



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI

CRIMINAL DIVISION

CRIMINAL REVISION NO.16 OF 2020

(As consolidated with H.C.Cr. Rev. No.15 of 2020)

PAUL ONGILI BABU OWINO.....APPLICANT

VERSES

REPUBLIC.....RESPONDENT

RULING

The Applicant, Paul Ongili Babu Owino is facing two charges before the trial magistrate's court (**Nairobi CMC. Criminal Case No.110 of 2020 (Milimani)**). In the first count, he has been charged with the offence of **attempted murder** contrary to **Section 220(a)** of the **Penal Code**. The particulars of the offence are that on 17th January 2020 at B Club Galana Plaza in Kilimani area within Nairobi County, the Applicant unlawfully attempted to cause the death of Felix Odhiambo Orinda by shooting him on the neck. In the second count, he was charged with the offence of **behaving in a disorderly manner while carrying a firearm** contrary to **Section 33** as read with **Section 34(1)** of the **Firearm Act**. The particulars of the offence are that on the same day and in the same place, the Applicant, while carrying a firearm make Steyr Pistol became disorderly and fired one round of ammunition with the intent to shoot Felix Odhiambo Orinda. The Applicant pleaded not guilty to both counts. He made an application to be released on bail pending trial. The application was opposed by the prosecution.

After hearing both parties, the trial court, in a considered Ruling, allowed the application. In the material part of the determination, the learned magistrate stated thus:

“In my considered view what would be best for this young man is to give him a reassurance, the best reassurance that he can regain the use of his limbs and that in spite of everything, he has a life to live. For now, this is only possible if he continues to receive the best treatment possible to enable him recover. The person who is ensuring that he gets this treatment unfortunately is the accused person. Detaining the accused person would be tantamount to pulling back the treatment this young man is receiving. This court has not been told of any other means by which he can continue to receive this treatment.

Therefore, whereas I was convinced that there are compelling reasons to decline bond for the accused person, I would give that a second thought and given the exceptional circumstances obtaining in this case allow the accused person to be released on bond for purposes of taking care of the welfare of the victim. However in order that the accused person's gesture was not just to hoodwink the public and the court into granting him bond I will concretize it into a court order and therefore grant him bond conditioned on the following grounds:

- 1. The accused person shall meet the initial medical expenses of the victim and to this end up to the value of Kshs.10 million. This sum is equivalent to the value of cash bail this court sets for the accused person. This sum will be deposited in court in four equal instalments of Kshs.2.5 million each for the next four months.**
- 2. This money will be used to offset the medical bills incurred by the victim while admitted to hospital. The hospital bills incurred to be presented to court for settlement from the deposited sum after every 21 days for the period the victim will be admitted to hospital and subsequently treatment upon discharge.**
- 3. In addition to 1 above the accused person will provide two contact persons who shall provide an undertaking that the sum of Kshs.10 million will be paid as directed by the court. The two contact persons shall be of equivalent stature and standing in society as the accused person and shall deposit copies of their national identity cards or**

passports in court.

4. Any sum that remains unutilized at the end of the treatment shall remain deposited in court until the determination of this case.

5. The accused person shall deposit his passport and all other travel documents in court.

6. The accused person is hereby prohibited from indulging in any form of taking alcoholic drink or narcotic drug or substance classified as such drug in a public establishment during the pendency of this case.

7. The accused person is hereby prohibited from commenting on this case in any forum be it in the media or public gathering where he may be attending whether as a Member of Parliament or in his personal capacity.”

In a rare occurrence, both the Applicant and the Respondent were dissatisfied by the decision of the trial court. The Applicant filed an application under **Section 362 and 364** of the **Criminal Procedure Code** and **Articles 49 and 50** of the **Constitution** before this court essentially seeking to revise the part of the Ruling that held that the prosecution had established compelling reasons to deny him bail pending trial. He was further aggrieved that the orders granted by the trial court displaced the presumption of innocence that is his constitutional right before commencement of the trial.

On its part, the prosecution invoked this court's jurisdiction under **Section 362 and 364** of the **Criminal Procedure Code** challenging the decision of the trial court essentially on the ground that the trial court had ordered the release of the Applicant on bail without any terms whatsoever. The prosecution was aggrieved that what the trial court ordered was in essence the provision for medical expenses for the victim of the crime which is an unknown concept in the criminal justice system. The prosecution therefore urged the court to examine the propriety and legality of this decision and accordingly issue orders to rectify the same.

Both parties responded to the other's application. Written submission were filed by both the Applicant and the Respondent. The Applicant also filed a bundle of authorities that he sought to rely on during the hearing of the application. The court consolidated the two applications since essentially they sought determination of the same issue: whether the prosecution had established compelling reasons to deny the Applicant bail pending trial and whether, if the Applicant is to be released on bail pending trial, what terms should be imposed by the court.

