REPUBLIC OF KENYA

High Court at Bungoma

Criminal Case 55 of 2009

REPUBLIC

VERSUS

JOKTAN MAYENDE.....1ST ACCUSED

JOHN WEKESA.....2ND ACCUSED

GIBSON KIBOI.....3RD ACCUSED

AMOS SIMIYU MULATI.....4TH ACCUSED

RULING

[1] This ruling is premised on the objection by the prosecution that the 4th accused person should not be released on bond or bail. The supreme law that governs grant of bond or bail is in Article 49(1)(h) of the Constitution, which states as follows

49(1) An arrested person has the right-

(a)…..

(b)…..

(c)…..

(d)…..

(e)…..

(f)…..

(g)…..

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

The phrase *compelling reasons*

[2] The right of the accused or person arrested to be released on bond as granted by the Constitution is not absolute. It has been limited by the Constitution itself in two respects. One, release on bond or bail

will be on conditions, although those conditions should be reasonable. Second, to the extent that there are *compelling reasons*, the accused will not be released on bond. The onus is however on the court to determine; the conditions of bond or bail; and in case the prosecution objects to grant of bond or bail, whether the reasons adduced are *compelling reasons* in the sense of Article 49(1) (h) of the Constitution. For the purpose of this ruling, I shall be concerned with the second limitation on the right to bail. And pose, what does the phrase *compelling reasons* entail?

[3] We are in a constitutional transition where the law is still settling and courts are continually engaged in interpretation sessions aimed at defining the scope of the jural words, terms and phrases used in the Constitution; an exercise which the court should strive to do with wise circumspection in order that the meaning and scope assigned to those words, terms and phrases give effect to the objects, purposes and values of the Constitution. In recent cases where the court was confronted by the word *compelling* in Article 50(6) (b) of the Constitution, Odero & Nzioka JJ, and Majanja J in separate decisions in **MSA HC CR APPL NO 66A & 66B OF 2011 MOHAMED ABDULRAHMAN SAID & ANOTHER V REPUBLIC [2012] e KLR,**and**NBIHC JR MISC APP NO 271 OF 2011 WILSON THIRIMBA V DPP [2012] e KLR** respectively, observed;

Once again we will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as ***"rousing, strong, interest attention, conviction or admiration"***.

I too take the same approach and adopt the finding by the Honourable Judges on the meaning of the word *compelling* in the context of the Constitution. But more light is shed by the Black's Law Dictionary 7th Edition. And accordingly, 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.

[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 our case, it is the curtailment of the liberty of the fourth accused person that is being sought. 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.

[6] In applying the test; are the reasons advanced by the prosecution a neat fit to the scales set by the Constitution as to deny the accused person bail?

PROSECUTION'S OBJECTIONS TO BAIL

[7] The prosecution advanced two reasons why they think the fourth accused should not be released on bond. One, that the fourth accused person has already interfered with a witness in this case. And the other, that the accused person absconded to evade arrest after the commission of the offence herein.

Interference with Witness

[8] The prosecution called C.N who is 17 years old and attends R Primary School where he has completed class six and is waiting to join class seven next year. The court was satisfied that C possess sufficient intelligence as to why the evidence he is to give is being received, and was also of sufficient understanding on the value of telling the truth. He then testified and was cross examined on his affidavit on 28th November 2012.

[9] According to the prosecution, the fourth accused person beat up C.N, who is one of the principal witnesses in this case. The said C.N swore an affidavit on 21st November 2012 which was filed on 22nd November 2012.The most significant deposition by the said C.N is that on 3rd November 2011 he was assaulted by the fourth accused person at R and he suffered bodily injuries. And that the reason for the assault by the fourth accused was because he was a witness in this case. He did not however produce any medical evidence to show that he suffered injuries. But he told the court that the medical notes were contained in an exercise book which he lost together with all his other school books.

Possibility of absconding

[10] The prosecution alleges that the fourth accused person had been in hiding in Uganda after the commission of the offence and there is a possibility that he will abscond if he is released on bond.

[11] To support this claim, the prosecution called two witnesses, C.N and Number 55614, Senior Sergeant Linus Ouma.

[12] C on cross examination, told the court that after the fourth accused person assaulted him on 3rd November 2011, the fourth accused disappeared to unknown place and only came back in October 2012. He said that the fourth accused is their neighbor and he, C, has not been seeing the fourth accused at home until October this year.

[13] Senior Sergeant Ouma (SSgt) told the court that he took over the file on 2.10.2012 from Vincent Ngereza, the investigating officer, but who has since been transferred to Lugari. The SSgt told the court that he was properly briefed by Sgt Ngereza on the file. The SSgt confirmed to the court that C had reported to Sgt Ngereza the assault on him by the fourth accused. Sgt Ngereza then visited the home of the fourth accused but did not find him.

[14] The SSgt further informed the court that on 9.11.2012 he was alerted by the mother of one of the deceased victims herein that the fourth accused was in police custody. He made quick enquiries from the DCIO Mr. Maina and established that indeed the fourth accused was in custody having been arrested on 8th November 2012 and booked in OB No 74 of 8.11.2012 as a suspect for series of robberies and murders in Bungoma. The SSgt later preferred charges against the fourth accused which he is currently facing in court.

