No. 2789

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL MISC. APP. NO. 3 OF 2011

GEORGE MOGUSU SIMBE.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

The applicant, **George Mogusu Simbe** with three others were charged before the Chief Magistrate's court, Kisii on 19th September, 2010 with two counts of robbery with violence contrary to section 296 (2) of the **Penal Code**. It was alleged that on the night of 19th September, 2010 at Ikuruma sublocation, Ngonyi location, in Kisii County jointly with others not before court being armed with dangerous weapons namely, A.K 47 rifles robbed **Michael Nyakundi Onchong'a** of one Nokia mobile phone 1800 valued at kshs. 4,500/= and unknown amount of money and immediately after such robbery shot dead the said **Michael Nyakundi Onchong'a**. In the 2nd count, it was alleged that on the same date, place and in similar fashion, they robbed **Sarah Motuka Nyakundi** of one Nokia mobile phone 1100 valued at kshs. 2,500/= and immediately before such robbery used actual violence to the said **Sarah Motuka Nyakundi**. There were also alternative counts of handling stolen goods contrary to section 322 (2) of the **Penal Code** involving **Susan Kerubo Ondieki** and **John Oyugi Momanyi** which do not concern us in this ruling.

The applicant and his co-accused denied the charges and were subsequently released on a bond of kshs. 500,000/= with alternative cash bail of kshs. 100,000/= on 15th November, 2010.

On 25th November, 2010 whilst the applicant was savouring his freedom on bail, **Mr. Mutuku**, learned Senior Principal State Counsel entered the fray. In an informal application he sought a review of the order granting bail to the applicant. In effect he was saying that the applicant should have been denied bail on the ground that during the commission of the offence, the victim of the robbery was killed, several people suspected to have had a hand in the robbery had since been lynched by the mob from the deceased's village which also happened to be the applicant's residence. That if the applicant was to be released on bail, most likely, he would meet the same fate as the situation on the ground was still volatile; the offence charged was serious, the sentence it would attract if convicted would make the applicant a flight risk and finally, that the applicant was likely to intimidate the witnesses as he was in possession of their

statements.

The informal application was vehemently opposed by **Mr. Bosire**, learned counsel for the applicant on the grounds that the provisions of law under which the application had been made were not cited, the prosecution had not proved compelling reasons for refusal of bail, the affidavit in support of the application for refusal of bail raised no new issues, insecurity of the applicant if released on bail had not been demonstrated, it was not proved that some suspects had been lynched, applicant hailed from a different locality, Situation on the ground being volatile had not been demonstrated, public interest in refusing bail had not been demonstrated and finally, that good reasons were given when bail was initially granted.

Having carefully considered the matter, the learned magistrate was persuaded and satisfied that a case for review of the earlier order for bail had been made out. He proceeded to allow the application to the extent that the earlier order granting the applicant bail was reviewed and reversed.

The applicant was unhappy with these developments. He therefore moved to this court by way of Notice of Motion seeking that he be admitted to bail pending the hearing and determination of Kisii **Chief Magistrate's Court Criminal case number 1623 of 2010** – **Rebublic –vs- George Mogusu Simbe & 3 others**. The application was anchored on article 49(1) (h) of the Constitution of Kenya, section 123 of the **Criminal Procedure Code** and **all other enabling provisions of the law**. In a way, the applicant was merely renewing his application for bail in this court and not appealing the decision to review and deny him bail. This is perfectly in order contrary to the submissions of the learned state counsel, **Mr. Gitonga**.

The grounds advanced by the applicant in support of the application are that the offence charged is bailable unless there were compelling reasons to deny him. The right to bail was a constitutional right. There were no sufficient compelling reasons to deny him bail and that his continued stay in custody was repugnant to justice and morality since he is permanently domiciled in Kenya and there was no possibility for him to jump bail, that the lower court had released on bail the 2nd co- accused and therefore the refusal by the same court to release him on bail as well was unconstitutional and discriminatory in nature. The applicant hailed from Nyamira whereas the offence was allegedly committed in Kisii, he would abide by any terms and conditions that may be imposed by court and finally, that the refusal by the state to have him released on bail was misplaced and based on mere suspicion not supported by tangible evidence.

