ample opportunity to call the witnesses deemed vulnerable. The record shows that the trial in this case commenced on 22nd September 2014 and proceeded on 23rd September 2014 and 28th October, 2014 during which the prosecution presented witnesses according to its prosecution plan. Considering the orders of the court in the rulings stated above, it was the legitimate expectation of the defence and indeed the court that amongst the witnesses so presented would be the witnesses already identified as vulnerable by the prosecution.

In submissions before court, prosecution counsel indicated that it had lined up a total of 14 witnesses from the Porkies establishment. In the view of the court, it is unlikely that all the 14 witnesses were vulnerable. It is also the view of the court that it will take time before all 14 witnesses testify. In the circumstances the court is of the view that it cannot allow the prosecution to shift goal posts and hide behind the independence of the office of the Director of Public Prosecutions to disregard the directions of the court in a matter before the court. The court is under duty to treat both parties fairly and to safeguard the integrity of the trial process. There being no other compelling reason, and considering the circumstances of this case, I exercise my discretion to admit all the six applicants to bail. They are released subject to the following conditions:-

- i. Each applicant to execute a personal bond of Kshs.1million and provide two sureties of similar amount.
- ii. Each applicant in possession of a passport to deposit such passport with the court.
- iii. Each applicant should not leave the jurisdiction of the court without leave of the court.
- iv. Each applicant shall not in any manner whatsoever interfere with prosecution witnesses and any interference shall lead to the automatic cancellation of bail.
- v. Each applicant to attend monthly mentions of the case before the Deputy Registrar of the court.
The first such mention shall be on 20th January, 2015

Orders accordingly.

Ruling delivered, dated and signed at Nairobi this 19th day of November, 2014

R. LAGAT - KORIR

JUDGE

In the presence of:-

Yussuf : Court clerk

All 6 accused present

.....: For 1st Accused/Applicant

..... : For 2nd accused/Applicant

.....: For 3rd accused/Applicant

.....: For 4th accused/Applicant

..... : For 5th accused/Applicant

..... : For 6th accused/Applicant

.....: For the State/respondent