



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI**

Criminal Case 23 of 2008

REPUBLIC.....PROSECUTOR

VERSUS

**JOSEPH WAMBUA MUTUNGA..... 1ST ACCUSED
PETER WAMBUA MUTHUI2ND ACCUSED
JAMES MWAMA MUNINI3RD ACCUSED
MUTHUI MUTAVI4TH ACCUSED**

R U L I N G

The four accused persons, **JOSEPH WAMBUA MUTUNGA; PETER WAMBUA MUTHUI; JAMES MWEMA MUNINI;** and **MUTHUI MUTAVI**, are on trial for the offence of murder.

It is alleged that the said accused persons, jointly with others who were not before the court, murdered **HASSAN NG'ANG'A MUSYOKI**, on the night of 26th and 27th February 2008. The incident is said to have taken place at Mukunike Village in Thika District.

The case was scheduled for trial on 20th and 21st September 2010.

On the 20th of September 2010, the prosecution had three witnesses in court, and they were ready to proceed with the case. Similarly, the defence were ready to proceed with the case. Regrettably, however, the court was unable to reach the case, because of the otherwise heavy case load before it on that day. Consequently, the court directed that the trial would proceed on the following day. The said directions were given with the concurrence of the accused persons.

The accused then moved the court pursuant to the provisions of **Article 49 (1) (h) of the Constitution of the Republic of Kenya**. They asserted that all offences were now bailable.

Pointing out that they had already been in custody for three years, the accused submitted that there were no compelling reasons to warrant their continued stay in custody pending trial.

As far as the accused were concerned, they are presumed innocent until and unless they were proved to be guilty.

It was the contention of the accused that they can be trusted because they have always attended court

regularly. Consequently, they believe that the state was not able to demonstrate that they might abscond, if the court granted them bail pending trial.

The accused also submitted that the state had not demonstrated that the community to which each of the accused belong, would reject them if they were granted bail. Had their respective communities rejected them, the accused believe that it would then have constituted a compelling reason for denying them bail.

The accused invited this court to give life to the values espoused in Article 10 of the Constitution. They said that the court could do so by granting them bail pending trial.

On the other hand, if the court declined to grant them bail, the accused believe that that would be contrary to interests of justice.

I was asked to take action which would demonstrate that the rights enshrined in the Constitution were not mere paper aspirations, but real values that underpinned the said Constitution.

In answer to the application, the prosecution filed an affidavit sworn by Sgt. Simon Makau Ndeti, the Investigating Officer. By the said affidavit, Sgt. Ndeti indicated that the accused persons were arrested on 7th March 2008. The original arrest was effected by village elders, who then handed the accused persons to the police officers at the Thika Police Station.

The accused were re-arrested by the police officers, for the offence of murder.

During the two-and-a-half years when the accused have remained in custody, they are said to have become aware of the persons whom the prosecution intends to call as witnesses.

Sgt. Ndeti is of the view that because the accused would be liable to receive the death sentence, if they were convicted, the severity of the said sentence may tempt the accused to abscond if they were released on bail pending trial.

Secondly, Sgt. Ndeti says that the prosecution witnesses reside in the same locality as the accused persons. Therefore, if the accused were granted bail pending trial, the prosecution fears that the accused would make contact with witnesses, whose expected evidence they had already become aware of. In the event that that happened, Sgt. Ndeti believes that fear will be inflicted on the witnesses.

The learned state counsel, Ms Wafula, submitted that the reasons advanced by Sgt Ndeti constituted compelling reasons to warrant the rejection of the application for bail.

The state invited the court to find that although an accused person is presumed innocent until and unless he is proved guilty, the said legal presumption ought not to be read in isolation from the other provisions of the Constitution.

The court was also reminded that each person in Kenya is entitled to equal protection before the law.

Nonetheless, the accused persons are said to be casual labourers, as opposed to persons who were engaged in permanent employment. Also, they are said to be without any family roots in Thika. Therefore, if they were granted bail, the state believes that there is nothing through which the accused can demonstrate, to the satisfaction of the court, that they will attend their respective trials.

It was further submitted that the public confidence in the administration of justice would be disturbed if the accused were granted bail pending trial, even if the accused are presumed to be innocent until and unless they were proved guilty.

