REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

(Coram: Odunga, J)

MISC. CRIMINAL CASE NO. 43 OF 2020

SEMBA KALOVWE.....APPLICANT/ACCUSED

VERSUS

REPUBLIC.....PROSECUTOR/RESPONDENT

RULING

1. The accused/applicant herein, **Semba Kalovwe**, together with his co-accused in Machakos Chief Magistrate's Court Criminal Case No. 481 of 2019 which was consolidated with Criminal Cases Nos. 627 and 502 both of 2019 faces five counts of robbery with violence the facts being that on 11th July, 2019 at Jopas Guest House, Katheka Kai area, Machakos Sub County, Machakos County, they jointly robbed No. 234795 CI **Abdnassir Harun, Jane Wanjiku Kyalo, Cosmas Nthiwa Mutiso, Mabaluka Musangi** and **Caroline Mwende Mutuku**. It is said that during the time of the said robbery, they were armed with firearms and crowbars.

2. In a ruling delivered on 5th November, 2019, the learned trial magistrate found that for the reasons that the weapon of robbery was still missing and since it was suspected to have been in custody of the accomplices of the applicant and as further investigations were still ongoing which could result in the arrest of other suspects, it was not proper at that stage to release the applicant on bond though the applicant was at liberty to renew the same application in future.

3. That ruling was delivered on 5th November, 2019, more than five months ago. From the charge sheet the applicant was arrested on 22nd September, 2019, more than six months ago. The same day of the delivery of the ruling, the order of consolidation was made in which the case was consolidated with another case presumably where the alleged applicant's accomplices were charged. On 20th January, 2020, the case against one of the accused persons was withdrawn on the ground that the said accused person was to be treated as a prosecution witness.

4. As appreciated by the learned trial magistrate, bail is a constitutional right. Therefore, from the constitutional point of view, the accused does not have to apply for release on bond since a person whose rights are recognised under the Constitution is not obliged to ask for the same. This right can only be limited where it is shown that there exist compelling reasons not to be released and the burden to prove the existence of the said compelling reasons falls squarely on the prosecution as was held in **Republic vs. William Mwangi Wa Mwangi [2014] eKLR**

5. It is my view that even in cases where limitations contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words, the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions being a hindrance to the fair trial.

6. One of the grounds upon which the applicant was denied bail was that investigations were continuing. This Court has had to deal with the said issue in **Agnes Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another [2019] eKLR** in which it held that:

> **"In my view, it is only in exceptional circumstances where there is evidence preferably by way of sworn affidavit, that the liberty of a suspect ought to be denied on the ground that investigations are ongoing. Courts ought not to be used by investigating agencies as holding grounds for suspects while they are conducting investigations. Ordinarily suspects ought only to be brought to court after investigations are finalised in which event the only issues that can fall for determination are the conditions for release of the suspects."**

7. As stated above the ruling was delivered more than four months ago. That is sufficient time if any time was needed for the investigations to have been completed.

8. The other ground was that the weapon that was taken from the 1st complainant is still at large and could be in the hands of the applicant's accomplices. Again as stated above it must be presumed that the said accomplices are the ones whose cases were consolidated with the applicant's and one of whom has had his case withdrawn on the ground that the prosecution intends to have him as a prosecution witness instead. Accordingly, that ground is no longer tenable.

9. On 22nd July, 2019, the 1st accused in the consolidated charge was admitted to bond of Kshs 500,000/- with one surety of similar amount. I do not see any reason why the applicant herein cannot be similarly treated. In the circumstances, I made the following orders:

> **(1) The accused person/applicant may be released on bond of Kshs 500,000.00 in Machakos Chief Magistrate's Court Criminal Case No. 481 of 2019 which was consolidated with Criminal Cases Nos. 627 and 502 both of 2019 with surety of similar amount to be approved by the trial Court.**
>
> **(2) He shall report once a month before the said Court and shall attend court without fail whenever required to do so.**
>
> **(3) He shall not contact or intimidate, whether directly or by proxy, any of the witnesses in this case as per the witness statements and other documents that have been supplied by the State to the defence.**
>
> **(4) In the event that any of these conditions are violated, he is liable to have his bail cancelled and he shall proceed with the case while in custody**

10. Orders accordingly.

Ruling read, signed and delivered in open court at Machakos 15th day of May, 2020.

G V ODUNGA

JUDGE

In the presence of:

Miss Adera for the prosecution/Respondent

Accused in attendance through skype

CA Simon