



REPUBLIC OF KENYA

High Court at Busia

Criminal Case 2 of 2013

REPUBLIC.....PROSECUTOR

versus

KOKONYA MUHSSIN.....ACCUSED

RULING

BACKGROUND INFORMATION

Judge in Busia was not sitting

[1] This file was brought before me because the Judge, High Court of Kenya at Busia, was not sitting at the time.

AN OBJECTION TO BAIL

[2] The matter at hand is an objection by Prosecution; that the accused person should not be released on bail. The reasons they advanced were that:

- a) *Although the accused is registered as a Kenyan nationality, and holds a Kenyan Identity Card No. 23854516, there are serious doubts why he waited to be registered until he was 28 years old*
- b) *The accused has a Ugandan passport*
- c) *The accused has on many occasions travelled from Kenya to Uganda and back*
- d) *The Kenya-Uganda border is unique as there are people of the same families who live in both divides, thus making the border quite porous with people travelling unhindered to and from either country;*
- e) *The trend has been that, in numerous cases accused persons living at the border after being released on bond, have escaped to Uganda and never to attend court again. Those incidents are common and have made it difficult for the law enforcement officers to enforce court orders.*
- f) *In the circumstances of this case, there is real possibility that the accused will abscond, and this is a compelling reason under Article 49(1) (h) of the Constitution on which an accused person could be denied bail.*

[3] The Prosecution however submits that, in case the court should grant the accused bail, then the court should consider the seriousness of the offence, and the entire circumstances of the case, and be minded to attach very stringent conditions to bail that will ensure his attendance in court. The Prosecution proposes

that the accused be required to surrender his Ugandan passport and be obliged to provide a Kenyan surety.

[4] There is another minor issue that the parties raised, that is; alleged harassment of a chief and or sub-chief by the OCPD. The issue does not relate to bail but I should only make a general comment on it by repeating the obvious; nobody has the right to harass another person irrespective of their stations in life, whether high and mighty, or lowly and meek in society. There is however no evidence of the alleged harassment of the chief or the sub-chief of the respective jurisdictions. The matter rests there.

DEFENCE DISCOUNTS PROSECUTION'S OBJECTION TO BAIL

[5] According to Mr. Ashioya, counsel for the defence, the State having confirmed that the accused is a Kenyan citizen, the question of suspicion is neither here nor there. On being registered and having been issued with a national ID card, any earlier lapse was cured, and there is no legal requirement that the accused should provide explanation for late registration at this stage. Even if an explanation for late registration was needed, then it was at the time of registration.

[6] He further argues that, even if by obtaining a Ugandan passport the accused breached the law, any such breach was cured by dint of Article 16 of the Constitution of Kenya, 2010.

[7] The accused is a citizen by birth and cannot lose his citizenship whatsoever merely because he was issued with a Ugandan passport or he has attained another citizenship. The Constitution allows dual citizenship, and as the law does not apply retrospectively, the accused cannot be blamed for past issues.

[8] On frequent travels to and from Uganda, Mr. Ashioya told the court that the accused is a timber merchant operating in Kenya, Uganda and DRC. This fact has been acknowledged by the Prosecution through the affidavit of the Investigating Officer (IO). That explains the movement by the accused to those countries. What is important, according to Mr. Ashioya, is that the accused, in carrying out his legitimate timber business, has subjected himself for scrutiny by the immigration authorities. The Prosecution is not alleging that the accused is involved in illegal activities. Therefore, it is untenable for the Prosecution to argue that the accused is planning to abscond once he is released on bail. The Prosecution is making mere allegations founded on fear which is not supported by cogent evidence.

[9] The defence urges that under Article 49(1) (h) of the Constitution, an accused person may not be released on bond only when *compelling reasons* have been adduced by the Prosecution. Those reasons must be clear and show that the release of the accused person will jeopardize the trial by him failing to attend court or interfere with investigations or threaten witnesses. None of those reasons have been laid before the court as to persuade the court not to release the accused on bail.

[10] Mere fact that the accused crosses over to Uganda cannot be a compelling reason as these are necessary business travels in pursuit of legitimate business ventures. There is no allegation that the accused is engaging in any illegal activities, or he threatens witnesses or the security or sovereignty of the nation. Travel alone to and from Uganda in the circumstances is not enough and such bare allegations should be discouraged from being peddled by the Prosecution unless they are grounded on real facts.

[11] In the absence of compelling reasons, the accused should be released on bond. The defence will provide Kenyan surety.

