



**Republic v Irungu alias Jowie & another (Criminal Case 51 of 2018)
[2020] KEHC 8361 (KLR) (Crim) (13 February 2020) (Ruling)**

Republic v Joseph Kuria Irungu & another [2020] eKLR

Neutral citation: [2020] KEHC 8361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CRIMINAL
CRIMINAL CASE 51 OF 2018**

J WAKIAGA, J

FEBRUARY 13, 2020

BETWEEN

REPUBLIC PROSECUTOR

AND

JOSEPH KURIA IRUNGU ALIAS JOWIE 1ST ACCUSED

JACQUELINE WANJIRU MARIBE 2ND ACCUSED

RULING

1. By a Ruling dated 30th day of October, 2018, this court declined to grant the Applicant (who is the 1st accused herein) bond, for reasons stated therein, which are on record. The applicant by an application dated 30th day of October, 2018 sought for orders for review of the said order, declining to grant bail, and by a ruling dated 18th day of November, 2019 the court stated as follows as regards the application:-

“22. Since the matter is now fixed for hearing, I am of the considered view that all the prosecution witnesses under protection should testify first upon which the court should reconsider the application herein for release of the Applicant on bond. In view of the context of the affidavit sworn by the Applicant and his father, I am further of the considered view and hold that the Probation Department conduct further social inquiry thereon and present to court a further Pre-bail report for consideration by the court.

23. In the circumstances of the matters stated herein, it is my view that the application by the 1st accused is premature at this stage and lacks merit. I therefore make the following orders therein:-



- a. The prosecution to line all the witnesses under protection for hearing between 25th and 26th of June 2019 when the cause is fixed for hearing and or soon thereafter as is practically possible.
 - b. The probation officer to submit a further pre-bail report in respect of the alternative mode of accommodation offered by the Applicant.
 - c. The court to review orders herein upon fulfillment of order (a) and (b) above.”
2. On 25th June, 2019 the trial here commenced and so far the court has recorded the evidence of fifteen (15) prosecution witnesses, including all the witnesses under protection, in compliance with the court direction herein.

Pre-bail Assessment Report

3. On 27th June, 2019 the Probation Officer presented to court a supplementary report, in which it was stated that the parents of the applicant had undertaken to accommodate the same at their home in Ngata Estate within Nakuru County, and were willing to be held personally responsible for the accused person’s court appearance during the trial. It was indicated therein that they had no intention of interfering with the deceased family nor prosecution witnesses and were willing to abide by any order that the court shall grant, having confirmed that the accused was not a flight risk. It was therefore recommended that the applicant be released on bail/bond and the parents made to enter into court recognizance pledge.
4. The father of the Applicant Julius Irungu Mwangi on the same date swore an affidavit, in which he confirmed ownership of plot No. 40 of LR 4730/342 and stated that the applicant only moved from the family home for education and work outside Nakuru and stated further that should the applicant be granted bond, he will assist him in the family poultry business.
5. The State through I.P. Maxwel Otieno filed a replying affidavit dated 28th November, 2019, in which he deponed that apart from witnesses under protections having testified, all other grounds upon which the accused was denied bond had not changed. It was deponed that there was no evidence or details of the income generated from the accused father’s family business or of his residence. It was stated that the fact that there were about ten (10) more witnesses to testify, was a new and compelling reason for the court to deny the accused bond, since there was high possibility of him interfering and intimidating civilian witnesses who included the deceased family.
6. It was contended that the strength of the prosecution case was not tenuous and the Applicant knowing the evidence so far tendered, there was a high possibility or incentive for him to abscond, should he be released on bond. It was stated further that the prosecution was ready to avail all the remaining witnesses at the earliest opportunity and ensure that the trial is concluded at the earliest time. It was further stated that the Applicant had never made any formal complaint about his stay in remand and only attempted to influence the Honourable Court when making decision on review, through an article in the Sunday Nation Newspaper dated 24th November, 2019. It was contended that the court had a constitutional duty to balance the rights of all persons and should protect the right to life under Article 26 of the *constitution*, by providing an enabling environment for the prosecution witnesses to testify without fear or interference, by declining to grant bond, as the right is not absolute.



