REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 50 OF 2012

DANCUN LIVINGSTONE KIMANTHI……....1ST APPLICANT

WINNIE WAIRIMU KARIUKI……...2ND APPLICANT

VERSUS

REPUBLIC…….....RESPONDENT

RULING

Dancun Livingstone Kimanthi and **Winnie Wairimu Kariuki** are the 1st and 2nd accused respectively in Criminal Case No. 50/2012. They are charged with the murder of **Sarah Akello Aruwa**. The offence was allegedly committed between 30th June and 1st July 2012 at Kiamiako Area in Githunguri within Kiambu County. Both accused were arraigned in court on 10th July 2012 when they pleaded not guilty to the charge and were remanded in custody. On 17th July 2012 the 1st accused applied to be released on bail pending trial. His application was heard and determined by **Ombija J**. vide a ruling dated 27th November 2013. The current Ruling is in respect of the 2nd accused's application dated 28th March 2013 and the 1st accused's 2nd application dated 30th May 2013. Both applications were consolidated for hearing hence this single Ruling.

The 1st applicant has stated *inter alia* the following grounds: that he is a student at the United States International University (U.S.I.U) and his studies are being adversely affected; that he co-operated with the police; that there is no legal basis to suggest that he will commit further crimes; that he has a constitutional right to bail; and that there are no compelling reasons that mitigate against his being granted bond.

In his supporting affidavit sworn on 30th May 2013, the 1st applicant has in his depositions amplified the grounds listed above and in addition averred that he will not abscond but will avail himself for trial; and that he is facing a charge of robbery with violence at the Makadara Chief Magistrate's Court in Criminal Case No. 275 of 2012 for which he has been granted bond of Kshs.150,000/-.

The 2nd applicant has set out the grounds that it is her constitutional right to be released on bail; that she has an unqualified constitutional right to be presumed innocent until the contrary is proved; that she is not a flight risk and will avail herself at the trial. In her supporting affidavit sworn on 28th March 2013, she avers that she is a first year student of Kiambu Institute of Science and Technology (KIST) and that her incarceration has interfered with her education; that she is simply facing allegations of murder which allegations cannot be a basis for her to be denied her human rights; and, further that she will abide by all reasonable conditions and attend her trial.

Both applications are opposed by the State through two affidavits sworn on 6th June 2013 and 20th May 2013 respectively by **No.64103 Cpl. Alfred Ruto** of Kasarani Police Station who is the Investigating Officer in the case. In respect of the 1st applicant, the Investigating Officer avers that the court fairly exercised its discretion on 27th November 2012 when it denied the applicant bail; that the applicant is facing another capital charge of robbery with violence in Criminal Case No. 275/2012 at Makadara Law Courts and is therefore a flight risk; that there is real possibility of interfering with witnesses who are yet to testify. The Replying affidavit sworn on 20th May 2013 in respect of the 2nd applicant contains similar averments.

At the hearing of the applications on 18th June 2012, I heard submissions from **Mr. Bowry** and **Mr. Kaingu** for the 1st and 2nd applicants respectively, and **Mr. Okeyo** for the respondent. In prosecuting the application for the 1st applicant, **Mr. Bowry** urged the court to disregard the earlier application and the ruling thereof. I must observe here that while an accused person is free to make an application for bail many times, the court (though differently constituted) cannot ignore its earlier rulings in respect of the same applicant. It is prudent for the court to understand why bail was denied in the first instance and to consider whether the circumstances may have changed to warrant a review or variation of its earlier orders. I will therefore in this application consider any issues which were pertinent then *vis-à-vis* the issues raised in this second application.

I will first address the constitutional basis of the applications. Both applicants have grounded their applications on **Article 49 (i) (h) of the Constitution** and **Article 50** on the presumption of innocence.

My reading of **Article 49 (i) (h)** is that any arrested person is entitled to be released on bond or bail pending a charge or trial. This right has since the promulgation of the Constitution 2010 been extended to persons facing any charge including that of murder as in the instant case. The right however is qualified in the following terms "…..unless there are compelling reasons." The right then becomes one which can be curtailed by the court where there are compelling reasons. Further, the Constitution, has in its wisdom, not listed what would qualify to be compelling reasons but left the decision thereof to the discretion of the court. It is then the duty of the court exercising discretion judiciously to decide each case on its own peculiar circumstances.