Mr. Okatch and Mr. Omari for the Applicant made oral submission before the court. Their submission can be summarized thus: they argued that the trial court erroneously reached determination that the prosecution had established compelling reasons to deny the Applicant bail pending trial. It is their contention that the trial court did not give the reasons on how it reached the conclusion that the prosecution had established such compelling reasons. They submitted that although the **Constitution** and Statute did not set out what constitutes compelling reasons, courts have stated that for an accused to be denied bail pending trial, the compelling reasons must be such that it serves the public interest and upholds the individual's constitutional right to liberty. Learned counsel submitted that the court should interpret compelling reasons restrictively so that the prosecution is required to provide specific compelling reasons that would persuade the court to deny an accused bail.

In the Applicant's case, learned counsel submitted that the prosecution had failed to establish any compelling reasons to deny the Applicant bail pending trial. There was no evidence which was supplied to the court to support the prosecution's contention that the Applicant had other pending criminal cases before any court. They complained that the trial court ignored the pre-bail report which was positive and which included comments from the victim's family who expressed their views to the effect that the Applicant should be released on bail pending trial. The family gave this assurance in light of the fact that the Applicant had assumed financial responsibility for the treatment of the victim. Learned counsel submitted that the fact that the Applicant had offered to cater for the medical expenses of the victim should not be taken to mean that he had pleaded guilty to the charges that were brought against him. To the contrary, it was the Applicant's desire that the victim's life be saved as the criminal process continues. They further submitted that the Applicant was unlikely to skip bail if he is released on bail pending trial on reasonable terms.

Mr. Ondari for the State opposed the application. He submitted that the trial court fell in error when it first held that the prosecution had established compelling reasons to deny the Applicant bail pending trial and then proceeded to release the Applicant on bail on terms that were unknown in law. There was uncertainty as to what bail terms were imposed by the trial court. It was his submission that the issue of the victim's medical expenses seems to have influenced the court into giving orders that were not recognized by the law. In particular, he submitted that where bond terms are imposed, the persons recognized in law are sureties and not contact persons as determined by the trial court.

It was the Respondent's contention that the Applicant had in fact been practically released on free bond because there were no sureties nor tangible recognizance in the terms imposed by the trial court. Whereas the prosecution empathized with the victim's position, it was not the role of the trial court to impose conditions unknown in the criminal justice system to secure the victim's treatment in hospital. He was of the view that the message being sent to the public, if such decision was to be upheld, is that one can injure an individual and then cater for his hospitalization and then plead to the court for favourable bond terms, and literally excuse his criminal conduct. This would amount to entrenching impunity.

Learned prosecutor submitted that the trial court did not take into account the victim's position before it made the Ruling in the manner that it did. He pointed out that the law presumed the Applicant innocent and therefore the issue of the Applicant catering for the medical expenses of the victim was not an issue that was before the trial court when considering whether or not to release the Applicant on bail pending trial. He denied the assertion by the Applicant that his right to fair trial would be infringed if the court imposes appropriate bond terms to reflect the serious nature of the charges that the Applicant is facing. He urged the court to revise the trial court's Ruling and give appropriate orders that would uphold the law.

From the submission made by the parties to this application, there are two issues for determination: the first issue is whether the prosecution

made a case for the court not to release the Applicant on bail pending trial. If the court determines the above issue in the Applicant's favour, the second issue for determination is what bond terms should be imposed. The **Constitution** under **Article 49(1)(h)** grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. It provides thus:

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be released.”

The **Constitution** does not define what constitutes “**compelling reasons**”. However, **Section 123A** of the **Criminal Procedure Code** provides thus:

“(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding Section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular –

- a. the nature or seriousness of the offences;**
- b. the character, antecedents, associations and community ties of the accused persons;**
- c. the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and**
- d. the strength of the evidence of his having committed the offence.**

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person-

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.”

The courts have rendered decisions that articulate what constitutes compelling reasons and include the following: **the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with witnesses, the need to protect the victim of crime and the accused person, the relationship between the accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives.** (See **ALHAJI MUJAHID DUKUBO-ASARIN Vs. FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006**). In **Grace Kananu Namulo –vs- Republic [2018] eKLR** Odunga, J held thus:

“17. I associate myself with the view expressed by Muriithi, J in Kelly Kases Bunjika vs Republic (supra) that:

“It is clear that the primary consideration for bail is whether the accused will attend his trial for the charges facing him, and it must, therefore, be a compelling reason if it is demonstrated that “the accused is likely to fail to attend court proceedings”. The question in this matter becomes whether there is, on a balance of probabilities evidence that the accused is likely to abscond. The accused claims to have a good defence to the charge of escape from custody. The nature of such defence and evidence is not disclosed. The accused merely asserts his “constitutional right to be granted Bond/Bail on reasonable and favourable terms.”

18. From the constitutional point of view, however an accused person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial. Therefore the accused does not have to apply for release on bond since a person on whom rights have been bestowed under the Constitution is not obliged to ask for the same. The right can only be limited where it is shown that there exist compelling reasons not to be released. Those compelling reasons include the ones set out hereinabove. It is however my view that the burden to prove the existence of the said compelling reasons falls squarely on the prosecution. That was the position in Republic vs William Mwangi Wa Mwangi [2014] eKLR where Muriithi, J held that:

“It is now settled that in the event that the State is opposed to the grant of bail to an accused person it has the onus of demonstrating that compelling reasons exist to justify denial of the constitutional right to bail... It is trite that the cardinal principle which the court should consider in deciding whether to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to be believe that he is likely to abscond if released on bail.”

