



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 10 OF 2020

REPUBLIC DPP

VERSUS

LUCY WAITHERA NJUGUNA 1ST ACCUSED

JOHN HARI GAKINYA 2ND ACCUSED

RULING

The 2 applicants **Lucy Waithera Njuguna** and **John Hari Gakinya** were initially charged separately in criminal case 10/2020 and 15/2020 respectively. The 2 cases were subsequently consolidated on 30-4-2020. Following the said consolidation their application for bail were heard by the court on 8.5.2020. This was by way of skype during the partial lockdown due to the COVID 19 pandemic. Learned counsel Mr. Ombeta and Mr. Khaemba appeared for the 1st accused while Mr. Wandungi appeared for the 2nd accused. Mr. Okeyo, appeared for the state.

For accused 1, Mr. Ombeta submitted that bail is a constitutional right of an accused person which right can only be denied upon proof of a compelling reason (article 49(1)(h). that in this case, the prosecution has failed to prove any such compelling reason. Counsel maintained that the affidavit of the investigating officer filed in objection of bail contains only matters of evidence which the accused has denied. He stressed on the principles of presumption of innocence of the accused.

On the ground that the accused might abscond, counsel relied on the authority of Republic Versus Dwight Sangaray & 4 others (2013)eKLR, that it is the duty of the person alleging to show proof of the likelihood of a party absconding, which the Respondent has failed to do in the case. He also cited the case of Republic Versus Richard David Alden (2016)eKLR that the prosecution must show material to prove their allegations of likelihood of interference with witnesses. Lastly, that the accused cannot be encompassed into looking for any other suspects in the course of investigations and neither can this be a ground for denial of bail.

It was confirmed that the accused is ready and willing to abide by any conditions that the court may impose in the grant of bail.

On his part, Mr. Wandungi for accused 2, submitted that accused 2 is an advocate of the High Court of Kenya and the charges relate to what he did in his professional capacity and that his clients have suffered due to his incarceration. As to the grounds raised for denial of bail, counsel maintained that public interest is not a compelling reason envisaged under Article 49. Also that the ground of strong evidence cannot stand as the prosecution do not even know the date of the offence and are only on a fishing expedition.

The submissions on behalf of accused 2 were based on several authorities counsel stated that he had filed a list of authorities however, on perusal of the court file, I cannot locate the said list of authorities. It has not been possible to locate the specific cases cited for lack of disclosure of their citations. In summary he submitted as follows:

That there must be proof likelihood of interference with witnesses (George Anyona Versus Republic.)

That National security and strength of the prosecutions case cannot be compelling reasons (Richard Nzioka Versus Republic.)

That seriousness of the offence is not a compelling reason (Thomas Muthai Versus Republic)

That bail is to ensure attendance of the applicant to court (Njehu Gatabaki Versus Republic). Also that court may impose strict conditions to bail.

That court ought to interpret constitution provisions to safeguard the right of an accused (Muganya Versus Republic.)

He summed up that the prosecution has not established any compelling reasons as to make the court deny the accused bail.

On the side of the prosecution, Mr. Okeyo submitted that the state opposes the release of the accused's on bail. First, that they are likely to interfere with witnesses. That Ms. Njoroge, a driver of the deceased and well known to the accused's is still at large and it is believed the 2 accused know about this. There are also 2 other employees of 2nd accused, yet to be arrested. That if released, the 2 accuseds are likely to interfere with these witnesses. Second, that accused 2 is likely to abscond. The reason being that he is a man of means with a family domiciled in the United Kingdom. Counsel summed up that should the court decide to grant the accused bond, then the court should impose stringent terms to ensure that the accuseds face their trial to conclusion.

I have considered the submissions made herein by both counsel for the 2 accused and the learned prosecuting counsel. I have also considered the respective affidavits filed by the 2 applicants and those in objection to the applications.

Article 49(1)(h) of the constitution of Kenya provides:-

Article (49)

(1) An arrested person has the right

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released"

The above provision clearly confirms the position that all accused persons, irrespective of the charges they are facing, may be placed on bail pending the trial and determination of their cases. However, the said provision goes on to make a rider that should there be compelling reasons shown, then the right to pre-trial bail may be denied. The Judiciary Bail/Bond Policy guidelines has given the courts general guides on what exactly would constitute compelling reasons good enough as to make the court deny the accused the right to bail. Article section 4.9 of the said guidelines, some of the considerations are listed as follows:-

The nature of the charge or offence and he seriousness of the punishment to be meted out if the accused is to be found guilty.

The strength of the prosecution's case.

The character and antecedents of the accused person

Failure of the accused to obey bond terms in previous cases.

Likelihood of interference with witnesses.

Need to protect witnesses and victims.

Relationship between the accused and potential witnesses.

Whether accused is a flight risk or likely to abscond.

Public order, peace and security.

It is clear from the above list that the same is not conclusive. The courts therefore must deal with each case according to its peculiarity of circumstances. And the burden of proving the existence of such circumstances lies with the prosecution. This is obviously in line with the cardinal legal principles of presumption of innocence of the accused, and secondly, that he who alleges must prove. This indeed is that holding in the case of Republic Versus Dwight Sagaray & 4 Other (2013)eKLR cited by the defence counsel, a decision which is persuasive to this court. In the case, the court held that the prosecution must place before court proof of existence of such compelling reasons.

