



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO. E037 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

GUYO DIBA JIRMA.....1ST ACCUSED

NURA HUKA GALGALO ALIAS TOM.....2ND ACCUSED

NURA ADAN HASSAN.....3RD ACCUSED

ALI WAKO ADAN ALIAS GIROO.....4TH ACCUSED

RULING

1. On the date the plea in this matter was taken, the prosecution came armed with an affidavit sworn by one No. 76721 CPL JOSEPH KIBET whose gist was to oppose the release of the accused persons on bail for reasons that-;

a. 1st, 2nd and 4th accused person had interfered with investigations by threatening 3 witnesses and 5 accomplices leading to the three witnesses disappearing to unknown locations.

b. That the threats were escalating by the day and the witnesses had been terrified.

c. After exhumation and post mortem the threats to family members and leadership of Garre community have escalated leading to them seeking and being offered Police protection.

d. The 4th accused attended a meeting of Borona elders at Kinna and Isiolo town where it was resolved that the deceased family withdraws the complaint on payment of compensation of 100 camels and that when the offer was declined attempts were made to kill the family members. The same is now the subject of police investigations pursuant to Isiolo Ob No. 39/15/6/2021 and 21/6/20 – 2021.

e. Isiolo being a conflict zone with gunmen armed with all types of firearms there are displaced families who are now exposed to real risk of targeting for purposes of elimination.

f. Even the police investigations team have received threats in the course of their duties to gather evidence and arrest other suspects.

g. The 2nd and 3rd Accused persons have no fixed abode, live in cattle sheds and are always on the move looking for pasture and water and running away from cattle rustlers, are always armed and accompanied by other armed men who could not be traced easily as the process become tedious and risky necessitating huge resources. If released on bond they will revert to their usual way of life and it shall be very difficult, tedious and risky to trace them.

h. The foregoing and the vast nature and remoteness of Isiolo area and being conflict prone make the four as real flight risk.

i. The 4th respondent is a repeat offender currently facing an offence related to firearms in Maua Cr. E423/2020 and if released will rejoin with his accomplices and perpetuate further offences and threaten police safety.

j. That the prosecution's case is known to the accused persons as strong hence the need to scare away the witnesses in a case which has elicited great public interest in the entire county.

2. On that same day the defence sought and were granted time to respond to the said opposition to bond by way of an affidavit(s). In that regard the 4th accused filed an affidavit sworn on the 28/6/2021 and filed in court the same day.
3. In that affidavit he asserts that he is a permanent resident of Isiolo and has residences at Kinna and Isiolo town and the immediate former member of Isiolo county assembly representing Kinna ward and a former chairman of the defunct Isiolo County Council. He then underscores his cooperation with the police by answering and responding to summonses every time he was summoned till the 17/6/2021 when after answering to such summons he voluntarily travelled from Kinna to Isiolo only to be told that he was under arrest. The summonses the 4th accused was responding to were concerned with an incident of 11/4/2021 at Kambi Samaki area in Borgatulah involving a raid by cattle rustlers during which herds of cattle were driven away, houses torched and people injured. All the while, between 21/4/2021 and 17/6/2021, he was always on a police bond but when arraigned before the court at Maua, the prosecution sought and obtained his detention for 14 days to enable them complete investigations regarding Kambi ya Samaki incident. The only time he learnt of his connection with the current case is when he made the first appearance in this court.
4. He denied being at the scene of the crime which is some 150 km away from Kambi ya Samaki and further vehemently denied threatening witnesses and family members of the deceased while asserting that having not been informed of being a suspect he had no reason to issue any threats. He denied ever attending the meeting of Borana leaders in which the compensation for the death of deceased with 100 camels as alleged by the prosecution was discussed. He equally denied being a repeat offender and that the charges at Maua are a fabrication.
5. Even counsel from the victim's family took the opportunity to file an affidavit and supported the prosecution in opposition to bail. He stressed the fact that the matter has raised a lot of heat as the deceased was the chairman of Somali council of elders. He underscored the fact that the 1st accused is the assistant chief of the area while the 4th is a political leader and a borana elder hence persons with influence over community with ability to interfere with witnesses.
6. He underscored the fact that some of the perpetrators of the offence are at large having been advised by the 4th accused to abscond and that the accused, like the 4th, declined to write a statement. He concluded that the family members of the deceased had been threatened and that Kinna is very dangerous with people holding unlicensed guns thus to visit the scene a contingent of GSU officers had to be assembled for security of the visiting team.
7. With all the industry invested, when the matter came up for argument, the prosecution told the court that he had been directed and instructed by his seniors to withdraw the objection to bail and to withdraw the affidavit by the investigating officer. To prosecutor the constitutional duty to prosecute was solely vested upon the office of the director Public Prosecution with absolute protection against being directed from any quarter.
8. That change of mind was welcome by the defense team but strenuously opposed by the advocate for the victim. The opposition by the victims counsel was designed to protect the victims of crime and abuse of power and to provide them with information and support services.
9. The counsel stressed the fact that there was evidence that there had been interference and intimidation of witnesses and family members of the deceased and bitterly complained that they had not been told the changed circumstances that was necessitating the withdrawal of objection. Counsel asked the court to direct that the investigating officer who swore the affidavit attends court and explain if he had intended to withdrawal the objection to bail.
10. Counsel emphasized the fact that under the Act and the Constitution the office of the Director of Public Prosecution is mandated to give the information on change of stand on bond to the accused person.
11. In response to the opposition, the prosecutor emphasized the fact that under article 157 (10).
12. While, I am of the learning that every accused person is entitled to be released on bail as of right, without the need to make any application in that regard, unless there be availed before the court a compelling reason militating against being released on bond. It is therefore the person pressing the charges or indeed the complainant or victim who has the background about the offence who would, in usual circumstances, be the source of information as to demonstrate compelling circumstances. I am therefore not in doubt that the conduct of any criminal trial must be left to the sole control to the prosecution. I was however, in these proceedings, asked by the victims counsel to find that the prosecution have a duty to communicate with and inform the victim of its reasons for change of mind as far as the opposition to bond/bail was concerned. My find in this matter is that, the victim protection Act, like all statutes that find direct under pinning upon the constitution must be read and given the assigned importance, giving effect to the constitution.
13. The Act mandates the protection of victims and commands that administrative body or a person performing any functions under the act must be guided by the principles of the constitution particularly articles 27 (4) 47, 48 and 49 of the constitution. I read section 4 of the act to mandate the office of Director of Public Prosecution and the court to give to the victim of a crime to be heard and respond before any decision affecting him or her is taken. In the context of this matter, Mr. Maina, as the prosecutor had a statutory duty to inform the victims through their counsel of the change of position and what had informed the decision and invite a comment or response. I see that right to be firmly secured under section 20(1) of the Act.
14. To the extent that the victim was never consulted before the decision not to oppose bail and to withdraw the affidavit opposing bail was made and without their input, I find that the prosecution abdicated the statutory duty imposed upon it.