In addition, the **Bail and Bond Policy** recently published by the **National Council on Administration of Justice** requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail.

In the present application, it was clear from the submission made that the prosecution opposed the Applicant's release on bail pending trial on the grounds that, being an influential person, he was likely to interfere with witnesses. Furthermore, the prosecution argued that in light of

the Applicant's past criminal record (that he has a pending criminal case in court), he ought to be denied bail pending trial. The prosecution further urged the court to look at the circumstances in which the offence was committed as constituting compelling reason especially noting that the Applicant is likely to serve a long stretch in prison should he be convicted. It is the prosecution's case that the above factors constitute compelling reasons that should convince the court not to release the Applicant on bail pending trial.

The prosecution further submitted that if the court was minded to release the Applicant on bail pending trial, then it should do so upon terms that reflect the serious nature of the charges that he is facing. In essence, the prosecution was saying that the bond terms imposed should be ascertainable and recognizable by the law.

On his part, the Applicant asserts that there were no compelling reasons for the court to deny him bail. He submitted that the prosecution had not provided evidence to support its claim that there were compelling reasons to deny him bail. He further urged the court not to ignore the fact that the law presumes him innocent since he had pleaded not guilty to the charges. The fact that he was financially contributing to the hospitalization and treatment of the victim should be considered positively and not as an admission of guilt. It was his case that by contributing towards the medical expenses of the victim, he was being mindful of the victim's life. He therefore urged the court to find that there were no compelling reasons to deny him bail pending trial. He further urged the court to direct that he be released on bail pending trial on reasonable terms.

This court has carefully evaluated the rival submission made by the parties to this application. It has also read the Ruling that provoked the two applications. The material part of the Ruling has been reproduced above. This court's jurisdiction under **Section 362** of the **Criminal Procedure Code** is circumscribed. That section reads thus:

“The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”

In exercise of its revisionary jurisdiction above, this court not sitting as an appellate court but rather it is considering whether a subordinate court has conducted proceedings before it in a lawful manner and rendered a decision that is lawful.

In the present application, it was clear to the court that the trial court properly considered the grounds that were placed before it in determining whether or not there were compelling reasons to deny the Applicant bail pending trial. However, it was apparent that the trial court was influenced by the fact that the victim was still undergoing treatment at the hospital. From the submission made, it is evident that the Applicant is paying the victim's medical expenses, not out of sympathy or charity, but with an eye to securing a favourable determination from the court. The trial court therefore formed the view that unless the Applicant was compelled to continue supporting the treatment of the victim, then most probably, and in all likelihood, the Applicant would stop providing financial support.

Being human, there is a probability that the trial court was moved by the serious injuries the victim sustained and the specialized medical treatment that he requires to regain his health, if he is ever to regain it (the prognosis at this stage is not good noting that the victim is yet to regain full use of all his bodily functions). The victim's situation is dire taking into consideration that his family is humble and does not have the financial capacity to provide for his treatment. From the victim's family point of view, the Applicant's financial support is not only welcome but is crucial towards securing the treatment that the victim deserves. This court notes that the decision by the Applicant to pay for the medical expenses of the victim cannot be compelled through the criminal process unless the Applicant admits to the offence. That compulsion can only emanate from a civil process which is beyond the purview of the criminal court. The Applicant can continue supporting the hospitalization of the victim as a moral obligation until otherwise compelled by a court of law.

The above notwithstanding, this court is of the view that whereas the victim's situation is one of the considerations that ought to be taken into account when determining whether or not the Applicant should be released on bail pending trial, and what terms should be imposed thereof, it should not have been the only consideration. The court is required to consider the totality of the law applicable including the broader interest of justice in determining whether or not the Applicant should be released on bail pending trial. As stated earlier in this Ruling, this court is not sitting on appeal against the decision of the trial court. It cannot therefore make comment regarding the reasons advanced for the ruling. What the court can however say is that the trial court fell in error when it failed to impose appropriate bond terms once it found that the Applicant qualified to be released on bail pending trial. The court shall rectify that error in order to meet the ends of justice.

This court agrees with the Applicant that the prosecution did not provide evidence to support its assertion that there were compelling reasons not to release the Applicant on bail pending trial. This court holds the prosecution did not establish that the Applicant will fail to attend court when he will be required so to do during trial. Being a public official, he has more to lose if he fails to attend court. This court therefore holds that the Applicant established a case for his release on bail pending trial. He shall so be released on the following conditions:

- I. He shall post a bond of Kshs.10 million with two sureties of the same amount, or
- II. He shall deposit a cash bail of Kshs.5 million.
- III. His passport shall continue to be deposited in court until the conclusion of the trial or until further orders of the court.
- IV. The Applicant shall surrender to the custody until he fulfils the above bond terms. It is so ordered.

DATED AT NAIROBI THIS 3RD DAY OF MARCH 2020

L. KIMARU

JUDGE