In our particular case, the prosecution has raised a number of grounds in objection to the accused's application for bail. I shall deal with each as follows:

(i) Seriousness of the offence:

The 2 accused both face the offence of murder contrary to section 203 as read with section 204 of the Penal code. There is no doubt as to the fact that this is a serious offence which in case of conviction also attracts stiff sentence. However, under Article 49 (1)(h) spelt out above, all accused are entitled to the right to pre-trial bail, irrespective of the seriousness of the charge. I am therefore not convinced that this alone can be a compelling reason, good enough to make this court deny the accuseds the right to bail.

(ii) Strength of the prosecution's case:

It was submitted by learned counsel for the prosecution that the prosecution has a very strong case against the accused and that on this basis the 2 accused ought to be denied bail this court notes that this matter is still fresh and ought yet to be heard. The strength or

otherwise of the prosecutions case is therefore yet to be tested.

Under Article 50(2) of the constitution,

Article 50(2) Every accused person has the right to a fair trial, which includes the right-

(a) To be presumed innocent until the contrary is proved.

I am therefore persuaded by the holding of the Hon Lady Justice H. Ong’udi in Rodgers Nzioka & 10 Others Versus Republic (2018)eKLR that since the court cannot at this stage evaluate any evidence to determine the strength of the prosecutions case, it would be prejudicial to the applicants to deny them bail on this basis. Denying the accused’s bond only on this basis would probably fly in the face of the express constitutional provisions above enumerated i.e Article 49(1) (h) and Article 50(2)(a). I accordingly do not agree with the submissions of learned counsel for the prosecution that accuseds ought to be denied bail on this ground.

(iii) Likelihood of interference with witnesses:

Again it was submitted by the prosecution side that accuseds’ ought to be denied bail on the basis that if released, they are likely to interfere with intended prosecution witnesses. That both accused are well known to at least 1 witness yet to be located and further that at least 2 witnesses are employees of accused 2.

From the submissions made in court, what came out were fears of the prosecution that the accused if released would interfere with the witnesses. No evidence of any contacts or attempted contacts with the said witnesses were shown to court. It is this courts’ considered view that for this ground to succeed as a compelling reason, it is incumbent upon the prosecution to place before the court tangible evidence leading to the irrefutable conclusion that indeed if released on bail, such interference would occur. No such evidence has been placed before the court.

In the case of Republic Versus Richard David Alden (2016)eKLR, Justice Lesiit held (paragraph 16) stated,

“For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference at least some facts must be placed before court otherwise it is asking the court to speculate”

I agree with the sentiments above of the learned judge. I am therefore not convinced that the prosecution sufficiently proved this as a compelling reason.

(iv) Likelihood of absconding:

The prosecution raised this ground, particularly with regard to accused 2. That accused 2 is likely to abscond if released on bail on 2 grounds. That he is a man of means and also that he has his family resident in the United Kingdom which he frequently visits. The counsel for the 2nd accused, has countered this and submitted that accused 2 being an Advocate of the High Court of Kenya with his own practice is well grounded and attached to Kenya and is unlikely to leave the jurisdiction of this court. That further he comes from a prominent family in Nakuru and he undertakes to obey all the conditions that the court may set in granting bail. Suffice it to say that accused 1 has similarly made the same undertaking.

It is not disputed that accused 2 is an Advocate of the High Court of Kenya and that he runs his own law firm in Nakuru town.

This alone goes a long way in proving his attachment to Kenya. It would be speculative therefore to assume that since his family is resident in the United Kingdom, then he shall abscond and run away from the jurisdiction of this court. Appropriate conditions set by the court would in my view take care of any possibility of the accused absconding. This is the same position taken in the case of Republic Versus Dwight Sagaray & 4 others (2013)eKLR, when it held that the Panacea for possible flight is not to automatically deny bail, but to impose stringent conditions that would attract attendance at trial.

I therefore do not find merit in this objection. I dismiss it. The main objection of release of an accused on bail is to ensure that an accused is able to do his case while he is out of custody. It is not an acquittal or an opportunity to run away from his trial. And in deciding whether one qualities to be accorded the right to bail, the court must carefully consider the circumstances of the case. I have carefully considered the circumstances in this instant case. I am not convinced that the prosecution has established any compelling reasons that could make this court deny the accuseds the constitutional right to bail. I dismiss the objections raised by the prosecution and order that both accuseds 1 and 2 be released on bail on the following terms.

- (a) That each may be released on bond of Ksh.2million with 1 surety each of a similar amount.
- (b) That in addition, each accused shall deposit a cash bail of Ksh.200,000/=.
- (c) That both accuseds shall deposit their passport in court.
- (d) That accuseds are ordered never to leave the jurisdiction of this court without express order of the court.
- (e) That accuseds are ordered never to contact any of the prosecution witnesses directly or through any agents or proxies till this case is determined.

(f) That the accuseds must both attend court at all times as may be ordered by the courts.

D. O. OGEMBO

JUDGE

15.5.2020

Court:

Ruling read out by skype in the presence of Ms. Gikonyo for the state, 1st applicant, and Mr. Wandungi for 2nd applicant and holding brief for Ombeta for 1st accused.

D. O. OGEMBO

JUDGE

15.5.2020

Ombeta:

The investigating officer has my client's passport.

Ms. Gikonyo:

I need to confirm this with the investigating officer. I have got the instructions that passport of accused 1 is an exhibit. We wish that it remains in the custody of the investigating officer.

Ombeta:

That is okay.

Court:

Passport of accused 1 may be retained by the investigating officer as an exhibit.

D. O. OGEMBO

JUDGE

15.5.2020