



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 4 OF 2020

KESUUNTU OLE NTIMAMA.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

INTRODUCTION

1. Pursuant to the provisions of article 49 (1) (h), article 50 (2) (a) of the 2010 Constitution of Kenya, section 123 (1) (2) (3) of the Criminal Procedure Code (Cap 75), Laws of Kenya and all enabling provisions of the law, Mr. Meing'ati, counsel for the accused has applied for release of the accused on bail/bond pending his trial on a charge of murder.

2. On 24/6/2020 Mr. Karanja, counsel for the respondent conceded to the release of the accused on bail, after he was informed by the investigating officer, that they were was not opposed to the accused being granted bail. As a condition of his bail, the prosecution applied to the court that the accused had to provide one surety. Accordingly, the court released the accused on his own bond of shs. 700,000/- with one surety of a similar amount.

3. Later on the same day, Mr. Parseen Masikonde, counsel for the victims applied under certificate of urgency for the cancellation of the order granting bail to the accused on the basis that the bail application was conducted in his absence. He blamed lack of his participation on the device used for video link technically known as "Microsoft Teams", which due to technical problems was unable to link him.

4. On 26/6/2020 both counsel entered into a consent agreement by which the order granting bail to the accused was cancelled. Thereafter, Mr. Masikonde filed two replying affidavits in response to the supporting affidavit of the accused. The hearing of the bail application of the accused had to start anew (de novo).

The case for the accused/applicant

5. Through his notice of motion, the applicant applied for bail pending his trial on a charge of murder. The application is supported by nine (9) grounds that are set out on the face of the notice of motion and a fifteen (15) paragraphs supporting affidavit.

6. The major grounds in support of the application are as follows. The accused is a law abiding citizen of Kenya without any previous criminal record. The applicant has strong community ties in Olenkuluo village and an alternative home at Ntimama Ridge (Melili), where he resides. He is not a flight risk. Additionally, the applicant is married with children, the majority are minors, whom he takes care of. Furthermore, the applicant has also stated that he is the sole breadwinner in his family and his continued incarceration will greatly affect his family. He further states that the investigations are complete and that he will not interfere with witnesses. Finally, he has stated that his family members are ready and willing to stand as sureties if needed by the court.

7. The applicant has deposed to a fifteen paragraphs supporting affidavit. He has deposed to the same matters that are set out as grounds on the face of his notice of motion, except for the following major matters. He was arrested on 23rd May 2020 and detained at Narok police station. He also pleaded not guilty before Hon. Bwonwong'a, J, on 3rd June 2020. He has deposed that he has been co-operative with the authorities in their investigations. He finally has deposed that he is aged 58 years old and married with children, who depend upon him.

The submissions of the accused/applicant

8. Mr. Meing'ati, counsel for the applicant submitted that the accused has a constitutional right to be released on bail, since he is presumed to be innocent in terms of article 50 (2) (a) of the 2010 Constitution of Kenya. He further submitted that the accused will relocate to his other home at Melili in Narok North, which is far from the scene of crime. He further submitted that it was not for Mr. Masikonde's clients (the administration chief and the brother of the deceased) to object to bail. The objection to bail should have come from the investigating police

officer, according to him. He also submitted that the investigating police officer has not filed a replying affidavit. He therefore, urged the court to ignore the affidavits of the area chief and the brother of the deceased, since they all belong to the same family. He further submitted that there no compelling reasons to deny the accused bail; a matter in regard to which he cited *David Muchiri v Republic, High Court at Nairobi, Case No. 46 of 2017* in support of his proposition.

9. Counsel also cited *Aden v Republic, High Court Criminal Case No. 48 of 2016*, in support of his proposition that where an allegation of interference with witnesses is raised, there should be proof of a likelihood of such interference.

10. Mr. Meing'ati objected to the revocation of his client's bail on the grounds set out in the affidavit of the area chief. He urged the court to disregard the consent recorded in court between him and Mr. Masikonde; since it was not adopted by the court as its order. Finally, Mr. Meing'ati submitted the prosecution should not take any position in the application; as Mr. Karanja's position was opposed to his colleague prosecutor (Ms Torosi) and urged the court to rely only on the affidavits.

11. He therefore urged the court to release his client on bail.

The case of the Respondent/Republic.