[12] On the request that he should deposit his passport in court, counsel for the defence argued that, such order if made will prejudice the business of the accused. Possession of the passport has not been shown to prejudice administration of justice in this case. In sum, the right of the accused to be released on bail outweighs all the reasons given by the Prosecution.

[13] Mr. Ashioya ends by saying that failure by the Prosecution to execute court orders cannot be blamed on the accused. He is not responsible for the failure. This submission shocked and aggrieved the Prosecution who retorted in a forceful manner that the submission is tantamount to saying that the court

should issue orders in vain particularly in this case where it is clear they will be violated.

COURT'S VIEW ON THE MATTER

Subject of bail becoming familiar

[14] The contours of the subject of the right to bail under Article 49(1) (h) of the Constitution are now becoming familiar and clearer as courts are confronted more and more with the subject. The court had the occasion to define the meaning and the scope of the phrase *compelling reasons* under Article 49(1) (h) of the Constitution in **BGM HCCRC NO 55 OF 2009 R v JOKTAN MAYENDE & 3 OTHERS**, and upon a deep and thoughtful consideration, held that:-

...the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.

[15] The court in the **JOKTAN MAYENDE CASE** stated further that:-

[4] This high standard is more in accord with the stringent constitutional requirements in Article 24 of the Constitution on Limitation of rights and fundamental freedoms...In light thereof, the court must be convinced by the prosecution that it is proportionate and justified in the circumstances of the case to deny the accused bail.

*[5] The above test is the exemplar of the constitutional order ushered by the Constitution of Kenya, 2010, when it pronounced that all offences are bailable completely departing from the earlier position where capital offences did not qualify for bail, and this explains why the court must be convinced to the set standard that there are **compelling reasons** for the accused person not to be released on bond.*

INSTANCES OF COMPELLING REASONS

[16] Before placing the reasons adduced by the Prosecution to the scales of the law, let me first enumerate some instances of reasons which, if proved, would constitute compelling reasons. It should not be taken that I am writing an academic thesis. I am only acutely aware of the importance of this subject, and that similar issues will arise in the future. For posterity, it is necessary to cite some grounds that have the potential of becoming *compelling reasons* under Article 49(1)(h) of the Constitution. The list is not exhaustive but the most common grounds include:

a) Interference with witnesses

[17] This as a compelling reason was dealt with in a comprehensive manner in the **JOKTAN MAYENDE CASE**, and the following excerpt is relevant:-

[24] In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya, 2010.

[21]For purposes of Article 49(1) (h) of the Constitution, a compelling reason hinged on interference with witnesses does not necessarily require strict medical proof of, where assault is claimed as the act of interference with witnesses since the court is not determining a criminal charge of assault the way we know it in a criminal trial. Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the case where the person is a witness, it suffices to prove that the accused did act(s)tending or intended to interfere with a witness. The court is then entitled, if not bound, to infer that the intention of the accused in accosting the witness had been to dissuade the witness from

giving evidence. Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give shewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice.

[22] All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses covers a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.

b) Interfering with investigations

[18] This is a general ground and it encompasses (a) above, but for the purpose of this treatise, it is treated as a stand-alone ground for there could be other incidences other than interference with witnesses which constitute interference with investigations, and depending on the allegations being made by the Prosecution, could be a legal basis for objecting to bail. Acts of interference with the general conduct of investigations such as destruction or possibility of destruction of evidence which is in the sole custody of or which only the accused knows of its whereabouts, are culpable obstruction of the course of justice. But a general averment that the accused is interfering or has interfered with investigations will not suffice as a compelling reason in terms of Article 49(1) (h) of the Constitution. The specific instances of interference with investigations must be laid before the court, and of course be specifically proved upon real and actual evidence as to persuade the court to make an inference that there are *compelling reasons* for the accused not to be released.

c) Real Possibility to abscond

[19] When the court releases the accused on bail, it is expected that the accused will attend court on the dates appointed for the mention or hearing of the case. If attendance by the accused is not guaranteed even by any amount of security or surety, then the accused will be denied bail. But it is for the Prosecution to prove the possibility to abscond is real by producing evidence that is real and cogent evidence as to lead the court to make an inescapable inference that the accused will, most likely than not, abscond. Accordingly, a possibility that is fanciful or imagined or based on fear or apprehension or believe is not sufficient as a compelling reason. The standard is high and must be attained by the Prosecution if the right to bail is to be limited on this ground.