15. Giving information to the victim and or just the fact and strategy in prosecuting a crime affecting the victim is not the same thing as ceding the constitutional mandate not to be directed in its performance of protectoral powers. It is to me a mechanism to ensure compliance with the constitutional statute that public officers and bodies observe the principles of public of governance and public service. It cannot derogate from right to undertake its tasks without external interference but a pillar in ensuing that the office meets the need to serve public interest, the interests of the administration of justice and the need to prevent the abuse of legal process. In short, the insulation given to the office of the Director of Public Prosecution is not some autocratic edifice immune from accountability and observance of good governance. It remains a public office, created by law and subject to the law. I do find that it is the statutory duty of the office of the Director of Public Prosecution and indeed every officer serving thereunder to keep the victim abreast of all the development in the file in which the victim is affected and in every case the office decides, to lay a charge, withdraw a charge or appeal, or prefer an appeal, on plea bargaining, bail and sentencing. Here that duty was never met by the prosecution.

16. I may however, hasten to add that the right to the victim either directly or through counsel is to be notified and given a chance to make contributions. It is not that the prosecution seeks guidance from the victim. Once the victim is informed of the decision on the prosecution of this matter and a chance given to him to provide the information in his possession, the duty is discharged. The prosecution must then perform its duty the way deemed best. If the victim be dissatisfied, further proceedings may then ensue not in the criminal file but a different and appropriate file.

TERMS OF BOND/BAIL

17. Having considered all the material placed before the court, the issue for determination turns out to be whether I can deny bail when the prosecution harbors no objection to establish a compelling reason.

18. I find that mine, as a court, is to grant bail as of right and course unless and until the prosecution avails to the court a compelling reason not to.

19. On that application, I do grant all the four accused persons bond in the sum of kshs. 2,000,000 with one surety in the like sum.

20. In the alternative, each accused may be released upon deposit of cash bail in the sum of Kshs. 1,000,000/=.

21. I further impose the following terms upon the accused persons;

i. Accused 1 and four shall restrain themselves from Isiolo County while this matter is pending.

ii. All accused persons shall restrain from any contact with the family of the deceased by way of physical contact or telephone calls either directly or by proxies.

iii. Accused No. 2 and 3 said to be herders and persons of no fixed abode, an allegation not contested by the defense shall report to the County Criminal Investigations Officer Isiolo once every month.

22. Based on the facts of the case highlighted in this ruling, this is a matter to be fast tracked. I direct that the prosecution provides to the defense all witness statements and documentary exhibits, if not yet provided, within 21 days from today for the matter to be heard on the 6th and 7th December, 2021.

23. The hearing shall be preceded with a case conference.

DATED SIGNED AND DELIVERED AT MERU THIS 12TH DAY OF JULY 2021.

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Jarso for 1st – 3rd accused

Mr. Millar with Mr. Kariuki for accused 4

Mr. Maina for state

Mr. Abubakhar for the victim's family

PATRICK J.O OTIENO

JUDGE