REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 6 of 2013

REPUBLIC.....PROSECUTOR

VERSUS

LUCY NJERI WAWERU.....1ST ACCUSED

ALICE MAGUNYE WAWERU.....2ND ACCUSED

CHRISTINE NGENDO WAWERU.....3RD ACCUSED

AGNES NYAMBURA WAWERU.....4TH ACCUSED

R U L I N G

This is a ruling on the application dated 14th January 2013 brought by the four (4) accused persons. The accused persons face a charge of **murder** contrary to **Section 203** as read with **204** of the **Penal Code**. This application was filed in court before the plea was taken and while the accused persons were still in police custody. The four were arrested and arraigned in court on 9th January 2013.

The application was certified urgent on 15/01/13 and prayer 2 granted to the effect that the first accused who was said to be sick and elderly be taken to hospital for treatment and dialysis procedure which she was undergoing before arrest. Prayer 3 has been spent because the plea was taken.

The application is supported, by the affidavit of one Mary Kamiri Waweru who is a daughter of the first accused and sister to the 2nd, 3rd and 4th accused. The grounds supporting the application are contained only two paragraphs of the said affidavit Nos.14 and 15. The deponent states that all the accused persons live in Dagoretti and are not likely to abscond. Further, that the 1st accused is in poor health and requires

treatment.

The application was opposed by the State on grounds that the key witnesses are very close relative of the deceased being children of the deceased and the first accused. The witnesses are siblings of the 2nd, 3rd and 4th accused. For this reason, the State feels that if the accused persons are released on bail, they are likely to interfere with the witnesses. Due to the severity of the offence and the mandatory death sentence which goes with it, the State is apprehensive that the accused persons may take flight and not be available for the trial of the case. In the event that the court decides to grant bail, the State urged the court to allow the first three witnesses who are close relatives to be allowed to testify before release of the accused persons.

Article 49(1)(h) of the **Constitution** provides that ***"an arrested person has the right to be released on bond or bail, or reasonable conditions pending a charge or trial unless there are compelling reasons not to be released."***

The provision has now changed the law in **Section 123** of the **Criminal Procedure Code** which declares offences like murder, robbery with violence and attempted robbery with violence not bailable. The **Constitution** is the supreme law of this country and binds all persons and State organs at both levels of the government as provided for by **Article 2** of the **Constitution**. It is therefore an established position that bail is a constitutional right of the accused person and that the only reason to deny bail would be where the State has given compelling reasons for not releasing the accused. It is therefore, correct to say that bail is not absolute. It is left at the discretion of the court to grant bail.

The accused persons were represented by Mr. Gitonga Mureithi while Mr. Kimanthi represented the Director of Public Prosecutions.

In considering whether the court will grant bail, the established principles applicable are the following:

(a) whether the accused persons are likely to turn up for trial should they be granted bail;

(b) whether the accused persons are likely to interfere with witnesses;

(c) the nature of the charges;

(d) the severity of the sentence;

(e) the security of the accused if released on bond;

(f) in case of illness of the accused, the nature and severity of the illness;

(g) whether the accused persons have a fixed abode within the jurisdiction of the court.

On the medical condition of the first accused, the court granted an order that she be escorted to hospital for dialysis when she was in police custody. The order was granted due to the urgency of the matter. The accused was said to be an elderly lady, suffering from diabetes and kidney failure. This was based on the facts deponed in the supporting affidavit by her daughter Mary K. Waweru. The court directed that a substantive medical report be filed in court within seven (7) days which order was not complied with. On the 8th day, the counsel for the accused persons handed over some documents to the court clerk in open court which were placed in the file. On perusal, the court noted that the documents were the following:

1) a note from one Dr. Sake of Coptic Hospital stating that the 1st accused Lucy Njeri Waweru suffers from kidney failure, diabetes and hypertension and that she attends dialysis twice a week.

2) An invoice for treatment charges from Meridian Equator hospital for the period from 17th November to 5th December 2012.

I wish to state that no medical report was filed in court. The note of Dr. Sake was just a medical note from a doctor. It is not known whether the doctor has ever treated the patient because the invoice was from a different hospital. It is within the knowledge of the defence counsel and any other person with a legal or medical background that a medical report is a comprehensive document giving the personal details of the patient, the history, nature of treatment, condition of the patient and the way forward relating to the illness of the patient. The counsel ought to have annexed the treatment notes of the first accused to his application which he failed to do. It should also be noted that the order of the court was only applicable to the time that the first accused was in police custody. The order cannot be extended without proof of the medical condition of the accused. The order extracted by the Deputy Registrar dated 16th of October is very clear and reflects the correct situation that the order was to take effect only once pending the hearing of the application interparties. The State was to be given a chance to be heard in respect of that prayer. On assumption that the prayer was spent, the defence did not present arguments in support.