d) Danger to accused person

[20] In some instances, the Prosecution have argued that the accused should not be released on bail due to the security of the accused. They normally cite hostile circumstances surrounding the case. This is a rather difficult ground to prove, but I do not want to slam the door on it or proclaim its potency or its prospects being minimal as a compelling reason under Article 49 of the Constitution. Except, it is for the court to evaluate the entire circumstances of the matter and decide whether it qualifies as a compelling reason to deny the accused bail. Initially the Prosecution alluded to political hostility and rivalry between two political factions, and the accused belongs to one of the warring factions, thus making the security of the accused to be at stake. That state of affairs is quite unfortunate at a time of elections. However, the Prosecution seems to have abandoned that ground and did not argue it as a compelling reason, and I have not been called upon to decide on it. So the less I say about that ground at this stage the better. Nonetheless, I recognize there is need for a more searching debate on this ground as a compelling reason to refuse bail under the Constitution.

ARE THERE COMPELLING REASONS IN THIS CASE?

[21] I now resume the substantive question in this case. Are there are *compelling reasons* for the accused person not to be released on bail? Or better put, are the reasons that have been adduced by the Prosecution *reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond?* The major reason that was advanced by the Prosecution is that the accused is likely to abscond. I gather the apprehension on the part of the Prosecution is founded on the fact that:-

a) *The accused has a Ugandan passport;*

b) *The accused is a frequent traveller especially to and from Uganda;*

c) *The late registration and issuance of an ID Card at the age of 28 is suspicious;*

d) *The porous Kenya-Uganda border makes it easier and possible for the accused to abscond*

[22] There is no doubt that the accused possesses a Ugandan passport. He is able to travel to and from Uganda with ease. This is not an exceptional matter as the East Africa Community has eased passage through the borders of the member states. I also observe that the prosecution has confirmed that the accused is a timber merchant operating from Kenya to Uganda to DRC. I am persuaded to agree with Mr. Ashioya that the plausible explanation is that the numerous trips to these countries are ventures in pursuit of the timber business that the accused is engaged in. As long as those travels were lawfully undertaken, that aspect does not add much to the Prosecution's objection to bail being granted to the accused.

[23] I take judicial notice that the border-situation is quite unique. You find members of the same family living on both sides. I do not however think the border-situation by itself is a sufficient proof that the accused will abscond. The situation must be accompanied by something else or evidence on the part of the accused that makes the possibility of absconding real. The accused is a Kenyan citizen and the fact that he was born at the border or finds himself in the border-situation, should not make his prospects to be released on bond any less than for other Kenyans or persons living in the hinterland. Likewise, that argument does not yield much in support of the objection to bail.

[24] Last but not least, the late registration of the accused as being suspicious is neither here nor there. Any explanation that may have been required, should have been sought at the time of registration. That matter is not particularly relevant especially now that the citizenship of the accused is not in doubt.

[25] I have said enough. The overall impression of all the reasons advanced, collectively and individually, is that they do not constitute *compelling reasons* under Article 49(1) (h) of the constitution. They are not *reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond*. In the circumstances of the case, it is not proportionate or justifiable for the accused person not to be released on bond.

Conditions for bail/bond

[26] I will not close without saying this. That I agree with the defence that failure by the Prosecution to enforce court orders in a particular locality should not be generalized and used as a basis to deny any person bail because the person comes from that locality. It will be wrong to use such notoriety as a consideration in an application for bail without showing specific incidences where the accused was the subject of the court order and the ensuing failure or difficulties in its enforcement. Ordinarily, the court should just treat each case on its merit, and set conditions which are reasonable and will procure the attendance of the accused in court.

[27] I will also not order a surrender or deposit of the accused's passport in court as a condition for bail for three reasons. One, I have not been persuaded that there is any justifiable reason to do so. Second, there is no constitutional grounding to order a surrender or deposit of the accused's passport. Lastly, conditions for bail must be reasonable, but an order for the surrender or deposit of a passport cannot be reasonable within the constitutional structure of the nation.

[28] Consequently, the accused will be released on bond of Kshs. 1, 000, 000 with two sureties of the like amount. Both sureties should be Kenyan Citizens.

Dated, signed and delivered in open court at Bungoma this 18th day of March, 2013

F. GIKONYO
JUDGE

In the presence of:

Mr. Kibellion for State
Chunge for Ashioya for accused
Khisa Court Assistant
Ruling read in open court.

F. GIKONYO
JUDGE