When replying to the submissions of the learned state counsel, the advocate for the accused, Mr. Evans Ondieki reiterated that the accused had a constitutional right to be granted bail.

As far as he was concerned, there had been no indication that the accused could, in some way, interfere with the witnesses; that contention is premised on the grounds that there had been no instances of interference with witnesses so far, even though the accused were arrested more than two-and-a-half years ago.

The accused also pointed out that by virtue of **Article 27 of the Constitution** they should not be discriminated against simply because they were casual labourers.

Both the accused and the state concur, that in interpreting the provisions of the Constitution, the entire document has to be read in a wholesome manner.

The parties also agree that everyone is entitled to equal protection under the law.

But the accused say that they have no capacity to interfere with the witnesses, even if they were granted bail. That statement was made from the bar. Thereafter, the accused indicated that if the facts alluded to in the affidavit of Sgt. Ndeti were inquired into properly, the court would ultimately conclude that the said facts offend the provisions of **Article 27 (1) of the Constitution**.

As it is the members of the Kenyan public that enacted the Constitution, through the Referendum, the accused believes that if they were granted bail pending trial, the public would not lose confidence in the administration of justice.

The court was then told that the mischief against which the provisions of **Article 49 (1) (h) of the Constitution** was enacted, was the fact that numerous persons were held in custody for long periods of time; and they were subsequently found to be innocent.

Having given due consideration to the application, I now make the following findings.

By dint of **Article 27 (1) of the Constitution**;

“Every person is equal before the law and has the right to equal protection and equal benefit of the law. “

In the circumstances, the fact that the accused persons herein were casual labourers, as opposed to persons who were engaged in permanent and pensionable employment, should not, of itself, be the basis upon which to determine whether or not to grant them bail.

Article 27 (2) of the Constitution makes it clear that;

“Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”

To my mind, the equality envisaged herein is as between any two persons facing similar circumstances, insofar as their legal rights were concerned. For instance, if two people were charged with the offence of stealing, if the items stolen or their values were comparable, the said two persons should be accorded equal treatment before the law. It should not matter that one was more affluent than the other, or that one was more “well connected” than the other.

However, I do not think that the envisaged equality would apply in equal measure to one person charged with defilement, as compared to another person charged with assault.

The equality before the law first requires the judicial officer to enforce rights in equal measure to any two or more people in similar circumstances. Secondly, it is also expected that, in general terms, two or more judicial officers who are handling cases whose circumstances are comparable, should strive to apply principles which were not completely at variance.

The latter goal is however more difficult to achieve, in real terms, although it is desirable that we aspire to do so.

I have consulted widely, with a view to ascertaining the reasoning that informed the decision to make all offences bailable.

In that respect, I did learn that this issue was not contentious and thus it did not feature in the deliberations of the Committee of Experts. That means that it was a view that was already settled at Bomas of Kenya, during the tenure of the Constitution of Kenya Review Commission, 2001.

It was noteworthy, from **“The Final Report of the Constitution of Kenya Review Commission”**, that the people of Kenya had said that there was a need to remove restrictions on rights.

In that regard, one of the complaints that had been received was that suspects were being held in custody for long periods, whilst they awaited trial.

After deliberations, the Commission resolved that there was a need for an expanded Bill of Rights, which was to be incorporated into the Constitution.

The commission also proposed that;

“there should be a general provision which says that rights may be limited, but that the requirements should be reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom, taking into account all relevant factors, and the major factors should be indicated for the guidance of courts.”

I believe that it is within that context that **Article 49 (1) (h) of the Constitution** was worded as follows;

“An arrested person has the right -

(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.”

Clearly, therefore, the court is being told that all things being equal, persons who are under arrest should be granted bond or bail pending a charge or bail. However, the Constitution also provides that if there are

compelling reasons for denying the person bond or bail, the court would be entitled to order that he should continue to be held in custody.

In effect, the guiding principle provided by the Constitution is that an arrested person ought only to be denied release on bond or bail, if there were compelling reasons.

During deliberations on the Bill of Rights, the Constitution of Kenya Review Commission took into account the Bills of Rights in several other countries such as Eritrea, Ethiopia, Uganda, South Africa, Brazil, Ghana, Namibia, Malawi and Tanzania.

