REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

(Coram: Odunga, J)

CRIMINAL CASE NO. 17 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JOSHUA MUEKE MUTUNGA ALIAS MOSES MUTUNGA

JOHN KITUMBI MUNYOKI

MUTUA MUASYA

KOKI KIMANZI.....ACCUSED

RULING

1. The accused hereinabove were charged with the offence of Murder contrary to section 203 as read with section 204 of the ***Penal Code*** (Cap 63) Laws of Kenya for which pleas of not guilty was entered. The particulars of the charge were that on the 16th April, 2019 at Gynery Area at Kitui Township in Kitui Subcounty within Kitui County, they jointly murdered **Benjamin Muema Kinyali.**

2. The 1st accused by his application dated 24th June, 2019 sought that he be released on bond pending the hearing of this case. After hearing the parties, **Mutende, J** in her considered ruling delivered on 19th November, 2019 deferred the question of bail until after the testimony of the wife of the said accused and the wife of the deceased and set the hearing date for 5th December, 2019. On 5th December, 2019, the testimony of two witnesses was taken though the said two witnesses were not the ones mentioned in the said ruling. The hearing of the case was then rescheduled to 11th and 12th March, 2020. On the adjourned dates, the matter could however not proceed as the Learned Trial Judge was indisposed. Accordingly, the matter was referred to this Court.

3. What is before me is an application dated 20th May, 2020 made on behalf of the 1st accused, **Joshua Mueke Mutunga** in which he has renewed his application to be released on bond upon reasonable terms pending the hearing of this case.

4. According to the Applicant, while he as in custody, his wife **Esther Wanjiru Njau**, left the matrimonial home after her father and her relatives went for her. He was therefore of the view that if released on bond, he will not be staying with his wife as she is currently staying with her parents in Kirinyaga County.

5. The Applicant stated that prior to his arrest and incarceration, he had obtained loans which have fallen in default since his employer removed him from the payroll. Thereafter the Bank sent agents to his home and informed his father that if no alternative arrangements were made to settle the loan, it would proceed to auction the home.

6. The application was however opposed by the Respondent. According to the Respondent, the Applicant has continued to threaten witnesses that are yet to testify. It was disclosed that though the witnesses were bonded and attended the court on 5th December, 2019, due to the court's workload, the said witnesses could not be heard. It was deposed that though the Learned Trial Judge, in her ruling had restricted deferral of the bail to the said two witnesses, by the said 5th December, 2019 more witnesses were threatened, namely **Bernard Kimanzi** and **Justus Makanga** who were directed to immediately testify on that day. It was denied that the Applicant's wife had relocated to Kirinyaga. According to the Respondent, the said witness works at Kauwi Subcounty Hospital which is 10kms away from Kitui so that if the applicant is released the threat to her life would still be there. It was disclosed that the Applicant was also under investigations for threat to kill. According to the Respondent, on 10th December, 2019, he Applicant's father without knowledge of the witness proceeded to Nyandarua to persuade the Applicant's father to desist from reporting the threat.

7. The Respondent denied the allegations made by the Applicant regarding the threat to auction their home and reiterated that the safety of the witnesses would be at risk and disclosed that the prosecution was willing to avail all the witnesses to testify at the earliest date.

8. In her affidavit, **Esther Wanjiru Njau**, the Applicant's wife deposed that she was threatened by the Applicant on the 25th August, 2019 when she went to visit him at G K Prison that since she was the reason he was remanded she would face the consequences when the Applicant is released on bond which the Applicant anticipated to be on 17th September, 2019 after the said witness gave a positive report to the Probation Officer. As a result, she reported the said threats to her parents and left the Applicant's home and proceeded to her home in Kipipiri. However, on 10th December, 2019, her father in law **Joseph Mutunga Mueke** proceeded to her home in Kipipiri and told her father that she should desist from reporting to court that the Applicant threatened her. As a result, she reported the matter to Kipipiri Police Station on 23rd December, 2019 and was advised to notify the DPP accordingly which she did. It was her deposition that she is stationed at Kauwi Subcounty Hospital which is 10kms away from Kitui Referral Hospital where the Applicant works and hence she was still fearful of her life should the Applicant be released on bond.

