



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 82 and 84 of 2020 (Consolidated)

PATRICK ENOCK OMI A..... 1ST APPELLANT

DENNIS KHAEMBA ANDOLI.....2ND APPELLANT

EMMANUEL WATITI NASHIRAKHA.....3RD APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in original Bungoma CM'S COURT case number 766/2020

delivered on 30.7.2020 by Hon J.K. KING'ORI)

JUDGMENT

The appellants Patrick Enock Omia and Emmanuel Watiti Nashirakha were charged in the Chief Magistrates Court with offence of **Robbery with violence Contrary to Section 295 as Read with 296(1) of the Penal Code.** Particulars of offence being; Patrick Enock Omia On the 8th day of June,2020 at Bungoma Township within Bungoma County ,jointly with others before court while armed with dangerous weapons namely AK 47 RIFLE robbed Michael Gacheche off Kshs.2,005,000/= and at the time of robbery killed him.

Emmanuel Watiti Nashirakha on the 8th day of June,2020 at Bungoma Township within Bungoma County, jointly with others before court while armed with dangerous weapons namely AK 47 RIFLE robbed Michael Gacheche off Kshs.2,005,000/= and at the time of robbery killed him.

On the 16/7/2020 during plea taking the prosecution filed an application dated 17/7/2020 opposing grant of bond to the accused on the following grounds;

- i. The accused are likely to be flight risk.***
- ii. They are likely to interfere with witnesses***
- iii. They are facing serious charges attracting death penalty and have no fixed abode.***

Upon hearing the application the trial magistrate upheld the prosecution objection to bond and accused(appellants) remained in custody.

Subsequently the appellants herein have appealed against the entire ruling in the application dated 17/7/2020 on the following grounds;

- i. That the Honourable Court trial magistrate erred in law and fact when he failed to find application by DPP un procedural and took into account matters that were not relevant.***
- ii. That the honourable trial magistrate erred in both law and fact when he failed to consider submission by appellant.***
- iii. That the trial magistrate erred in law and fact when he failed to find that pre-bail report recommended the appellant to be released on bail.***
- iv. That the Honourable trial magistrate failed to find that the charge that faces the appellant ought to be granted bail/bond.***

The appellants also have filed written submissions through Counsel BW'ONCHIRI for the 1st appellant in support of his grounds of appeal. He submitted that appellant has filed application dated 12/8/2019 which has not been opposed by the respondent. He submitted that this court permit the appellant on bond/bail pending hearing and determination of the trial relying on case law in **Michael Juma Oyamo and another VS. REPUBLIC(2019) Eklr.**

From the evidence on record this court should determine whether **the appellants should release on bond/bail?**

I have considered the appeal to the application, the submissions made and the authorities relied upon.

Article 49(1)(h) of the Constitution provides that: -

An accused 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.

It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary, must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the amount rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this.

The Nigerian Supreme Court (**Justice Ibrahim Tanko Muhammad J.S.C.**) set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

- i. The nature of the charges;**
- ii. The strength of the evidence which supports the charge;**
- iii. The gravity of the punishment in the event of conviction;**
- iv. The previous criminal record of the accused if any;**
- v. The probability that the accused may not surrender himself for trial;**
- vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;**
- vii. The likelihood of further charges being brought against the accused;**
- viii. The probability of guilty;**
- ix. Detention for the protection of the accused;**
- x. The necessity to procure medical or social report pending final disposal of the case.**

It is now clear that in interpreting the right to bail, section 123A of the *Criminal Procedure Code* gives the parameters for the grant of the right to bail as follows:

(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection

The judiciary faced by lack of uniformity on matters bond/bail came up with the Bail and Bond Policy Guidelines 2015 which gave an outline of factors to be considered:-

The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty (b). The strength of the prosecution case (c) Character and antecedents of the accused person (d) The failure of the accused person to observe bail or bond terms on previous occasions is a good ground for denying bail or bond (e) Likelihood of interfering with witnesses (f) the need to protect the victim or victims of the crime from the accused person (g) the relationship between the accused person and potential witnesses (h) child offenders (i) the accused person is a flight risk (j) whether accused person is gainfully employed (k) public order, peace or security. (l) Protection of the accused person.

I have carefully considered the law and the circumstances surrounding this case. I find that the circumstances of this case dictate against an order for bail/bond. It is clear to me that the appellants are likely to interfere with witnesses and it is very likely that the appellants will not attend court when required. In the premises and for the reasons above stated, the appellant's appeal to be released on bail/bond pending trial is dismissed. The trial shall proceed to fix the matter for hearing.

Dated and Delivered at **BUNGOMA** this 2nd day of March, 2020.

S.N.RIECHI

JUDGE