



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

MISCELLANEOUS APPLICATION NO. E005 OF 2021

DCIO WEST POKOT.....APPLICANT

VERSUS

FRED KOMO NGURU.....RESPONDENT/ACCUSED

RULING

The case for the applicant

By its notice of motion dated 24th September 2021 the applicant filed the instant application pursuant to the provisions of section 118 and 122 (2) of the Criminal Procedure Code (Cap 75) Laws of Kenya and section 180 of the Evidence Act (Cap 80) Laws of Kenya the applicant has applied for the following orders.

1. *Spent*
2. An order that there be no order as to costs.

The application is supported by an affidavit of No. 92165 PC Wilfred Githumbi of the CID office at West Pokot.

The deponent has deposed to the following major matters. He is the investigating officer in respect of the murder charge that has been filed against the /respondent accused. The accused was arrested on 22nd September 2021 and that he be denied bail for the following reasons. The accused might interfere with witnesses in view of the seriousness of the offence with which the accused is facing as he has physically interacted with witnesses.

Furthermore, the place of a board of the accused person is unknown. And that it will be a challenge to trace him if he absconds after being granted bail. There has been intimidation by the respondent's family to both the investigating officer and the witnesses.

Additionally, the accused holds a Kenyan passport and travels outside the country occasionally for business trips. And finally the deponent has deposed that: ***“Due to proximity of West Pokot County to Uganda border, he might get out of the country easily and he is a flight risk.”***

The submissions of the applicant

Mr. Makori, the Assistant Director of Public Prosecutions for the applicant submitted that the respondent should be denied bail since there are compelling reasons to warrant the denial of bail; which reasons are set out in the affidavit of No. 92165 PC Wilfred Githumbi, who is the investigating officer.

He has submitted that the fundamental rights of the accused must be balanced with the greater public interest. Based on the decision of this court (Ochieng, J) in Republic Vs. Ahmed Mohamed Omar & 6 others, counsel for the applicant submitted that the right to bail is not absolute. Counsel pointed out that the only rights that are absolute are those that are set out in article 25 of the Constitution of Kenya.

Counsel has further submitted that the following factors militate against the release of the accused on bail. The seriousness of the offence charged, the accused being a flight risk, his likelihood of interference with witnesses and the accused being a person of unknown abode. Counsel also submitted based on Republic v Zacharia Okoth Obado & 2 others (2018) e-KLR, that the whole issue of the likelihood of interference with witnesses should not be taken lightly. Counsel also cited R v Leliman & 4 others () e-KLR, in which the role of the victims was recognized to the extent that they should be given opportunity to be heard in respect of matters of bond as a decision on that issue is likely to affect them.

The case for the respondent/accused

The accused has filed a 12 paragraphs replying affidavit in opposition to the application; whose major averments are as follows. The accused has denied that he will interference with witnesses; and has termed the applicant's averment in that regard as false. In response to the applicant's averment that he has no fixed abode, the accused has deposed that he is a resident of Namawanga Kibomet within Trans Nzoia County, to which he has annexed the title deed title and photographs of his residential home. In response to the averment that his family has intimidated the investigating officer and witnesses, the accused has deposed that the alleged intimidation has not been attributed to him and that no further evidence was brought to the attention of the court during its first sitting on 23rd September 2021.

Furthermore, in response that he travelled to China once on 15th May 2018 the accused has deposed that he has a right to a living for himself and his family and that the said trip was for business purposes.

In addition to the foregoing, in response to the averment that he is a flight risk due to the proximity of West Pokot County to the Uganda border, the accused has deposed that the said averment is not supported by any evidence. He has also deposed that there is no evidence that to support the averment that he will interfere with witnesses and the exhibits.

The submissions of the accused

Messrs Kimani & Company advocates for the accused have urged the court to release the accused on bail pending his trial; since the right to bail is guaranteed by article 49 (i) (g) (h) of the Constitution and the police have a duty to give reasons for the continued detention of an accused person. Counsel further submitted that the accused has a fixed place of abode being a resident of Namawanga Kibomet within Trans Nzoia County. The accused has the title deed registered in his name. Additionally, the accused produced photographs of his home.