THE FOURTH ACCUSED'S CASE

[15] The fourth accused filed two affidavits in court on 27th November 2012. One is sworn by the fourth accused, and the other by his advocate, Mr. Emanuel Situma. Both affidavits are sworn on 27th November 2012.

[16] The affidavit of the fourth accused reinforces the fact that he knows C very well whom they call as Junior. In that affidavit, the fourth accused denies generally that he assaulted C.N. He reiterates that he has never been charged with assaulting C and that not even an OB entry has been produced to support the claim for assault. He also denies having ever left for Uganda and annexes a photocopy of undated letter purportedly written by Assistant Chief, Ndengelwa sub-location.

[17] Mr. Situma's affidavit is largely supporting the claim by the fourth accused that he has never gone into hiding as alleged by the prosecution as he has been attending court in **BGM HC SUCCESSION CASE NO 137 OF 2006** onthe dates indicated in the said affidavit.

COURT'S CONSIDERED VIEW

On the issue of absconding

[18] The allegation that the fourth accused had been evading arrest and that he has been hiding in Uganda is neither here nor there, for, the officer who was investigating the case was not called by the

Prosecution to shed light on this allegation. His evidence would have been useful as he may have given first hand information on the whereabouts of the fourth accused during the tenure of his investigation.

[19] I have also perused **BGM HC SUCCESSION CAUSE NO 137 OF 2006** and the affidavit of Mr. Situma, and there is nothing on record that shows the fourth accused attended court on the various occasions cited by Mr. Situma. That does not however mean that Mr. Situma is not telling the truth because the practice of many judicial officers in recording the Coram does not always indicate the party who attended court particularly where an advocate is appearing for that party. Hence, the court finds itself in an obtrusive situation of pure conjecture, and the ground does not meet the constitutional threshold of *compelling reasons*.

On interference with witnesses

[20] The other reason that the court should determine, is whether the fourth accused has interfered with a witness in this case. There is not a dispute that C is a witness in this case and has recorded a statement regarding the subject of the charge herein. In my own assessment of his demeanor and the general observation of the way he gave his testimony, C was truthful and I believed him when he told the court that Amos, the fourth accused assaulted him because he is a witness in this case. The charges facing the accused indeed are about the death of Dennis and Kennedy, whom C referred to as his friends. According to C, the accused told him sarcastically that he is beating him so that he, C, 'should give evidence in this case'. That evidence was not controverted in cross-examination. C also testified that the fourth accused is their immediate neighbor at home. He therefore knew the fourth accused personally and was not under any delusion about the identity of the person who assaulted him.

[21] One thing is clear to the court, that the fourth accused person accosted the witness in this case on the reason that he was going to testify in the case. This is an act of interference with witnesses which is loathe in administration of justice. 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 give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice. For greater understanding of this position of the law see the case of **R V KELLET [1975] 3 All ER 468.**

[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.

[23] Except for a general denial that the fourth accused assaulted C.N, there is no any specific evidence which rebuts the evidence before the court that the fourth accused accosted the said C.N, a witness in this case.

[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.

[25] Administration of public justice particularly in criminal sphere includes the process of adjudication as well as investigation of offences. On this, the following words of Mac Dermott, Lord Chief Justice in the case of **Reg. v Bailey [1956] NI 15 at p. 26** are most apt:

''The administration of public justice, particularly in the criminal sphere, cannot well be confined to the process of adjudication. In point of principle we think it comprehends functions which nowadays belong to, in practice almost exclusively, to the police, such as the investigations of offences…''

It also recognizes the *compelling-state-interest* principle where the state's constitutional duty to bring offenders to book should be free from wanton interference of its witnesses, and is to be weighed against the right to liberty of the person charged if that person is being accused of interfering with witnesses in his own cause. It is therefore a matter of great public interest to allow the course of justice to run without being hindered by any person, a group of persons, a state organ or organs whatsoever, otherwise the pillar of justice that is the enabler of constitutional rights and obligations in society will collapse, and with it will tumble the entire societal fabric, social justice and the rule of law. That is the amount of preponderant weight that administration of justice bears and outweighs the right of the fourth accused to liberty particularly where he has acted in a manner tending to impede the course of justice. The fourth accused, I am convinced, interfered with a witness in his own cause.

THE DECISION

[26] In the circumstances of the case, the prosecution has advanced a compelling reason that the fourth accused should not be released on bond. It is forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Accordingly, the fourth accused is denied bail and will remain in remand for the period of the trial.

[27] Right of appeal 14 days.

Dated, signed and delivered in open court this 6th day of December, 2012

F. GIKONYO
JUDGE
6.12.12

IN THE PRESENCE OF

Alusa-court clerk

Situma for 4th accused person

Kibelion for the DPP
4th accused present

Court: Ruling read and delivered in open court

F. GIKONYO
JUDGE
6.12.12