The striking feature in those other jurisdictions is that they have enacted a "**Bails Act**", or other equivalent statutes. Through such statutes, courts are further guided on the manner in which they should actualize the right to bond or bail.

In Malawi, there is the "**Bail (Guidelines) Act**" whilst in Uganda they enacted the "**Trial on Indictments Act**".

I believe that it would be useful to have a Bails Act in Kenya; and I sincerely hope that the Legislature will give serious consideration to enacting the relevant legislation.

Through legislation, various structures and instruments can be put into place, so as to assist the Judiciary in ensuring that accused persons who are granted bail, do turn up for trial.

Already, we have a large number of accused persons who have jumped bail, in Kenya. In many such instances, the courts had even ordered that the suspect should only be released from custody upon provision of an approved surety.

The surety would then deposit in court, some form of security, such as his log-book or a title deed. However, we have numerous log-books and title documents which have been abandoned in court, even after accused persons have jumped bail.

It does appear to us that the securities deposited in court, in many instances, is a forged document. And even though the courts also hold certificates of official searches, those too have not been useful because, they too, are ultimately proved to be forgeries.

Bearing in mind such practical realities, it would be remiss of the court to nonetheless grant bail in situations where there was no way of ensuring that the accused later attended court for his trial.

I am aware that in some jurisdictions an accused person may be fitted with a gadget such as a bracelet or a tag, which will ensure that he does not leave the jurisdiction of the court. In the event that he should attempt to either leave the jurisdiction without lawful authority, or that he tried to tamper with the said gadget, the gadget would immediately trigger-off an alarm at the nearest police station.

For such gadgets to be introduced in Kenya, appropriate legislation would be necessary.

In some other jurisdictions the accused would be discouraged from jumping bail because he would thereafter be unable to transact most transactions. What discourages him from jumping bail is because he is aware that his Social Security Number is necessary whenever he wants to undertake most transactions.

Therefore, he would be either revealing his exact location whenever he was involved in any transaction, or alternatively, he might have his access blocked. Perhaps we could explore how best to utilize our Personal Identification Numbers (PIN).

Sometimes, the law may recognize and reward "**Bounty Hunters**" to hunt down fugitives from the law.

All such options could be explored by the legislature, which may thereafter put in place an appropriate legal frame-work to govern bail.

Other factors which could be given consideration are the desirability of granting bail if either the trial did not commence within a specified period or if the trial was not concluded within a specified period of time.

But until the Legislature puts in place the proposed "**Bail Act**", the court must nonetheless give effect to the provisions of the Constitution.

Pursuant to the provisions of **Article 49 (1) (h)**, a person who has been arrested has the right to be released on bond or bail pending charge or trial. The terms of the bond or bail are to be reasonable.

However, if there were any compelling reason or reasons that militate against his release, the person would remain in custody. Therefore, the right to be released on bond or bail is not automatic, except if the offence with which he is charged is punishable only by a fine or by imprisonment for not more than six (6) months.

In effect, persons who are liable to the sentence of only a fine, if convicted, should not be remanded in custody. Similarly, those whose maximum sentence would be six (6) months or less, should also not be held in custody. Their said right is enshrined in **Article 49 (2) of the Constitution**.

If the number of pending criminal cases is to be kept in check, I believe that it is now more important than ever, to have the "**Bail Act**" passed by the legislature, with a view to making it very un-attractive for any person to jump bail. Unless that is done, there is a real probability that many persons who are charged with offences that attract only fines or that attract imprisonment for six (6) months or less, will not bother to turn up in court for their trials. The Nett effect will be to increase the volumes of pending cases in leaps and bounds.

The applicant in this case conceded that they are not automatically entitled to be released on bond or bail. They further acknowledged that there were challenges in the implementation of the law.

However, they asked this court to consider imposing stiff conditions for their release. The word "stiff" has been used by me, not the accused persons.

I have used it to describe the bail sum of KShs.500,000/- which the accused persons suggested, when placed within the context of the Kenyan people, whom the accused described as generally very poor.

On my part, if I were to grant bond or bail to an accused person, I would ensure that the conditions thereof were reasonable. And in order to be considered reasonable, the conditions would be influenced by, amongst other factors, the nature of the offence and the severity of the sentence that the offence attracts.

