REPUBLIC OF KENYA

IN THE HIGH COURT

AT GARISSA

Criminal Case 1 of 2012

REPUBLIC ……PROSECUTOR/RESPONDENT

VERSUS

MOHAMED HAGAR ABDIRAHMAN…….....1ST APPLICANT

ADAN ALI FARAH……..…….....2ND APPLICANT

RULING

Introduction

1. The two applicants are asking this court to admit them to bail pending trial in the murder case facing them. They were arraigned before the High Court Nairobi on 17th October 2011 but the plea was not taken until 19th October 2011. Thereafter they asked the court in Nairobi to release them on bond/bail pending the hearing of their case. The court through its ruling delivered on 7th December 2011 declined to admit them to bail pending trial. In so declining the court reasoned that safety of the applicants was at stake. By reading that ruling, it is my understanding that the learned judge's reasoning was informed by the information presented before her by the investigating officer to the effect that tension was high between the two clans involved in the circumstances surrounding the commission of this offence.

2. The court took note of the fact that at the time the application for bail was being presented, the hearing dates in this matter had been fixed for 20th, 21st, 22nd and 23rd February 2012. The court was of the view that there was high probability that the case would be concluded on those dates. Upon transfer of this case to High Court in Garissa the applicants have come to court the second time asking for bail pending trial. It is worth mentioning that the case did not proceed to full hearing on the dates fixed due to factors that appear on the court file records. These include the time spent while the applicants sought to change defence counsel.

The application

3. The application is brought under Articles 20 (3)& (4); 21 (1); 22 (3) & (4); 49 (1) (h) and 50 (2) (a) of the Constitution of Kenya 2010; Section 19 of the Sixth Schedule to the Constitution of Kenya 2010 read together with Rule 23 of the Constitution of Kenya (Supervisory jurisdiction and protection of fundamental rights and freedoms of the individual) High Court Practice and Procedure Rules, 2006 and all other enabling powers and provisions of the law. It is dated 21st February 2012 and was filed on 12th March 2012. It is supported by the grounds on the face of the application and the supporting affidavit of

Adan Ali Farah, the second applicant.

Applicants' Submissions

4. In support of the application counsel for the applicants submitted that bail in now available to persons charged with murder by dint of Article 49 (1) (h) of the Constitution of Kenya 2010 unless there are compelling reasons to deny bail to such persons; that the applicants are presumed innocent until the contrary is proved; that they are Kenyan nationals who reside within the jurisdiction of this court with no intention of relocating; that both applicants have families in Kenya and are well known within Garissa Municipality and both undertake to avail themselves to court until this matter is concluded and that they are willing to abide by the bond/bail conditions set by the court.

5. Counsel assured the court that the applicants will not interfere with witnesses and that indeed their release on bail will assist the facilitation of peace initiatives being pursued between the two clans. He conceded that this is the second application for bail after the High Court in Nairobi denied the applicants bail in the first application on the grounds of their personal security. He stated that there is no law barring an applicant from bringing a similar application if the circumstances have changed. He stated that the situation on the ground has changed in that there are no hostilities between the two clans and the release of the applicants will enhance peace initiatives being pursued by the two clans.

6. Counsel further submitted that there are no compelling reasons advanced by the State to make the court deny the applicants bail. He stated that the Government has enough machinery to ensure peace prevails.

Respondent's submissions

7. The State Counsel told the court in his submissions that he relied fully on the contents of the replying affidavit of Chief Inspector Mbati of Garissa CID sworn on 26th April 2012. Counsel referred the court to a similar application by the applicants argued before Nairobi High Court in which the judge found a compelling reason to deny the applicants bail. Counsel stated that right to bail under Article 49 (1) (h) is not absolute and that the court should determine as to whether the applicants are entitled to bring a similar application for bail without appearing to be appealing against the ruling in the earlier application; that, if the court finds that they are entitled to bringing a similar application, the court should determine under what circumstances should such an application be brought.