7. The court issued direction that the application for review be heard after all the protected witnesses had testified, and on 28th day of November, 2019 the prosecution confirmed that all the witnesses under protection had testified. It therefore follows that the application is properly before the court.

SUBMISSION

8. It was submitted by Prof. Nandwa on behalf of the Applicant, that nothing in the evidence of the protected witnesses had incriminated the applicant and that the said witnesses should not have been placed under protection in the first place. It was contended that the applicant had a fixed abode as confirmed through the affidavit of his father, which had been verified through the pre-bail report. It was contended that it was beyond the control of the prosecution to conclude the case expeditiously.
9. Ms Nyanchoka for the family of the victim, submitted that there was a strong case against the Applicant who was likely to be placed on his defence. It was contended that that fact that he had deposited his passport in court was no guarantee that he will not flee the country and further that his skills put him at a position to intimidate the remaining witnesses.
10. On behalf of prosecution Ms Gichuhi submitted that, whereas the protected witnesses had testified, Section 4.9 of *Bail and Bond Policy Guidelines* set out as a compelling reason the strength of the prosecution. It was therefore submitted that the court had heard the testimony of witnesses that link the Applicant with the deceased and have placed him at the house of the deceased. It was contended that knowing the evidence against him, there was high probability to abscond. In support of the submissions, the case of *Republic v Jane Muthoni* [2017] eKLR was submitted, where Justice Ngugi held that it was a ground upon which the court would deny an applicant bail during trial.

Analysis And Determination

11. This is the second time the applicant is approaching the court on review of the order earlier issued in which the court denied him bail.

The law on the consideration for grant of bail was stated by the court, in the ruling made on 18/11/2019, the content of which I don't wish to restate herein, save to say that on application for review, the applicant must prove to the satisfaction of the court that there has been change of circumstances to warrant grant of the orders sought. See *Republic v Diana Suleiman Said & another* [2014] eKLR And *Republic v Leonard Kanari Gitau* [2016] eKLR.
12. In this matter the court was clear in its mind, that the application for review shall be considered when all those witnesses who were under protection, whose evidence the court ought to preserve had testified. It is clear that the said witnesses have now testified and their evidence preserved. The prosecution's fear that the applicant might interfere with them, now has no foundation at all. The applicant has further provided the court, by way of affidavit evidence of the place where he shall reside during the remaining period of trial and what he shall be doing. I am therefore satisfied that there has been change of circumstance from the time the applicant was first denied bond to the time of this ruling. It is therefore clear that he is entitled to review of the orders denying him bond, having placed adequate material on the change of circumstances as stated herein.
13. The only issue which the court now has to determine, is whether having heard and recorded the evidence of fifteen (15) prosecution witnesses, there now arises the issue of the strength of the prosecution case as a compelling reason, to enable the court deny the same bond, on account that having known the case against him, there is real likelihood and or temptation to abscond, so as to defeat the course of justice.



14. Whereas it is clear that the court has discretion to grant bail at any stage during trial, when the application for bail is made during the course of trial, one of the compelling reasons which the court has to take into account is the strength of the prosecution, as provided for under the [Bail and Bond Policy Guidelines](#) at 4.9 (b) as follows:-

“An accused person should not be subjected to pre-trial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pre-trial detention where the evidence against the accused person is strong. For example, where all the prosecution witnesses have testified and the accused person is aware of the weight of the prosecution’s case against him or her, it is presumed that such a person has an incentive to abscond as should therefore be denied bail – see [Republic v Margaret Nyaguthi Kimeu](#) [2013] eKLR.”

15. Faced with a similar submissions on the strength of the prosecution case, Justice Ngugi had this to say in the case of [Republic v Jane Muthoni Muchere & another](#) (*supra*)

“21. The question presented here, then, is whether the Prosecution has, on a balance of probabilities, demonstrated compelling reasons to continue denying bail to the Accused Persons. Tailored to the arguments by the Prosecution and Victims’ Counsel, here the question is whether the strength of the prosecution case coupled with the risk of absconding jointly constitute compelling reasons to deny bail in this case.

