



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL CASE NO. 18 OF 2019**

**MUGURE PETER MWAURA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Brief Facts**

1. This is an application dated 15<sup>th</sup> December 2020 seeking three prayers namely review of bail, self-representation, restitution of the applicant's motor vehicle registration number KCP 740F, his personal effects, release of a military file and supply of the witness statements.
2. The applicant faces a charge of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. He subsequently made an application for bail, which was declined on 21<sup>st</sup> February 2020.
3. In opposition to the application, the respondent filed an affidavit in reply sworn on 1<sup>st</sup> April 2021 and grounds of opposition dated 31<sup>st</sup> March 2021.

**Applicant's Case**

4. The applicant states that since 18<sup>th</sup> November 2019 to date, he has engaged 3 different lawyers to represent him, however he has relieved all of them due to under representation and or mis-representation. The applicant contends that he ought to be allowed to represent himself as he understands the circumstances of his case better than any legal representation he can get and that he is ready to waive his right of appeal if convicted on the grounds of self-representation. He adds that he understands that he faces a murder charge which is a serious offence carrying a possible death sentence in the event he should be convicted.
5. The applicant further requests that a military file was confiscated by the Investigating Officer when he was arraigned at Nanyuki Law courts and handed over to the lawyer who was representing him at the time. He has tried to retrieve the file from the lawyer however his efforts have proved futile as the advocate demands payment for appearing for the applicant on that particular day.
6. The applicant contends that he has never directly or indirectly engaged any of the witnesses against him and as for his sister Nancy Mugure visiting or engaging Collins Pamba, the applicant states that he is not in any position to influence and control her commissions and omissions and further he was not privy to their engagement.
7. The applicant further states that he is a person living with disability and thus the prison conditions put him at an enhanced risk of contracting Covid 19 or other lifestyle diseases. He adds that he is a family man, with 2 children of tender years and an elderly mother who depends on him.
8. The applicant urges the court to release his motor vehicle registration number KCP 740F and his personal effects as per the inventory dated 18<sup>th</sup> November 2019. Alternatively, he states that photographs can be taken of the items and his effects and motor vehicle released to him.
9. The applicant further urges the court to take into account the period he has spent in custody and accord him reasonable bail terms. He adds that he is willing to abide by the bail terms the honourable court may impose.

**The Respondent's Case**

10. The respondent states that there are no exceptional or unusual circumstances or new material/evidence to warrant the review of refusal to

grant of bail.

11. Further that the motor vehicle registration number KCP 740F is a material prosecution exhibit and cannot be released to the applicant.

12. The respondent further adds that they are ready and willing to conduct an expeditious trial and that he is not opposed to the applicant representing himself at trial as long as he is warned of the dangers of self-representation.

13. The respondent filed an Affidavit in Reply sworn by CPL Reuben Mwaniki, one of the Investigating officers in the matter herein and he reiterates the contents of the Grounds of Opposition save to add that the evidence gathered so far points to the applicant having participated in the murder of the three deceased persons and that he tried to interfere with the cause of investigations and with witnesses.

14. The respondent further states that he is not aware of the existence of any purported military file belonging to the applicant. He concludes by stating that there are compelling reasons to warrant the continued detention of the applicant pending the hearing and determination of the case herein.

#### **Applicant's Submissions**

15. The applicant submits that he has not interfered with any witnesses on his part and the prosecution witnesses will attest to the same. He adds that the constitution provides for witness protection programmes to which no witnesses has been assigned to drawing the conclusion that no witness feels threatened by the applicant.

16. The applicant submits that he has not been issued with his personal effects and his dependants continue to suffer as they cannot access his bank accounts.

17. The applicant relies on the case of **R vs Jane Muthoni Muchere & Another** (no citation given) and submits that he should not be deprived of his personal liberty urging the court to balance between the interests of the state in bringing offenders to trial in order to dispense justice, the protection of the rights of citizens and the presumption of innocence of an accused person. The applicant adds that bail ought to be granted to an accused person unless there are compelling reasons not to grant the same. The applicant relies on the cases of **R vs Danford Kabage Mwangi Criminal Case No. 8 of 2016, Grace Kananu Namulo vs Republic Criminal Case No. 35 of 2018 and Alhaji Mujahid Dukubo-Asari vs Federal Republic of Nigeria SC 20A/2006** to submit that he shall readily attend court as he is a military officer whose whereabouts and place of residence is public information.

18. The applicant further submits that he is a person living with disability and being pre-disposed to lifestyle diseases his continued incarceration greatly increases his chances of being unavailable for trial should he contract Covid 19 virus.

19. The applicant further submits that by not being granted bail and being in custody, his rights under Article 25(c), Article 50(1), (2)(c) and (2)(j) of the Constitution continue to be infringed. He has no access to the internet or legal books or case files to help him prepare for his defence.