12. The respondent through Ms. Torosi opposed the release of the accused on bail based on the affidavits of the area administration chief and the brother of the deceased.. She urged the court to ignore the position taken by his colleague Mr. Karanja, who had conceded to the accused being released on bail. The respondent did not file any replying affidavit.

The case for the victims

13. Mr. Masikonde, counsel for the victims, filed two affidavits in opposition to the release of the accused on bail.

14. One of those two affidavits is that of the area chief (Tobiko Ole Lepore), who deposed to an 11 paragraphs affidavit in opposition to the release of the accused on bail. He has deposed to the following major matters. He deposed that the accused and the deceased are immediate neighbours at home. And that if the accused is released on bond, his security is not guaranteed; although the situation may change later, when the deceased's family members heal from the loss. And that the accused disappeared after the attack and was captured and arrested at Ewaso Nyiro trading centre, as he was being aided to escape by his son Sharar Ntimama using an ambulance at around 00.32 am during mid-night. He has further deposed that there is much tension in his area and the families of the deceased and the accused have turned against each other and that he has only managed to calm them down with a promise that justice shall be done.

15. In addition to the affidavit of the area chief, there is the affidavit of the brother of the deceased (Rereu Ole Wotuni), who deposed to the following major matters. He deposed that the deceased was his brother and was a neighbour of the accused. He further deposed that there was a land dispute between the deceased and the accused; which they thought they had solved. Following the killing of the deceased by the accused, the family of the deceased was of the view that it was the boundary dispute that led to the killing of the deceased.

16. He also has deposed that the killing of the deceased brought back the animosity and the family are so bitter and they have not yet healed. He has further deposed that if the accused is released, more attacks could occur and that he will interfere with witnesses. Some of those witnesses are neighbours of the accused.

17. The deponent has also deposed that the family of the deceased and that of the accused are immediate neighbours and if he is released on bail, his security is not guaranteed as there is much tension, pain and animosity. Finally, the deponent has deposed that the grant of bail be refused for some time to enable the family of the accused to relocate to Melili.

The submissions of the victims.

18. Mr. Masikonde, counsel for the victims submitted that the consent between him and Mr. Meing'ati was executed after they agreed that the victims had a right to participate in the bail application pursuant to sections 9, 10 and 11 of the Victims Protection Act of 2014. And the grant of bail in their absence was an error and that Mr. Meing'ati has not shown any reasons as to why the consent should not be adopted.

19. After Mr. Meing'ati changed his mind and agreed that the consent was valid and that what was coming for hearing was the application. Mr. Masikonde then responded to the submissions of Mr. Meing'ati. He submitted that the area chief was not from the family of the deceased. The area chief was an independent administrator, who represented the national government at the village level and was not taking sides in this application. He further submitted that the investigating officer through the prosecutor (Mr. Karanja) conceded the application. He did not file any replying affidavit and could not be cross examined. Mr. Masikonde therefore urged the court to adopt the position taken by the second prosecutor (Ms. Torosi), who opposed the application for release of the accused on bail.

Issues for determination

20. I have considered the affidavits and submissions of the victims, the accused and the prosecutor in the light of the applicable law. I find the following to be the issues for determination.

1) Whether the victims have a right to participate in the bail application. 2) Whether there are compelling reasons to deny bail to the accused.

2) Which of the conflicting positions of the two prosecutors should the court rely upon?

Issue 1

21. Mr. Meing'ati for the accused urged the court to ignore the affidavits of the area chief and the brother of the deceased, since they all belong to the family of the deceased. The two deponents filed affidavits in opposition to the release of the accused on bail. In other words, according to Mr. Meing'ati, the victims have no right to participate in the bail application. Mr. Masikonde maintained that the victims have a right to participate in the bail application.

22. I find that the participation of victims in the bail application is recognized by section 20 (1) (b) of the Victims Protection Act of 2014. The provisions of that section provide that: "20 (1) A victim has a right to submit any information for consideration to the- (b) court during plea bargaining, bail hearing and sentencing."