22. In the ruling of 20/12/2016, I explained the proper context of when the strength of the prosecution case can be a legitimate factor in denying bail. The [Bail/Bond Policy Guidelines](#) at p. 16 (Paragraph 4.9(b)) is couched in the following language:

An Accused Person should not be subjected to pretrial detention where the evidence against him or her is tenuous, even if the charge is serious. Conversely, it may be justifiable to subject an accused person to pretrial detention where the evidence of the accused person is strong. For example, where all the prosecution witnesses have testified, and the accused person is aware of the weight of the prosecution’s case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail.

23. The Policy Guidelines cited [R v Margaret Nyaguthi Kimeu](#) [2013] eKLR for the last proposition. Ms. Mwaniki has argued that at this point the instant case is on all fours with the [Margaret Nyaguthi Kimeu](#) Case. This is because, she argued, the Court has now heard key Prosecution witnesses and has a sense of what direction the trial is taking.

24. In the ruling of 20/12/2016, I expressed the view that while the strength of the prosecution case can be a valid factor in consideration whether bail should be granted and whether there are compelling reasons to refuse bail, it alone, like the nature of the offence, is not sufficient reason to deny bail. The apparent strength (or weakness) of the Prosecution case can be one of the factors that a Court takes into account but it cannot be the anchor reason for denying bail.

25. In the present case, after hearing ten witnesses, I am prepared to say that the prosecution case is not tenuous. I do not wish to say more for the fear of



embarrassing the remaining trial and pre-judging issues. This in itself would not be sufficient reason to deny bail as I stated above. However, here, it is coupled with the unresolved question of Mr. Nelson Njiru who is a fugitive of justice in this case. Both direct evidence received in Court as well as the statement by the 1st Accused Person establish a connection between Mr. Njiru and both Accused Persons. The almost literal vanishing of Mr. Njiru into thin air should give us pause about the real possibility that the two Accused Persons could follow suit hence subverting justice in this case. Despite Mr. Njanja's valiant efforts to disassociate the 1st Accused with Mr. Njiru, I believe that her own statement speaks for itself: "I requested a friend, a Mr. Njiru who is also a teacher at Voi University if he could get me a friend who could assist me with a car..." Those are the 1st Accused Person's own words. It blitzes Mr. Njanja's denials from the bar.

26. It is a rare and exceptional case when the Court will deny bail to an Accused Person. The circumstances of this case makes this one of those rare and exceptional cases. To mitigate the effect of this decision and balance the rights of the Accused Persons, the Court shall prioritize the hearing of this case. It has already heard the case on two consecutive back-to-back days. Ten out of twenty possible witnesses have been heard. The Court will now set aside, subject to the availability of defence counsels, time to conclude the prosecution case within the next three weeks."
16. As stated herein above, the strength of the prosecution case in itself, alone is not a good ground to deny an accused person the enjoyment of his constitutional right to bail. It must be demonstrated that by virtue of the strength of the prosecution case, there is a great incentive on the part of the accused person to abscond so as to defeat the course of justice. At this stage the court is not expected to go into the merit of the case. In making the said determination, the court must always balance between the conflicting interest of the State to bring offenders to trial and to dispense justice and the protection of the right of citizens, and the presumption of innocence, which require that no one without justification should be deprived of personal liberty.
17. The court at this stage in the trial, is not in a position to conduct a risk assessment as to whether the applicant is likely to abscond, should he be released on bail and therefore takes the view that unless the bail terms and conditions cannot guarantee his attendance to court, a person who has not been convicted for an offence is entitled to bail, unless compelling circumstances militate against his admission to bail. An accused person cannot be kept in detention pending during trial as a form of anticipatory punishment. The presumption of not guilty as stipulated in Article 50(2)(a) of the Constitution, is that he is innocent until his guilt has been established by the court beyond any reasonable doubt and not on the strength of evidence so far tendered. This is the purpose for which Article 49(1)(h) of the Constitution and Section 123 of Criminal Procedure Code are part of our legal system.
18. The right to personal liberty was stated by Justice Obasek in Nigerian case of *Saidu v State* [1982] 2NCR 4 as follows:-

"It does not give the court any joy to see offenders escape the penalty they really deserve but until they are proved guilty under the appropriate law, in our law courts, they are entitled to



walk about on streets and tread Nigerian soil and breathe the Nigerian air as free as innocent men and women.”

