



**Republic v Hussein (Criminal Case E026 of 2020)
[2023] KEHC 19736 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19736 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CRIMINAL CASE E026 OF 2020
EM MURIITHI, J
JULY 7, 2023**

BETWEEN

REPUBLIC PROSECUTION

AND

MOHAMED ALI HUSSEIN ACCUSED

RULING

1. By an Application dated April 19, 2023, in Prosecution seeking an order principally “ that the Bail/ Bond terms admitted to the Respondent [accused] be suspended/cancelled pending hearing and determination of this case,” on the grounds of new and compelling reasons and alleged breach of conditions of bail with regard to interfering with witness.
2. The Application was supported by the Affidavit of the Investigating Officer, Sgt Juma Ali attaching statements of three witnesses Somo Aden Halake, Francis Gichamu and Gute Susan Bonaya, setting up a case of alleged breach of the Bail terms.
3. The Accused filed a Replying Affidavit sworn on April 26, 2023 denying intentional breach of the bail order and deponing that he only went to Kisima area which was the subject of the restraining order in the Bail terms upon summons by the DCC Tigania East for a meeting on January 18, 2023 to restore a land dispute which he had requested in January 2023 when he got information that several people had invaded his land parcels Ngaramara/Gambela/15550 and 15647 and forcefully occupied them.
4. The family of the victim represented by Mr K Mugambi relied on the Affidavit and statement presented by the Prosecution and in supporting the application for cancellation of bail urged the court to protect the victim in terms of section 10 of the *Victim Protection Act*.
5. On request by counsel for the reference Mr Nkunja, the deponent of his Affidavit in support of the application for cancellation for bail and the attached statements were produced before the court and cross examined.



The law

6. It is trite that bail is a Constitutional right for all accused persons subject only to a compelling reason against grant of bail demonstrated by the Prosecution in terms of Article 49(1) (h) of the Constitution.
7. The Court of Appeal in the decision cited by Counsel for the Defence, Michael Juma Oyamo and Another V R [2019] eKLR recalled the principle established in R V Nuseiba Mohammed Haji Osman [2018] eKLR that “denial of a Constitutional Right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the Constitutional Right to liberty must not be made on speculation or conjecture,”

Jurisdiction to cancel bail

8. It is common ground and hence the application for suspension/cancellation of bail herein that, as held in Oyamo’s case, *supra*, “if upon [accused’s] release there is evidence that they are adversely interfering with public order, peace and security, the prosecution can move the court to reconsider any order made in their favour.”
9. More succinctly, the court in Nuseiba, *Supra* said:

“it follows that where there is sufficient and compelling evidence that an accused may undermine the integrity of the criminal justice, by, for example, intimidating witnesses or interfering, with the evidence, or fleeing the jurisdiction of the court or by posing danger to himself or to any other individual or to the public at large if released, then there will be justification to either deny such an accused person bail, or set stringent bail or bond terms in the interests of justice”
10. In establishing compelling reasons for denial of bail courts have required “strong forceful and convincing” reasons, “cogent grounds” (see R V Joktam Mayande cited in Nuseiba’s case) and “cogent, very strong and specific evidence and that there allegations, suspicious, these objections and insinuations will not be sufficient”. (see R V Joseph Thiongo Waweru & 17 ors. [2017]eKLR.

The facts of this case

11. Upon considering the evidence of the alleged interference with witness in this case and the alleged of breach of the terms of the bail order, the court is not satisfied that there is established even on the lower standard of balance of probabilities as considered in Joseph Thiongo Waweru case, *Supra*, that the accused had threatened the prosecution witnesses herein. The evidence being the question why incidents of alleged interference and threat to kill Gute Susan Bonaya on June 2022 were not acted upon until April 2023 when this application was filed despite an alleged destruction of fence and crops on her land on October 24, 2022.
12. In addition, the witness statement of Somo Adan Halake dated 14/12/22 does not indicate any threats to kill being made save for alleged trailing by accused when they met near Bomen Hotel, Isiolo, not Kisima area the subject of the restraining order, moreover, the Investigation Diary contradicts the witness statement and testimony before the court stating that Somo was threatened by the accused “who was in a motor vehicle.”
13. The evidence of the Chief Francis Gichamu only confirmed that on January 18, 2023 the DCC Tigania had called “a meeting of all persons who had land disputes in Kisima Sub-Location bordering Isiolo County.” And that “when Mohammed [accused] came accompanied by his advocate a lady



when people wanted to attack the accused saying the Government was protecting the murderer and wondering why he had come to claim the land.”

This evidence supports the accused case that he had attended the DCC’s meeting on January 18, 2023 on invitation by DCC. The Chief confirmed that “I know the accused lives in Isiolo. He claims a shamba but he is not a resident. He does not live there [Kisima].”

14. The court does not consider that the prosecution has established a cogent case of interference with prosecution witnesses and or breach of the bail order restricting the accused from visiting the area of alleged killing, subject of his murder trial. The court finds it more likely than not the accused had been invited to a meeting by the DCC as with all other persons who had disputes in Kisima area as testified by Chief Francis Gichuma. The only misstep in this case was that he should have sought leave of the court in view of his condition of bail that he does not visit Kisima area of the alleged killing. The accused may have thought as he has explained that he had lawful authority to visit the area in answer to his invitation by the DCC to the meeting for resolution of land disputes.

Orders

15. Accordingly, for the reason set out above, the court does not find that there are compelling reasons for the denial of bail to the accused and, consequently, the application for cancellation of bail is declined.
16. The accused is only reminded by the court to comply with the specific order restraining his visit to Kisima area and any interference with the Prosecution witnesses by physical contact, verbal or Telephone communication or by proxy.
17. The Prosecution remains at liberty to move the court for orders appropriate in the event of breach of the terms of bail or new interference with Prosecution witness.

DATED AND DELIVERED THIS 13TH JULY DAY OF 2023

EDWARD M. MURIITHI

JUDGE

APPEARANCE.

Mr. Masila for DPP.

Mr. K. Mugambi watching brief for Victim’s Family.

Mr. Nkunja Advocate for Accused.

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