#### **The Respondent's Submissions**

20. The respondent submits that the application for bail was declined by this court on 21<sup>st</sup> February 2020 and the applicant has not brought out any exceptional or unusual circumstances or new material/evidence to warrant review of the decision not to grant him bail. In saying so, the respondent relies on the case of **Omba Gandu Magloire alias Bongo vs Republic (2005) eKLR.**

21. The respondent adds that the applicant faces three counts of murder which if convicted will attract a sentence of death and this increases the temptation to abscond.

22. The respondent further submits that the motor vehicle registration number KCP 740F cannot be released to the applicant as it forms part of the exhibits in the case herein. It was used to ferry the three bodies of the deceased persons to a shallow grave from the Military Camp at the Laikipia Airbase.

23. As regards the existence of a purported military file belonging to the applicant, the fact is not within the knowledge of the Investigating Officer and hence cannot handover something that is not in his possession.

24. The respondent submits that he is not opposed to the applicant representing himself. The applicant was made aware of his constitutional right to legal representation at the cost of the state but he has rejected the same. The respondent adds that the applicant may represent himself but he should be made aware of the dangers of *pro so* defence. In saying so, the respondent relies on the case of **Faretta vs California, 422 U.S. 806 (1975).**

#### **Issues for determination**

25. On perusal of this application, affidavits and the submissions, the main three issues for determination herein is as follows:-

- a) Whether there exists new material or exceptional circumstances to justify review of bail;
- b) Whether the applicant ought to be allowed to represent himself;

- c) Whether the motor vehicle registration number KCP 740F should be released to the applicant.
- d) Whether the applicant is entitled to orders for release of the military file and personal effects.
- e) Whether he ought to be supplied with the evidence and documentary exhibits file.

## The Law

### Whether there exists changed circumstances to justify the review of bail

26. In considering a review for bail, the court has to determine whether there is new and important material or exceptional circumstances. This was enunciated in the following persuasive authorities:-

27. In **Republic vs Francis Maina Wairimu (2020) eKLR** where the court held:-

**“In an application for review of the denial of bail, the applicant is under a duty to convince the court that there has been a change of circumstances from the time when he was denied bail to warrant the court reviewing its earlier orders.”**

28. In **Republic vs Diana Suleiman Said & Another (2014) eKLR** where it was held that:

**“The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail, so may the prosecution urge that the situation has deteriorated to compel a reconsideration of bail granted to the accused.”**

29. On perusal of the ruling of Ngaah, J delivered on 21/02/2020 I make a few observations. The court considered that the accused faces a serious offence with three counts of murder where he allegedly killed his wife and two children. If found guilty, the accused may be sentenced to death. Due to the gravity of the offence and the severe sentence provided for by the law, the court said that there is a great probability that the accused may be tempted to abscond.

Secondly, the accused was found to have interfered with witnesses in that he sent his sister to visit one Collins Pamba in prison with a view of persuading him to retract his confession in this murder case where Pamba had explained to the police what he saw in the house of the accused and how the dead bodies were disposed of. The judge held that the prosecution had demonstrated to the satisfaction of the court that the accused was determined to obstruct the course of justice by interfering with witnesses.

The accused has not shown any change of circumstances in these issues neither had he demonstrated any special or extraordinary circumstances to justify review of the court's ruling denying him bail delivered on 21<sup>st</sup> February 2020.

I do not find merit in this prayer for review.

### Whether the applicant ought to be allowed to represent himself.

30. The respondent in conceding to the prayer by the applicant to represent himself relied on the case of **Faretta vs California 422 U.S. 806 (1975)** the Supreme Court of the United States held:

**“When an accused manages his own defence, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant, need not himself have the skill and experience of a lawyer in order to competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation. So that the record will establish that he knows what he is doing and his choice is made with eyes open.”**

31. From the **Faretta case (Supra)**, it is evident that for a defendant to exercise his right to self-representation he must knowingly and intelligently waive the right to counsel. He would have to be made aware of the dangers and disadvantages of self-representation so that the record will establish that “he knows what he is doing and his choice is made with eyes open.”

32. The Chief Justice in this case held a dissenting opinion and stressed that the defendant by self-representing would add to the problems of an already malfunctioning criminal justice system. For him the determinative factor was that to do justice in most cases counsel would be required.

33. Borrowing heavily from the dissenting opinion of the Chief Justice in the **Faretta case** various issues arise such as does the accused understand the consequences of waiving his right to legal counsel; what is his educational background, his experience, the nature of the offence, the penalty if the accused person is convicted, the accused's lack of knowledge of technical rules of evidence and the procedure in criminal law; the inability of the learned judge to give the applicant any special treatment when he is representing himself.