8. Counsel relied on **Misc. Criminal Application No. 679 of 2004 Omba Gandu Magloire v. Republic** and also the grounds in the replying affidavit that the circumstances surrounding the commission of this offence arose as a result of the Abdwak clan attacking the Aulian clan with a motive of evicting the Aulian clan members from their land; that this attack was led by the applicants leading to heightened tension between the two clans that took the intervention of Government security agencies to defuse. That a revenge attack was being planned by the Aulian clan targeting the applicants by the time the two applicants were arrested; that there is information that tension between the two clans remain high and the issues that triggered the hostilities in the first instance have not been resolved, therefore the situation on the ground has not changed. The State Counsel urged the court to find that the compelling reasons still exist and that submissions that the situation on the ground has changed are mere submissions that cannot replace the affidavit by an officer involved in the day to day security operations who says the situation on the ground has not changed.

Court's reasoning and findings

9. Clarification of some issues is called for before the court makes a finding and settles this matter:

i. That this court is not sitting on appeal on the ruling of a sister court that handled a similar application and denied the applicants bail. This court is being asked to consider and determine this application under this court's original jurisdiction and on the application's own merit.

ii. That the law does not bar an applicant from bringing another similar application after the

first one has been denied, however such an applicant coming to court the second time has to show that the circumstances have changed to warrant the court to consider such an application in his favour (**see Misc. Criminal Application No. 679 of 2004: Omba Gandu Magloire v. Republic**).

iii. That the compelling reasons contemplated under Article 49 (1) (h) are not defined by the Constitution 2010 and therefore the court has to look elsewhere for such a definition. One of the areas where the court can turn to for definition is the dictionary and decided cases.

10. In an earlier application for bail pending trial, I did define the word "compel" from various online dictionaries and the Thesaurus as **"a reason that is convincing, that is forceful, that is persuasive, and that tends to persuade by its forcefulness or that which makes one feel certain that something is true." (see Republic v. Osman Hanshi Hussein & another, Cr. Case No. 3 of 2012).** From this definition therefore, it my belief that "**a compelling reason would be such a reason that is forcefully convincing as to persuade this court to believe something is true"**

11. The right to bail envisaged under Article 49 (1) (h) of the Constitution is not absolute. It is allowed or disallowed by the court using its discretion. The court is given discretion and jurisdiction to consider whether compelling reasons exist to deny an applicant bail. As the guardian of the rights of an individual, the court has to exercise that discretion in a manner that takes into consideration the rights of an individual being released on bail against the rights of society at large to ensure that the release of such an individual on bail will not compromise the safety of the community to which the individual is released.

12. The question of bail pending trial for persons charged with murder has been discussed in numerous cases in our courts after the coming into force of the new constitution 2010. This is because the new constitution has allowed release on bail pending trial of persons charged with murder and other serious crimes hitherto not admitted to bail. All these cases and others before the new constitution came into effect have considered the following, among others:

i. Whether the accused person will turn up in court for trial

ii. The nature of the charges facing an accused person

iii. Presumption of innocence of an accused person

iv. Safety of an accused person

v. The gravity of the punishment in the event of conviction

vi. The strength of the evidence supporting the charge

vii. Any previous criminal records

13. The courts have held that the paramount consideration is whether an accused person will attend court and be available for trial. All factors and circumstances for the release of an accused on bail pending trial are centered on this question and any other factor is secondary (**see Watoro v. Republic (1991) KLR**)

14. My reading of the replying affidavit by Chief Inspector Julius Mbati, especially paragraphs 7, 8, 9, and 10, discloses that the respondent is opposing this application because the release of the two applicants might ignite hostilities between the Abdwak and Aulian clans as a result that the security of the applicants may be threatened. It is trite law that a party alleging existence of compelling reasons bears the burden of proof on a balance of probability that such reasons exist (**see R. V. John Kahindi Karisa & 2 others, Msa HCCRC No. 23 of 2010**). In this case, the State alleges there are compelling reasons that the applicants' security is at stake if the court were to release them on bond/bail. It is the State to proof on a balance of probability that such is the case. On their part, the applicants have told the court through submissions by their counsel that there are no hostilities on the ground and that indeed the release on bail of the applicants will facilitate peace initiatives between the two clans.