9. In a rejoinder the Applicant swore an affidavit in which he disclosed that he has been in remand custody from the date of arrest in this case duly remanded pursuant to the orders of the court first issued on 10th June 2019, and has no communication with the outside save for routine visits by relatives under the watch of prison warders and which visits ended in March 2020 when Covid 19 was declared a pandemic in Kenya. He denied that he has ever threatened his estranged wife, **Esther Wanjiru Njau**, with whom he had a good relationship when the case was being investigated and she stood surety for him in Kitui Chief Magistrate's Criminal Miscellaneous Application Number 48 of 2019. According to him, the said **Esther Wanjiru Njau** visited him in prison on 25th August, 2019 and he talked with her in the presence of a prison warder, and did not threaten her as alleged. Thereafter, she organized with her relatives to come for her from his home because she became a frequent visitor to the Investigating Officer in this case, and he suspects that it is out of that dalliance that she has decided to frame him with the charges of threatening her. He reiterated that from 25th August, 2019 when his aforesaid wife visited him, he has never talked to her either directly or through any proxy, and he is surprised why she has opted to peddle malicious falsehoods against him.

10. It was his view that her statement which he attached does not incriminate him with the offence herein.

11. He disclosed that he had established that his own father, **Joseph Mutunga Mueke**, visited the parents of his wife at Kipipiri at their request and they did not discuss this case or any nature of threats, and that **Esther Wanjiru's** allegations are not true, otherwise, the Investigating Officer would have recorded statements from his parents-in-law. If anything, he averred, the Investigating Officer has not disclosed the outcome of the complaint that was lodged with the police on 23rd December 2019, implying that it was found baseless and possibly closed.

12. It was further averred that his father, **Joseph Mutunga Mueke**, has sworn an affidavit detailing his visit to Kipipiri and the subject of his discussions with his parents-in-law which affidavit he attached. According to him, the Investigating Officer is treating him like a convict and denying him the right of the presumption of innocence yet he is a law abiding citizen who will abide with all the conditions to be attached to the bond terms if so released. He averred that for the more than one year he has been in remand custody, his life has been ruined and his financial affairs fallen in shambles, and he pleaded with the court to admit him to bond in order to redeem what is possible.

13. On 23rd June, 2020, I directed the mother of the deceased to respond to the application within three days and granted leave to the applicant to file a further reply within three days of service thereof with parties filing their submissions within three days thereof. Unfortunately, only the applicant has fully complied with the said directions. The victim's lawyer opted to only file the submissions while the Respondent only filed the replying affidavit.

14. It was submitted on behalf of the Applicant that by her said ruling the learned trial Judge had technically agreed to grant the applicant bond subject to the condition imposed on the conclusion of the said ruling. The trial Judge has ever since been ailing and missing court sessions occasionally, and thus making it impossible to conduct any hearings in the case from 5th December 2019 to the date of making these submissions a period of over 7 months. And due to factors beyond the control of the trial judge, there is no certainty when she will be hearing matters next.

15. It is on that premise that the instant application was made, urging the court to vary the conditions imposed on the aforesaid ruling to the extent of the 2 witnesses who have already testified.

16. It was further submitted that the Covid 19 Pandemic has also made case not to proceed normally and admitting the applicant to bail will further ease the congestion in jails and reduce the chances of infection with the disease.

17. According to the Applicant, it is admitted by the prosecution that the wife of the applicant left his home on 13th September 2019 and is now under the care of her parents. This fact was not brought to the attention of the accused who was then in custody, as well as to the trial court when it delivered its ruling on 19th November 2019. Since the presence of the accused and his now estranged wife being in the same home was the prime consideration, the fear of interference with the witness has become remote.

18. According to the Applicant, her statement to the police attached to the Applicant's affidavit even if it were to be adopted without questions, the same is not incriminating to the Applicant hence her reports to the police seem intended to achieve other objectives as the investigations have been done and no one has been found culpable. It is on this basis that the applicant averred that his estranged wife is having a peculiar dalliance with the Investigating Officer with a view to denying him his right to bail pending trial, and her reports should be treated with utmost caution.