34. The role of counsel was discussed in the Court of Appeal decision of David Njoroge Macharia vs Republic [2011] eKLR where the court held that:-

**“The counsel’s role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact, sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. “**

35. The Court went ahead to quote Lord Denning in his decision in Pett v. Greyhound Racing Association (1968) 2 All E.R 545, at 549. He had this to say: **“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who should be a lawyer who has been trained for the task”**

36. Further the Trial Chamber I of the Special Court for Sierra Leone in its decision on the application of the 1st Accused, Samuel Hinga Norman in Prosecution v. Sam Hinga Norman, Moinina Fofanah and Alieu Kondowa, Case No. SCSL-04-14-T, (CDF case), for self-representation, gave an insightful opinion on the role of the defence counsel. The Chamber, in determining whether to grant the said accused’s application for self-representation, noted that, **“the role of a defence counsel is institutional and is meant to serve, not only his client, but also those of the Court and the overall interests of justice.”** It further noted firstly that the right to counsel was predicated upon the notion that representation by counsel was an essential and necessary component of a fair trial. Secondly, that the right to counsel **“relieves trial judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a pro-active participant in the proceedings”**.

37. I am of the opinion that considering the nature of the offence and the penalty if the accused is convicted are of a very serious nature to warrant him legal counsel. In saying so I am guided by the Namibian Case of In the Government of the Republic of Namibia and Ors vs Mwilima and Ors (2002) (Case No. SA 29/2001) which was cited by the Court of Appeal in the case of David Njoroge Macharia vs R (supra) where a majority of the Supreme Court of Namibia considered that in a criminal proceeding involving only one or two defendants, and not raising complicated issues of law, the presumption of innocence, the role of the trial judge in ensuring procedural fairness and the prosecutors’ duties to treat an accused fairly may be sufficient to ensure a fair trial.

38. Currently, the **Constitution of Kenya in Article 50** provides:-

**(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

**(2) Every accused person has the right to a fair trial, which includes the right— ...**

**(c) to have adequate time and facilities to prepare a defence; ...**

**(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;**

**(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;”**

39. Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This right is so fundamental that it has been entrenched in the constitution. Owing to the nature of the offence, the gravity of the sentence that will be meted out if the applicant is convicted and the fact that the accused himself has admitted that he does not have access to legal books or information to adequately prepare for his defence it would be prudent to decline his application for self-representation and prefer that he is assigned an advocate.

#### **Whether the motor vehicle ought to be released to the applicant.**

40. The investigating officer said that the motor vehicle registration number KCP 740F is an exhibit in this case and was allegedly used to ferry the bodies of the three deceased persons to a shallow grave from the Military Camp at Laikipia Airbase. The trial of this case is yet to begin. The witnesses of the prosecution will require to refer to the said vehicle in order to articulate their evidence before the court.

41. Even if the vehicle was to be photographed at this stage and be released to the accused or to a member of his family, this would affect the quality of the evidence of the witnesses and place the prosecution case at a disadvantage. The investigating team spent a lot of time in this case and collected several exhibits. It would be fair and just to allow them to use the said exhibits to demonstrate their evidence to the court during the trial.

42. As for the accused person, he is still in custody and his family or relatives can make other arrangements of survival in the area of mobility or of transport. As such, I am of the view that the benefits of detaining the vehicle far outweigh the disadvantages that may be occasioned by its release.

43. The foregoing analysis leave this court convinced that the release of the vehicle registration number KCP 740F must be put on hold until the prosecution are done with it.

44. The applicant asked the court to order a military file held by his former counsel based in Nanyuki be released to him. The respondent said he has no knowledge of such a file. No sufficient particulars of the said file were given by the accused that is it is important to note that the former counsel whose name is given as Wanjohi was not served with a notice to attend court or to release the said file by the accused. This court cannot therefore make any order in regard to release of items that have not been confirmed to exist and whose information of their whereabouts is not known. Finally, it is not in the interest of justice for this court to make an order against a person who has not been summoned to defend himself or herself against the allegations made by the accused.

45. The final prayer was for the prosecution to provide the accused person with a duplicate copy of the entire evidence file. In this regard, the prosecution did not respond to the issue. However, the law provides that the prosecution must supply and disclose all the evidence at their disposal against the accused person in a criminal trial. Although it is not clear whether the former counsel on record for the accused was supplied with the evidence file, I find that this request be granted in the interests of justice.

46. On personal effects, no particulars were given of the said items and in whose possession they are. The prosecution said they were not aware of the issue. As such, the court is at a loss in making any order in this regard.

47. In conclusion, I decline to review bail at this stage for the reasons given in this ruling. The prayers for release of vehicle KCP 740F; for release of the so-called military file is also declined. Self representation prayer has been denied for reasons given herein.

48. The court allows the prayer for supplying the accused with witness statements, documentary exhibits and any other material to be used during the trial. The prosecution to comply within fourteen(14) days.

49. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 10<sup>TH</sup> DAY OF JUNE, 2021.**

**F. MUCHEMI**

**JUDGE**

**Ruling delivered through video link this 10<sup>th</sup> day of JUNE 2021.**