



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CRIMINAL APPLICATION NO. E055 OF 2021

VINCENT LUSIGE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the judgment of Hon. Y.A Shikanda, Principal Magistrate, delivered on 28th May 2021 in Chief Magistrate'

Court at Shanzu Criminal Case No. E649 of 2021).

RULING

1. Hon. Y.A Shikanda, PM in a very well reasoned ruling where the prosecution objected to bond stated “I do not feel compelled to deny the accused persons bond or bail. Prosecution had not proved that accused persons were habitual offenders; that they were a part of a criminal gang; that they would commit further offences on that they had no fixed abode. He also found that the prosecution did not allude to any instances of public chaos following the arrest of the accused persons and in his opinion it was not enough for the investigating officer to swear an affidavit containing allegations against the accused persons.

2. In regard to interference with witnesses he relied in the holding of Korir J, in R. v. Dwight Sagray & 4 others [2013] eKLR and a holding of Gikonyo J in Republic v. Joktan Manyende & 2 others [2012] eKLR to say that it was wrong to rely on medical report and statements of witnesses who had not testified to support allegations of interference with witnesses because there was no evidence that accused persons tried to contact the prospective witnesses after being charged. He said the fear of an apprehension that accused persons if released are likely to harm the witnesses should be real and not imagined. It should be based on tangible facts and not mere assumption.

3. Hon. Y.A Shikanda went ahead to find and rightly so that denial of bond should be a last resort since steps can be taken to protect witnesses under Victim Protection Act to ensure the alleged victim is protected and the court to impose conditions for release of accused persons on bon to secure their attendance.

4. Having found that there was no compelling reasons to warrant accused persons being denied bond I do find that the verdict to grant bond with surety and an additional cash bail of Kshs. 200,000/= is prejudicial and punitive and therefore not reasonable and justifiable. It has not been shown how the additional cash bail will make the accused persons not to maintain public peace and order. In my view the bond terms are meant to ensure accused persons remain in custody during trial and goes against the spirit and grain of the constitutional provision that the accused person should be presumed innocent until proven guilty. The bond terms are therefore reviewed to bond of Kshs. 500,000/= with one surety each and in the alternative cash bail of Kshs. 200,000/= each. The requirement to execute bond to maintain peace pending hearing and determination of the case is also not lawful as the law in regard to bond to keep peace has since been declared unconstitutional.

5. The appellants are hereby required to ensure that they do not interfere with witnesses and to attend court as and when required during their trial in the lower court.

HON. LADY JUSTICE A. ONG'INJO

JUDGE

17.6.2021

Before Hon. Adwera Onginjo – J

Ogwel – Court assistant

Ms. Mwanyika Adv. Watching brief for complainant

Ms. Auka Adv. For Appellants

Ms. Karanja for Respondent

COURT

Ruling delivered, dated and signed in court. Copy of ruling to be supplied to parties upon payment of copying charges.

HON. LADY JUSTICE A. ONG'INJO

JUDGE