The investigating officer in his replying affidavit depones that he understands the circumstances surrounding this case. That the body of the deceased was discovered in a house occupied by the 1st and the 2nd accused and that there is sufficient evidence to connect the four (4) accused persons with the offence. The fear of the prosecution for interference and intimidation of the witnesses comes from the fact that the accused persons are closely related to the witnesses. It did not come out clearly from the affidavits in support and in opposition of the application whether the witnesses and the accused persons live in one house, on one compound or on the same parcel of land in order to determine the degree of likelihood of interference. It was also not clear whether the witnesses are adults who are living on their own away from their parents. However, whatever the situation may be, it is not in dispute that the blood relationship of the accused persons and the witnesses is pretty close. The 1st accused is the mother of the witnesses (DW1, DW2 and DW3), the mother of accused Nos. 2, 3 and 4 and the widow of the deceased. If the accused persons are released on bail, the likelihood that as close family members, they will keep in association and in close contact with the witnesses irrespective of whether they are living in the same house, location or in different houses and locations is highly probable. The 1st accused being the mother of DW1, DW2 and DW3 is in a position of influence as a parent over her children. The possibility of the 1st accused influencing the witnesses is indeed very high. In regard to all the four (4) accused persons, the likelihood of interfering with the witnesses or intimidating them cannot be ruled out. I share the fear of the prosecution in this regard. The court is under an obligation to do all in its power to preserve evidence in a case where there is danger of interference with witnesses or likelihood of destroying evidence.

The four accused persons are said to be residing in Dagoretti which is within the jurisdiction of the court. It came out in the affidavit of the investigating officer that the accused persons have fixed abodes in Dagoretti. The prosecution would have no problem in tracing them unless they take flight to another area. At the moment, there is no evidence to show that the accused persons intend to flee the jurisdiction of the court. However, none of the accused persons rendered evidence on oath that they will attend court if released on bond. Such an undertaking is best done by tendering evidence on oath through an affidavit by the accused person. This application was supported by the affidavit of a third party who was not qualified to give such an undertaking.

The offence of murder is a serious one carrying death sentence. The severity of the sentence may enhance the likelihood of absconding if the accused persons are released on bond. The offence of murder though serious is now bailable under the Constitution. The accused persons shall not be deprived of their rights of liberty upon reasonable suspicion of having committed the offence. They are presumed innocent until proven guilty. It would therefore not make sense to deny the accused persons bail only on the ground that the offence is serious and carries the mandatory death sentence. This would render obsolete the privileges and rights of the accused persons.

The security of the accused persons ought to be considered in granting bail. The death of the deceased occurred on the 6th January 2013 which is less than one month ago. The deceased was the husband and father of the accused persons. The key witnesses are family members who are likely to react with hostility to the accused persons if released on bail at this early stage of the trial. In my considered opinion it will

be appropriate to allow tempers to cool among the close relatives of the deceased. The right to life of the deceased was taken away and his close family members emotions could still be high taking into consideration the short stint of time since the death of the deceased. In the course of time, it is expected that the emotions of the close family members will cool down.

The defence counsel argued that the prosecution have not discharged the burden of proof on the compelling reasons. The counsel cited the case of **Danson Mgenya & Another vs. Republic, High Court of Kenya at Mombasa Criminal case No. 26 of 2008** where the court found that the prosecution had not shown any compelling reasons for the accused persons to be denied bond. The ruling of Judge Mohamed Ibrahim was well reasoned in this case and I agree with it. However, I wish to distinguish that case with the one before me. In that case the accused persons were an administration police officer and the area chief and had no blood relation at all with the deceased or the witnesses. As I have explained above, the close blood relationship of the accused person and the deceased on one hand and the accused persons and the witnesses on the other hand calls for this case to be treated in a different way. In that regard, I do not find the decision directly applicable in the circumstances herein.

It is now time to consider whether the likelihood of interfering with the witnesses, of influencing them or of intimidating them are compelling reasons under **Article 49(1)(h)** of the **Constitution**. The word *"compelling"* is defined in the **Readers Digest Complete Word Finder** as *"rousing strong interest, attention, conviction or admiration."* This definition calls upon strong and convincing reasons on part of the prosecution. This is a case where the accused persons who have already been supplied with witness statements know the identities of the prosecution witnesses and the nature and content of their evidence to be adduced at the trial. The accused persons may not care much about the evidence of witnesses outside the family circle. However, there is likely to be some flow of sympathy based on the blood relationships. I rely on the case of R**epublic vs. Joseph Wambua Mutunga & 3 others** where Ochieng, J found that the likelihood of interfering with witnesses was a compelling reason under **Article 49(1)(h)**.

It is my conviction that the prosecution have discharged the burden of proof in showing that if released on bail, the four accused persons are likely to interfere, to influence and to intimidate the key witnesses. The accused persons are also at risk of harm from close family members of the deceased if granted bail at this stage.

I therefore decline to allow the application dated 14th January 2013. The review of this application may be done in the future, more preferably after the family members have testified.

In the same breath, I wish to state that the defence counsel is at liberty to apply afresh for any orders relating to treatment of the first accused after compliance with the court order dated 15/01/13. As I have already stated the earlier order was not intended to be continuous and was only applicable when the first accused was remanded in police custody.

F. N. MUCHEMI
JUDGE

Ruling dated and delivered in open court in the presence of the four accused persons, the defence counsel Mr. Mungau and the State counsel Mr. Kimanthi on the 21st day of February 2013.

F. N. MUCHEMI
JUDGE