In support of the application, the applicant swore an affidavit. That affidavit merely expounded and elaborated on the foregoing. Suffice to add that his continued stay in custody had made him sick and continuously now requires medical attention, that he had a clean history of character and his security is guaranteed, hence there was no potential insecurity against him, that he was not aware of any witnesses in the case and therefore his release on bail will not be prejudicial to the state case.

Pursuant to leave granted to the applicant on 21st February, 2011, the applicant filed a further affidavit in which he deponed where pertinent that 8 witnesses had already testified and the remaining ones were formal witnesses and hence the allegation that he would interfere with them was baseless and unfounded. That the trial magistrate had confirmed that he was suffering from asthma.

When the application came up for interpartes hearing on 4th April, 2011 **Mr. Bosire** reiterated the grounds in support of the application as well as the two affidavits sworn in support of the application. To buttress his application and submissions, **Mr. Bosire** relied on the following authorities:

- **Republic -vs- Danson Mgunya & Anor (2010) eKLR**

- **Republic -vs- Daniel Musyoka Muasya & 2 others (2010) eKLR.**

It must however be pointed out that the above authorities were rendered by courts of coordinate jurisdiction as this one. They are not therefore binding on me. However they are of persuasive value only.

In opposing the application, **Mr. Gitonga** submitted that the right to bail was not absolute. It can be curtailed if there are compelling reasons. The state had through the affidavit filed in the trial court and sworn by **CPI Lawrence Mwangale**, the investigating officer in the case discharged that burden. It was not true that the applicant had been discriminated against by the trial court when it released the co-accused on bail and denied him the same. The circumstances alluded to by the investigating officer in his affidavit were peculiar to him.

What did the investigating officer say in his affidavit opposing the grant of bail to the applicant? It is what **Mutuku** told the trial court when he informally sought the review the order for bail. Suffice to add that the persons who were killed by the mob from the deceased's village were:- **Evans Siko Ogamba** alias **Mwarabu**, **Paskali Onyiego**, **Jeremiah Bogonko Nyakundi** and **Dominic Opondi**. The deceased persons were suspects in the robbery that led to the death of the victim. That once released on bail, the applicant will most likely interfere with the prosecution witnesses who will not be free to come forward to give evidence once they know the suspects are on bond. Investigations were incomplete in that more suspects namely **James Oroko Momanyi, Okiri, Ooga Nyariki, Musikari Kombo** and **Joseph Onchong'a** were still at large and being sought. In the circumstances if the applicant was released on bail, he would interfere with the investigations and make the arrest of the said suspects very difficult and impossible.

I have carefully read and considered the application, the rival affidavits and the annextures thereto, as well as respective oral submissions, the authorities cited, the law and the proceedings so far of the trial court. It is common ground that the law prior to the promulgation of the constitution of the 2nd Republic of Kenya on 27th August, 2010 prohibited the grant of bail to an accused on capital charges. That was provided for in section 72(5) of the repealed constitution. Further section 123 of the **Criminal Procedure Code**, expressly prohibited the courts from granting bail to any accused person facing the specified capital charges. All these now belong to the dustbin of history. With the coming into force of the new constitution, the aforesaid prohibitions were taken away. The courts have been granted discretion in very clear terms under section 49(I) (h) of the constitution, to grant bail in all cases where an accused is charged with an offence punishable by fine alone, or imprisonment for a period not exceeding six months and in all cases, an accused will be released on bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be so released. In other words, after the effective date of the constitution, section 49 (I) (h) thereof permitted the release on bail of an accused person charged with a capital offence, unless there were compelling reasons not to be so released. I think it was in bearing allegiance to this provision of the constitution that the trial court initially released the applicant on bail though charged with robbery with violence which is a capital offence. Later, the trial court was persuaded to change its mind about granting bail to the applicant. Again there is nothing wrong with that move.