Furthermore, counsel has submitted that no evidence was adduced by the applicant as to the particular member of the family of the accused who has intimidated the investigating police officer and the witnesses. Counsel has further submitted that if indeed there were intimidations the applicant being police know the legal avenue to address them. Counsel therefore submits that the allegations are false and misleading.

Furthermore, the respondent has submitted that the allegation that the accused is a flight risk and might easily sneak out of the country due to the proximity of West Pokot county to Uganda is not supported by evidence.

In response to the allegation that the respondent will interfere with the exhibits if released on bail, counsel has submitted that no evidence has been adduced to support this allegation.

Counsel has therefore urged the court to release the accused on bail.

Issues for determination

I have considered the affidavits of the parties and their submissions including the authorities cited. I find the following to be the issues for determination.

1 Whether the reasons advanced by the applicant to deny the accused being released on bail amount to compelling reasons that warrant the denial of bail to the accused within the meaning of article 49 (i) (g) (h) of the 2010 Constitution of Kenya.

I find that the applicant has not produced tangible evidence to support its allegation that the accused is likely to interfere with witnesses and the exhibits. It therefore follows that this is a bare and general allegation. The investigating police officer has not particularized which member of the family of the accused has interfered with the witnesses and the exhibits. Furthermore, the investigating police officer has not arrested any member of the family of the accused for the offence of interference with witnesses. He has also not deposed that any member of the family of the accused is under investigation in respect of the allegations of interference with witnesses and exhibits.

The second reason advanced in opposition to the release of the accused on bail is that the accused is a flight risk and since West Pokot county borders Uganda he can easily cross the border into Uganda. This allegation lacks supporting evidence. Additionally, mere residence in a county that borders Uganda is not itself evidence of one being a flight risk. This argument is potentially discriminative as it suggests that suspects who are residents in this border county are by virtue of that flight risks and that those who are residents of non-border counties are not potentially flight risks. It is for this reason that the law requires evidence in support of a suspect being a flight risk irrespective where a suspect resides. See generally **Panju Vs. Republic [1973] E.A 282 at page 283 the court expressed itself as follows:**

The Magistrate was right in discounting such allegations, which now becoming stock allegations against accused persons, as such allegations need to be substantiated by affidavit, as it has often been held by this court (e.g Bhagwanji Kakubhai Vs. R. (1943) 1 T.L.R (R.) 143). If the courts are simply to act on allegations, fears, or suspicions, then the sky is the limit and one can envisage no occasion when bail would be granted whenever such allegations are made. However, the prosecution did not appear to wish to pursue this matter any further in so far as the co-accused was concerned'.

I also find as incredible the allegation that the accused is a person of no fixed abode for the following reasons. First, there is the credible affidavit of the accused that he is a resident of Namawanga Kibomet within Trans Nzoia County whose home is situated in Kitale municipality block 18/Bidii/1235, a matter in respect of which the accused annexed to his relying affidavit a copy of the title deed marked as annex FKN 1 and photographs of his home as annex marked FKN.2. He has also annexed a copy of his residential house as annex marked FKN 2 to his replying affidavit. Additionally, I also find as credible that the accused is a business man operating in Kitale municipality and according to a copy of his passport marked as annex FKN3 to his replying affidavit he has travelled once to China.

I find that the foregoing averments have not been controverted by any credible evidence by the applicant.

In the premises, I find that there are no compelling reasons to deny the release of the accused on bail with the result the accused is hereby released on a bond of Kshs 600,000/- with one surety of a similar amount to be approved by the Deputy Registrar of the court. In the alternative to the foregoing, the accused may be released on cash bail of Ksh. 500,000/= to be deposited in court. In the interim period, the accused will remain custody until he complies with the terms of his release on bail.

RULING SIGNED, DATED AND DELIVERED IN OPEN COURT THROUGH VIDEO CONFERENCE AT KAPENGURIA THIS 12TH DAY OF OCTOBER 2021.

J. M. BWONWONG'A

JUDGE

In the presence of-

Mr. Kinyua and Mr. Juma Court Assistants

Mr. Makori for Republic

Ms Mwemeke the for accused.