23. In this instant application, the victims through the affidavits of the brother of the deceased (Rereu Ole Wotuni) and the area chief (Tobiko Ole Lepore) have submitted their information for consideration to the court. The two affidavits must be subjected to the test of admission in terms of relevance and probative value and what weight to be attached to them in determining the bail application. Furthermore, those two affidavits should not be prejudicial to the rights of the accused or be inconsistent with a fair and impartial trial as stipulated by section 9 (2) (b) (i) of the Victims Protection Act of 2014. As long as the two affidavits pass the foregoing tests they should be considered by the court.

24. I find that the two affidavits have passed the foregoing tests. And for that reason I find that the participation of the victims in the application for bail is in law proper. As a result, I find that the objection taken by Mr. Meing'ati is without legal basis and is hereby dismissed for lacking in merit.

Issue 2

25. The brother of the deceased has in his affidavit deposed that following the killing of the deceased there is much tension, pain and animosity between the family of the deceased and that of the accused to the extent that the security of the accused cannot be guaranteed. He further deposed that the grant of bail be refused for some time to enable the family of the accused to relocate to Melili in Narok North. And that if the accused is released more attacks could occur.

26. Furthermore, the area chief has deposed that the accused disappeared after the attack and was captured and arrested at Ewaso Nyiro trading centre as he was being aided to escape by his son Sharar Ntimama using an ambulance at around 00.32 am during mid-night. The area chief has supported the affidavit evidence of the brother of the deceased.

27. I find as cogent and credible the foregoing affidavits of the brother of the deceased and the area chief. It therefore follows that there is ample evidence that the accused is a flight risk. This a compelling reason to deny bail to the accused within the meaning of article 49 (1) (h) of the 2010 Constitution of Kenya. And I find that the accused is released, his security will be in danger.

Issue 3

28. In the initial stage the first prosecutor (Mr. Karanja) conceded the application for bail after being informed by the investigating officer that it was safe for the accused to be released on bail. During the second *inter partes* hearing of the application, the second prosecutor (Ms Torosi) changed the prosecution stand that they were now opposed to the release of the accused on bail. During the two stages of the *inter partes* hearing of the application, the prosecution had not filed any replying affidavit.

29. The answer to the conflicting positions taken by the prosecution lies in the affidavits of both the victims and the accused.

30. The issue as to whether the accused was a flight risk or not turned on the affidavit evidence of both the victims and the accused. The prosecution having not filed any replying affidavit. The two prosecutors merely expressed their opinions which were not supported by any evidence. I find that in the absence of the evidentiary basis for their opinions, the conflicting stands taken by them was not useful to the court.

31. However, I must point out that any position taken by the prosecutor should generally be based on evidence whether oral or affidavit; unless the position taken is one of law. If the position taken is in respect of a matter of law, there will be no need for an evidentiary basis for such opinions.

32. In the instant application, it appears either that the police investigations were not yet completed or they did not take into account the views of the victims in this bail application.

33. Police investigations always take into account the views of the victims in applications such as the current one. The reason being that the law allows the views of the victims to be taken into account when such applications come up for hearing. This will save time and money for the victims; who also may not be possessed of the legal expertise in terms of presenting their views to the court. There is yet another reason why the police should also present the views of the victims to the court. The reason for this is to be found in *Bukenya & Others v Uganda [1972] EA 549*, in which the court held that the prosecution must make available all the witnesses necessary to establish the truth even if their evidence is inconsistent. Although that statement of law was made in the context of the trial process, it applies with equal force in bail applications. Furthermore, the second reason for this is that the prosecutor is an agent of justice, and as an advocate in court, the prosecutor represents the public including the victim of the crime and the public is interested in knowing the truth through a fair prosecution. See *Berger v USA 295 US 78, 88 (1935)*. See also *Ochau s/o Osigai v Regina [1956] 23 EACA 586*

34. Since Mr. Meing'ati for the accused conceded in the course of oral arguments in court that the consent between him and Mr. Masikonde for the victims was valid, I find that that consent was validly entered into between them. It is on that basis that the hearing of the application

proceeded for hearing *inter partes*.

35. In the premises, the application fails and is hereby dismissed.

Ruling signed, dated and delivered at Narok this 15th July 2020 via video link in the presence of Mr. Meing'ati for the accused, Ms. Torosi for the respondent and Mr. Masikonde for the victims.

J. M. BWONWONG'A.

J U D G E

15/07/2020