Whether or not to grant bail to an accused person is an exercise in the discretion of the trial court bearing in mind of course, the constitution, the gravity of the offence, the sentence which the offence carries and the risk of absconding, the risk of influencing witnesses, collusion with co-accused, the applicant's behaviour and attendant security threats, the conduct of the prosecution and complexity of investigations. This list is neither comprehensive nor exhaustive as each case must at the end of the day be considered on an individual basis as no two cases are hardly the same. However the basic consideration in granting or refusing bail is whether the applicant will attend court at the trial. The foregoing may in one way or another amount to compelling reason(s) as to why bail would be denied.

The question in this application is whether there are compelling reasons why the applicant should be

denied bail and what are those compelling reasons. Coupled with this is the issue of who carries the burden of giving the compelling reasons. I have no doubt in my mind that the burden lies upon the state to advance the compelling reasons. Such compelling reasons may be advanced orally in court and not necessarily by way of affidavit.

In this application, the state has advanced compelling reasons by way of affidavit. The offence charged is serious no doubt and upon conviction carries a death sentence. In this case a person was killed in the course of the robbery. The possibility of death penalty being imposed on the applicant upon conviction may act as an incentive for the applicant to abscond, so it is argued by the state. However as **Odero J.** said in **Republic -vs- Daniel Musyoka Muasya** (supra), that is a simplistic way of looking at things. Whilst an accused who knows he is guilty may indeed be tempted to abscond, there are equally those accused who believe in their innocence and who will wish to have their day in court to clear their names. They will thus not abscond.
The state in my view have essentially three grounds upon which it feels that the applicant should be detained in custody pending his trial; his safety is not guaranteed, he will interfere with witnesses, ongoing investigations and thereby make the arrest of the other suspects still at large difficult.

With regard to the first reason, it is not unheard of and indeed it is prevalent occurrence in this jurisdiction for those released on bail on a capital charges to be victims of mob justice or is it injustice. The villagers do not know the difference between a suspect being released on bail to await his trial and an acquittal following a trial. They cannot appreciate how someone charged with such heinious crime should shortly thereafter be seen walking freely the streets. Thus the court should also consider the safety of the applicant. It is in his paramount interest that his safety is assured, as the families of the deceased are also bitter an could exact revenge, which leads to lawlessness. Already there is uncontested evidence that as a result of the death of the robbery victim, a mob from his village which happens to be the applicant's residence as well descended on the would be suspects and lynched them. The names of those suspects have been given. The investigating officer has deponed that the situation on the ground is still volatile. The applicant's response is that he does not come from the village but stays about 70 kilometres away in Nyamira. This may well be true. However, who says that the marauding gang cannot reach him in Nyamira County. His further submission is that the allegation by the state was based on mere suspicion and not supported by any tangible evidence. This submission is not entirely correct. The state has proved an oath that four people have since been killed on suspicion of having participated in the robbery. This is not fiction. It is real. I do not think that the applicant may escape such wrath. It is in his own interest and security that he remains behind bars.

The state has also advanced the argument that the applicant may interfere with witnesses. The applicant's reaction is that so far 8 witnesses have testified and the remaining ones are only formal witnesses. Who says formal witnesses cannot be interfered with? In any event we are not even sure of that assertion by the applicant. Even those witnesses who have testified can be interfered with to pass a message to the remaining formal witnesses. Several cases have stalled in this court because of interference with witnesses by accused following issuance of threats to them either directly or indirectly. Indeed it was only the other day that a murder trial stalled though witnesses had been bonded and were actually present in court but when called out, by prosecutor, they failed to respond following some form of threats communicated to them by the accused and or his ilk. Accordingly, the prosecutor's fear in this regard is not wholly unfounded. This is yet another compelling reason for this court to consider just like the trial court did in refusing the applicant bail.

Lastly, it is the case of the state that if the applicant is released, he may interfere with attempts to have arrested those other suspects still at large. This assertion has not been countered by the applicant. The names of those suspects have been given. It is not beyond the realm of possibility that those at large may in one way or another contact the applicant if released on bail thereby making their possible arrest by the state well nigh impossible.

For those reasons, I decline to grant the prayers sought in the Notice of Motion. It is dismissed.

Ruling dated, signed and **delivered** at Kisii this 4th day of May, 2011

ASIKE-MAKHANDIA

JUDGE