19. Having stated the legal principles and considered the affidavits, pre-bail report and submission by the parties, I find that there are now no compelling reasons to enable me deny the accused his right to bail. The evidence of the protected witnesses have now been secured. His parents have provided an alternative accommodation, there has been no evidence of any contact with prosecution witnesses during the period he has been in custody and the likelihood of being a flight risk can be adequately mitigated through appropriate bail/bond terms. As pointed by the Advocate for the applicant, his parents have attended every court appearance since the same took plea and must now be aware of the magnitude of the offence the same is facing and have confirmed that they will ensure his attendance to court throughout the trial.
20. On the issue raised by the prosecution on the possibility of the trial being concluded in the shortest time possible, it is clear that the trial commenced on priority basis in the month of June, 2019 and so far the court has taken the evidence of fifteen witnesses, doing the best in the prevailing circumstances it is not possible to provide a scientific estimation, on when the same shall be concluded. The Constitution requires that unless there are compelling reasons, an accused person must be allowed to continue with his life while awaiting the next step and I find that the accused is entitled to this right.
21. This therefore leaves the court with the issue of the determination of reasonable bail terms. As stated herein the bail/bond terms issued by the court must be those that are reasonable not amounting to denial of bail and will secure his attendance at the trial. The accused faces a charge of murder, wherein one of the possible sentence upon conviction is death, which must be taken into account. I have looked at some of the cases in the recent past, where accused persons charged with murder and which have attracted much attention, have been released on bond as follows:-
 - 1) *Republic v Zacharia Okoth Obado* [2018] eKLR
 - a) Deposit into court of Cash Bail in the sum of Kenya shillings five (5) million (Ksh 5,000,000/-).
 - b) In Addition two sureties of Ksh 5 Million cash.
 - 2) *Republic v Sarah Wairimu Kamotho* [2019] eKLR
 - (i) The accused shall execute a bond of four million shillings (Ksh 4,000,000/-)
 - (ii) The accused shall provide two sureties with each surety providing a bond of two million shillings (Ksh 2,000,000/-)
 - (iii) In the alternative the accused shall deposit with the Registrar of the Court a sum of Kenya shillings two million (Ksh 2,000,000/-) as cash bail.
 - 3) The applicant’s co-accused *Jacqueline Wanjiru Maribe v Republic*
 - a) Bond of Ksh 2,000,000 (Kenya shillings two million) with one surety of similar amount.
 - b) In the alternative Cash Bail of Ksh 1,000,000/- (Kenya shillings one million) with three (3) sureties of similar amount.
22. The Applicant’s application herein is made in the middle of the trial, wherein the prosecution has called and examined fifteen (15) witnesses, and therefore the nature of the prosecution case is well known to



the same, which the court has to take into account in setting bond terms. I am therefore satisfied that the following bond terms are reasonable to secure his attendance at the trial:-

- a) Bond of Kenya shillings three million (Ksh 3,000,000/-) with two (2) sureties of similar amount.
- b) In the alternative cash bail of Kenya shillings two million (Ksh 2,000,000/-) with three (3) sureties of similar amount.
- c) The accused passport shall be deposited in court and shall be retained throughout the period of this trial.
- d) The accused shall not be issued with any new passport and or any temporary travelling documents of whatever nature.
- e) He shall not make any contact with any prosecution witnesses, including those who have testified against him, in whatever nature unless the same is done in the presence of the Investigating Officer in this case.
- f) The accused shall not comment or discuss and or post anything on this case, including the testimony of witnesses, the direction of the trial and the likely outcome, either by himself or through agents, on any media platform including social media and in any forum including but not limited to instagram, whatsapp, facebook, tiktok, snap chat, twitter and others, during the period of the trial.
- g) Upon his release the same shall report to the area Chief of the place where his parents reside immediately and shall be reporting to the same every last Thursday of the month until the conclusion of his case and the said Chief shall make monthly report to the Deputy Registrar of this court, of the attendance of the accused at the said mentions.
- h) In default of any condition herein the bond shall stand cancelled.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2020.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Gichuhi/Mr. Okeyo for the State

Mr. Ayuo for Prof. Nandwa for the 1st Accused

Mr. Katwa for the 2nd Accused

Ms Nyanchoka for Omiti for the family

Both accused persons present

Court assistant- Karwitha

