



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO.66 OF 2014

REPUBLIC.....PROSECUTOR

VS

JOHN NAKUMOI LONGORI.....1ST ACCUSED

EKWAM LOKICHAR.....2ND ACCUSED

JOSPHAT EKIRU.....3RD ACCUSED

PHILIP LOWASA.....4TH ACCUSED

FRANCIS LOKAI ALIAS BULAI.....5TH ACCUSED.

RULING

By two Notice of Motion Applications dated 21st October and 18th November 2014 respectively, the 1st and 2nd accused persons on one hand and the 3rd-5th accused persons on the other, have sought to be released on bail/bond pending trial.

The gist of the two applications is that the accused persons have Constitutional rights to be released on bail/bond and that there are no compelling reasons as to why the accused persons should not be granted bail.

The applications were opposed. Mr. Musyoka, Learned State Counsel sought to rely on a replying affidavit sworn by PC Samson Muritu, the investigating officer in this case. He deponed inter alia that key prosecution witnesses are well known to the accused persons and that if the accused are released on bail/bond, the possibility is pretty high that they will interfere with witnesses; that their detention is necessary in order to maintain confidence in the administration of justice having regard to all the circumstances; including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment provided for in law. He further contended that the right to bail/bond as enshrined in the Constitution is not absolute and is at the discretion of the court.

It was contended by Mr. Kariuki for the 1st and 2nd accused that the 1st and 2nd accused have never obstructed investigations or attempted to flee and that further there were no compelling reasons not to grant the accused persons bail/bond. Mr. Mureithi for the 3rd- 5th accused contended that there are no

compelling reasons not to release the accused persons on bail/bond and that the affidavit sworn by the investigation officer was merely speculative and as such urged the court to admit the accused persons to bail/bond.

Before the court considered these applications, the court called for pre bail reports in respect of all the five accused persons. According to the reports filed in court on 17th December 2014, the family of the deceased and the members of the community are not ready to receive the accused persons in the community and if released, there is a likelihood of retaliation, triggering tribal animosity which is common in the area. The area chief and the sub area felt that this was not the appropriate time for them to be released in whatever circumstance.

I have considered these applications, submissions by counsel, investigating officer's affidavit and the pre bail reports. In **Ng'ang'a vs. Republic 1985 KLR 451** Hon. Chesoni J, as he then was held, commenting on principles to be considered in applications for bond:

“1. The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should consider the following factors

a. In principle, because for 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:

- i. The accused will fail to turn up at his trial or to surrender to custody;**
- ii. The accused may commit further offences; or**
- iii. He will obstruct the course of justice.**

b. The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

- i. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- ii. The strength of the prosecution case;**
- iii. The character and antecedents of the accused;**
- iv. The likelihood of the accused interfering with prosecution witnesses.**

I am alive to the fact that this case and the principles enunciated above, were decided and applied before the enactment of the new Constitution. In a more recent case **REPUBLIC V MOSES KENU OLE PEMBA (2010) Eklr** Emukule J declined an application for bail pending trial by a person charged with murder. The Learned Judge in that case recalled that the repealed Constitution had ruled out bail for such offences and further held that under section 123 of the Criminal Procedure Code, the courts were still prohibited from granting bond or bail in such offences except in cases involving children suspects who are exempted from the death penalty and the Judge further observed that there were also subsidiary reasons for denying bail.

Even though an arrested person has Constitutional right to bail/bond pursuant to Article 49 (1) (h) of the Constitution, the said right is not absolute since the same provision provides that an arrested person shall not be released if there are compelling reasons. Though the constitution does not define what compelling reasons are, each case would depend on its own circumstances.

This is a fresh matter as no witness has testified so far. The State Counsel's submission that the prosecution has a very good case is no ground to deny the accused bond as the accused are presumed innocent until proved otherwise.

As regards the allegation that the accused will interfere with witnesses, the Investigation Officer did not depone to any real likelihood of interference and that remains speculation.

I have considered the Probation Officer's Reports. One of the consideration by the court before grant of bond is the safety of the accused person when released on bond. It has been disclosed that the lives of the accused may be in danger and may trigger tribal animosity in the area if released. That fact cannot be ignored and in my view, that is a sufficient reason to deny the accused persons bond. The offence was committed in August 2014. It is still fresh in the minds of the deceased's relatives and for these reasons I decline to grant the prayer to release accused persons on bond. In the pre bail reports the officer seems to have been suggesting that this was an application for review of bad terms but that is not the case. There is no earlier order granting accused persons bail.

Considering all these circumstances and facts, I am satisfied that there are compelling reasons not to grant the accused persons bail/bond. I decline to grant accused persons bail/bond in this case. The applications are dismissed in their entirety.

DATED SIGNED AND DELIVERED THIS 18th DAY OF DECEMBER, 2014

R. P .V. WENDOH

JUDGE

Mr. Musyoka for state

Mr. Murith for Applicant

Kirimi Court Assistant

All present applicants