But before determining the conditions of the bond or bail, the court must first determine whether or not to release the accused persons.

In **Malawi, section 42 (2) (e) of the Constitution** stipulates that bail should be granted unless the interests of justice require otherwise.

The only difference between that provisions and **Article 49 (1) (h) of the Constitution of Kenya** is that whilst in Kenya the phrase

“compelling reasons” is used, in Malawi, the

phrase used is;

“Interests of Justice.”

However, in both jurisdictions;

“the onus is on the State to show or prove that the interests of justice require the accused person’s continued detention.”

-as held by the Supreme Court of Appeal, Malawi, in **FADWECK MVAHE VS. THE REPUBLIC, MSCA CRIMINAL APPEAL NO. 25 of 2005.**

The said court went on to express itself thus (at page 9 of its judgment);

“.....in considering the issue of the interests of justice the paramount issues the court will consider include the likelihood of the accused attending his trial, the risk that if he is released on bail the accused person may interfere with the prosecution witnesses or tamper with evidence, the likelihood of his committing another offence or other offences, and also the risk to the accused person, if granted bail and he returns to his village where the deceased’s relations may harm him. In considering these issues the court may take into account, among other things, such factors as the gravity of the offence, the punishment likely to be imposed and, indeed, as was conceded by the court in the Lunguzi case, that the accused is a sickly person.”

To my mind, the phrase “in the interests of justice” can be readily replaced with words “compelling reasons”, as used in our Constitution. I say so because it is a compelling reason to ensure that the court always acts in the interest of justice. Therefore, if there should be compelling reasons for depriving an arrested person bail pending trial, it should automatically follow that such deprivation was in the interests of justice.

I now come round to asking whether or not the state has satisfied the court that there were compelling reasons why the accused should not be released on bail.

As far as the state was concerned, the fact that the accused persons would be liable to receive the death penalty if convicted, was reason enough to tempt the accused to abscond if granted bail pending trial.

But the accused pointed at the fact that for the last two-and-a-half years, they have always attended court whenever they were required to do so.

Of course, the accused persons may have been present before the court on all occasions todate, but that cannot be attributed to their wish or desire to attend court voluntarily. I say so because for as long as the

accused were in custody, they could be compelled to attend court by the prison authorities. It would thus be erroneous to use, as a yardstick in measuring whether or not they would attend court voluntarily, the facts of their attendance to date.

The prosecution has pointed out that the accused persons do now know the identities of each and every person whom the prosecution will call as witnesses. Furthermore, the accused persons know the exact nature of the evidence which each such witness will adduce at the trial.

The accused persons became aware of the identity of the prosecution witnesses, and also of the evidence to be tendered by each such witness, as soon as the accused were provided with copies of the witness statements.

In those circumstances, I do share the fear expressed by the prosecution; that the prosecution witnesses are likely to have fear inflicted in their hearts and minds, when they know that there was a real possibility of encountering the accused either in the streets or in the village.

In **UGANDA (DPP) Vs COL. (RTD) DR. KIIZA BESIGYE**, the Constitutional Court of Uganda expressed itself thus;

“where there is a substantial likelihood of the applicant failing to surrender or turn up for trial, bail may only be granted for less serious offences. The court must weigh the gravity of the offence and all the other factors of the case against the likelihood of the applicant absconding.”

The court went on to restate that: -

“the court has to be satisfied that the applicant will appear for trial and not abscond.”

But at the same time, there was a strong caution, in the following words: -

“The applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment, as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially.”

I find those words to be persuasive, and I do therefore adopt the same.

In this case I find that there is a real possibility of the accused making contact with the potential witnesses, if they are granted bail. That could probably inflict genuine fear and anxiety in the potential prosecution witnesses, especially because the accused persons know not only their respective identities, but also the nature of the evidence which each witness is expected to tender to the trial court.

Secondly, I find that the severity of the sentences of death were such that the accused would, more probably than not, be tempted to abscond.

In the event, there are compelling reasons for rejecting the application for bail pending trial, at this stage of the proceedings. The application for bail is thus rejected.

Dated, signed and delivered at Nairobi, this 12th day of October, 2010.

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FRED A OCHIENG
JUDGE