15. Have the circumstances in this case changed as to allow the applicants bring a similar application before this court? A reading of Justice Mwilu's ruling shows that the Judge in making the ruling in the earlier application considered that the offence had been committed barely two months to the date the first application was being made and therefore there was a possibility that the other suspects who were alleged to have committed the offence with the applicants could harm the applicants for fear of being implicated. She also considered that at the time, the case had been fixed for hearing in February 2012 and there was probability that the case could be determined fully within those dates. This has changed in that this case was not heard on those dates and no hearing date of the main suit has been fixed yet.

16. My reading of the affidavit of the Chief Inspector Mbati and the submissions by State Counsel and considering the same, I find that the replying affidavit contains matters of evidence especially paragraphs two to eight, all inclusive. To believe these contents of the affidavit at this stage without hearing all the evidence during full trial would be to go contrary to the presumption of the innocence of the applicants until contrary is proved.

17. In respect to paragraph nine of the replying affidavit, it is my considered view that if the State through its machinery is privy to information that tension is still high and the issues leading to the commission of the offence have not been resolved, then it is incumbent on the State to ensure security of all its citizens. It is also incumbent upon the State to investigate and arrest the other persons who are alleged to have committed the crime with the applicants. The court was not told of any further investigations on this matter. I wish to reiterate the words of the learned Judge in the **John Kahindi Karisa case above** who had this to say:

".....I also reject the idea that the accused should be remanded and not granted bail for their own safety, security and good. Any accused person released on bail has his Constitutional rights secured and protected. No member of the public or any other person can try him or punish him. This can only be done by a competent court with appropriate jurisdiction."

18. My attention was drawn to paragraph eleven of the replying affidavit sworn by Chief Inspector Mbati. I have no problem with the advice given that the right to life is superior to right to bail. However, if this court were to find that the applicants cannot be released on bail basing that finding on the contents of paragraph eleven, this would be tantamount to finding that the applicants committed this crime before hearing the evidence proving the same. In a murder trial, what is not a matter of contention is the fact that a person died and that that death has been caused by another person. The arrest and arraignment to court of a suspect for that murder is not proof that the suspect is the one who committed the crime. That is why the court goes through the rigours of criminal law and procedure in trying to establish who committed the offence.

19. After due consideration of the application and the supporting affidavit, submissions by both counsel and the cited authorities it is my finding that the State has not discharged the burden of proof on a balance of probability that there are compelling reasons to deny the applicants bail. As stated above if tension remains high on the ground, the court was not told what the Government Security agents have done to mitigate the situation given that the applicants have been in custody for over six months. The court was not told who the perpetrators of the tension are and why they have not been arrested. In any event the court sets conditions under which an applicant for bail is released and if these conditions are not met, the law should be allowed to take its course.

20. On the other hand, the applicants have demonstrated that there are changed circumstances to persuade this court to admit them to bail pending trial. They have told the court that peace initiatives have commenced and that their release will facilitate those initiatives. I have also taken note that this matter did not proceed to trial as scheduled, this being one of the factors the Court in Nairobi took into account in denying bail to the applicants that the matter would be heard and probably concluded in two months time. With the above in mind, I hereby allow the application for bail pending trial and set the following conditions:

i. That each applicant shall sign a bond of Kshs. 2,000,000 (two million)

ii. Each applicant shall provide a Kenyan surety of Kshs 2,000,000 (two million).

iii. In the alternative, each applicant shall deposit in Court a cash bail of Kshs 1,000,000(one million)

iv. Each applicant shall report to the DCIO Garissa every Monday, beginning 18th June 2012 and thereafter every Monday of the week until this matter is heard and concluded.

v. Any travel outside Kenya by any applicant shall only be undertaken with written authorization of this court.

It is so ordered.

Dated, signed and delivered at Garissa this 12th day of June 2012.

STELLA N. MUTUKU, JUDGE