The above position of the law is not contested in this application. What is contested is whether or not there are any compelling reasons why the applicants cannot be released. It is the position of the applicants that there are no compelling reasons to warrant their being denied bail. The State has taken the opposing view.

From the rival affidavits and submissions, it is apparent that the State opposes the applications on the basis that the applicants might interfere with witnesses and/or abscond if released on bail. In respect of the 1st applicant, **Mr. Okeyo** drew the court's attention to averments in the Replying Affidavit and the court's earlier ruling.

The basis for the prosecution's fear that the applicants will interfere with witnesses is that the 1st applicant and the deceased were both students at the U.S.I.U and that some of the witnesses were also students at the same university. While not contesting the fact that both the accused and the deceased were students at U.S.I.U, **Mr. Bowry** for the 1st applicant submitted that there was no evidence of likely interference. I note that this issue was canvassed extensively before **Ombija J.** and he found that there was a likelihood that the release of the applicants would cause fear not only to the witnesses but to other students as well considering that the 1st applicant is accused of kidnapping and murdering the deceased. I am likewise persuaded that the release of the applicant would not only cause fear in the student community but would also lead to the likely interference with the prosecution witnesses in the same university. No new circumstances have been brought to my attention in the present application to warrant a contrary finding.

With respect to the 2nd applicant, she is said to be a student at K.I.S.T. It is not stated whether she has any

links with the witnesses if at all. No basis is laid for the fear that she will interfere with witnesses. I am therefore not persuaded in this case that there is any likelihood of the 2nd applicant interfering with witnesses. It has been stated before, and I repeat here that "where the prosecution opposes bail on account of any of the often-cited and commonly known fears….. It must step out of realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail". See **Republic –Vs- Patius Gichobi Njagi & 2 others. Nairobi HCCR. No. 45/2012 (UR)**

The second reason raised by the prosecution is that both applicants are likely to abscond if granted bail. It has been submitted on behalf of the State that both applicants are facing a robbery with violence charge at the Chief Magistrate's Court in Makadara and that they were likely to abscond if released on bail. Both **Mr. Bowry** and **Mr. Kaingu** for the 1st and 2nd applicants respectively while admitting the existence of the robbery with violence charge against their clients, submitted that they had been granted bail by the lower court and that they remained innocent in both charges until proved otherwise through trial. I do agree with defence counsel that the right to be presumed innocent provided for in **Article 50 (2) (a)** of the **Constitution** is not derogable. However the discretion to grant or not to grant bail is in my view not antithesis to the presumption of innocence. The court under **Article 49 (i) h** is given discretion to curtail the right to bail where there are compelling reasons. The question then in this application is not whether the applicants may be guilty or not but whether they are likely to abscond if released owing to the fact that they are facing charges in the two capital offences with a probability of conviction in either or both charges.

I am persuaded by the argument of the prosecuting counsel that the applicants are more likely to abscond than to attend both trials. It is my view that with a likelihood of conviction in either or both charges, the temptation to abscond would be higher. It is to be remembered that the primary purpose of bail is to secure the attendance of the accused at trial. Secondly, a multiplicity of charges, while not indicative of the applicants' guilt, raises doubt in my mind as to whether the applicants are law-abiding citizens whom upon release would desist from further unlawful conduct.

For the reasons stated above, I find that there exist compelling reasons not to admit the applicants to bail. I am therefore disinclined to exercise my discretion in favour of the applicants.

Their respective applications are dismissed.

Ruling delivered and signed at Nairobi this **22nd** day of **August,** 2013.

R.LAGAT-KORIR

JUDGE

In the presence of:-

Mosinko:Court clerk

Duncan Livingstone Kimanthi:1st Applicant

Winnie Wairimu Kariuki:2nd Applicant

Mr. Bowry:Counsel for the 1st Applicant

N/A for Kaingu:Counsel for the 2nd Applicant

Ms. Mwaniki :Counsel for the Respondent