19. It was further submitted that the applicant has shown that he is a civil servant who is law abiding, and has further undertaken to fully comply with any conditions to be attached to the bail by the court, an undertaking which has not been doubted by the state.

20. In support of the application, the applicant relied on the decision of **Lesiit, J** in the case of **Republic –vs- Richard David Alden [2016] eKLR, Lessit, J**. while admitting the accused to bail in that case, cited other cases on the issue on the interference of witnesses and stated amongst other things as follows:

> **"All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner……"**

21. Accordingly, it was submitted that the prosecution has not placed such material before the court which demonstrates actual or perceived interference without asking the court to speculate. The applicant has on his own placed the statement of the witness said to be intimidated and shown that her evidence, even if, adopted as recorded, is not at all incriminating. While the Applicant denied the allegation that he issued threat on 25th August, 2019 in the prison precincts, it was submitted that even considering the alleged threat in totality, to wit; "***Nikitoka Tutaonana"*** it is doubtful whether it was a threat or a wish by the applicant longing to meet his wife because its literal translation from Kiswahili to English is simply this: *"When I come out, we shall see one another"*. It was therefore submitted that there is no evidence that the applicant's estranged wife has been threatened from giving evidence in court or persuaded to give her evidence in a particulars way.

22. The upshot, it was submitted, is that the prosecution has not placed any sufficient material before the court, including any outcome of the stated investigations to justify the court to deny the applicant bail on account of interference with witnesses. The Court was therefore urged to allow the application and admit the applicant to reasonable bail terms as prayed.

23. On behalf of the victim, it was submitted that since there was an earlier application for bond which was heard and determined by **Mutende, J** and a ruling delivered on 19th November, 2019, in the absence of an appeal, this Court cannot sit on appeal on a decision of a court of concurrent jurisdiction. According to the victim, the only alternative would be for this court to take up the hearing of the criminal trial, hear the witnesses that were required to testify before the issue of bond was revisited though the victim appreciated that within the matrix of criminal procedure, this court may not do so as long as **Mutende, J** is still the judge in Kitui.

24. In the victim's view, the issue of Covid 19 Disease is not a legal justification for alternation (sic) of earlier orders of the court. Since the High Court in Kitui continued to sit until sometime in June, 2020, the current application, which is founded on Covid 19 pandemic, ought to have been raised before that court earlier. The Court was urged to take judicial notice of the fact that Covid 19 lock down in Kenya started in March, 2020. It was averred that there are many other people in our prisons today, including the applicant's co-accused, who are equally affected by Covid 19 and it has not been argued that the Ministry of Health guidelines on Covid 19 are not been adhered to in prison.

Determination

25. I have considered the application, the affidavits both in support thereof and in opposition thereto as well as the submissions filed.

26. Article 49(1)(h) of the Constitution provides that:-

> ***An accused 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.***

27. The Constitution however has not identified what qualifies under the term "compelling reasons." The ordinary meaning according to ***Thesaurus English Dictionary*** of the word "compelling" is forceful, convincing, persuasive, undeniable and gripping. From this plain meaning it is apparent that the court would consider any fact or circumstances brought to its attention by the prosecution which would convince the court that the release of the accused would not augur well for the administration of justice or for the trial at hand. The court would therefore in my view consider the circumstances of each case using commonly known criteria, primary of which is whether or not the accused will attend trial.

28. It is true that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is however not necessarily a reason for denial of bail. That ground only becomes a factor if it may be an incentive to the accused to abscond appearing for trial. Therefore, the real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and set the conditions rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of her release. In **S vs. Nyaruviro & Another (HB 262-17, HCB 122-17, XREF CRB 1454A-B-17) [2017] ZWBHC 262 (31 August 2017)**, the Court held that:

> **"The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established where there is a likelihood that the accused, if he or she were released on bail, will (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or (ii) not stand his or her trial or appear to receive sentence; or (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system… the ties of**

the accused to the place of trial; the existence and location of assets held by the accused; the accused's means of travel and his or her possession of or access to travel documents; the nature and gravity of the offence or the nature and gravity of the likely penalty therefore; the strength of the case for the prosecution and the corresponding incentive of the accused to flee; the efficacy of the amount or nature of the bail and enforceability of any bail conditions; any other factor which in the opinion of the court should be taken into account…In considering any question…the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely (i) the period for which the accused has already been in custody since his or her arrest; (ii) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail; (iii) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay; (iv) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused; (v) the state of health of the accused; (vi) any other factor which in the opinion of the court should be taken into account… In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

> **"The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."**
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> **In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* vs. *The State* HH 63/2008… The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case."**

29. Gravity of the offence as a consideration was appreciated however by **Mbogholi Msagha, J** in **Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic** (unreported) at page 3, wherein he held as follows:

> **"However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences, there may be no such incentive."**

30. The Nigerian Supreme Court **(Justice Ibrahim Tanko Muhammad J.S.C.)** set out some essential criteria on the issue of whether to grant bail in **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** as follows:

> **"…When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-**
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> **(i) The nature of the charges;**
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> **(ii) The strength of the evidence which supports the charge;**
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> **(iii) The gravity of the punishment in the event of conviction;**
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> **(iv) The previous criminal record of the accused if any;**
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> **(v) The probability that the accused may not surrender himself for trial;**
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> **(vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;**
>
> **(vii) The likelihood of further charges being brought against the accused;**
>
> **(viii) The probability of guilty;**
>
> **(ix) Detention for the protection of the accused;**
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> **(x) The necessity to procure medical or social report pending final disposal of the case.**

31. However, in **Republic vs. Danson Mgunya & Another [2010] eKLR,** the Court while appreciating the need in this Country to have a policy on bail/bond was of the view that the above criteria reflects the true legal position but opined that:

> **"…criteria (ii) above (the strength of the evidence which supports the charge) ought not apply in Kenya except where**

perhaps the application for bail is being made or renewed after the court has placed the accused on his defence. This is inconsistent with the principle that an accused is presumed innocent. Such criteria should be applied with great caution and only in exceptional circumstances like where there is a statement that show that the accused was caught-red handed or where there is a lawfully admitted confession. Criteria (viii) above (the probability of guilt) appears to be in reference to where an accused has been placed on his defence."

32. That case was decided before the policy on bail-bond was formulated. It is now clear that in interpreting the right to bail, section 123A of the ***Criminal Procedure Code*** gives the parameters for the grant of the right to bail as follows:

(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 offence;

(b) the character, antecedents, associations and community ties of the accused person;

(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.

33. In **Kelly Kases Bunjika vs. Republic [2017] eKLR**, **Muriithi, J** was of the view that:

"The second limb of paragraph (b) of sub-section (1) of section 123A must be read separately and disjunctively from the first part so that the Court considers whether the accused 'if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody'…Of course, the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault, and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail; it is merely the exercise of the Court's mandate to grant bail as constitutionally empowered. It only means that the Court finds a compelling reason within the meaning of the Constitution to refuse bail in the particular case."

34. The considerations in determining whether or not to grant bail are set out in Kenya Judiciary's ***Bail and Bond Policy Guidelines, March 2015*** at p. 25 which sets out judicial policy on bail as follows:

The following procedures should apply to the bail hearing:

(a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused person bail, including the following:

a. That the accused person is likely to fail to attend court proceedings; or

b. That the accused person is likely to commit, or abet the commission of, a serious offence; or

c. That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or

d. That the accused person is likely to endanger the safety of victims, individuals or the public; or

e. That the accused person is likely to interfere with witnesses or evidence; or

f. That the accused person is likely to endanger national security; or

g. That it is in the public interest to detain the accused person in custody.

35. 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 person 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."

36. 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. This 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 believe that he is likely to abscond if released on bail."

37. In **Foundation for Human Rights Initiatives vs. Attorney General [2008] 1 EA 120** it was held by the Constitutional Court of Uganda that:

"The context of article 23(6)(a) confers discretion upon the court whether to grant bail or not to grant bail. Bail is not automatic. Clearly the court has discretion to grant bail and impose reasonable conditions without contravening the Constitution. While the seriousness of the offence and the possible penalty which would be meted out are considerations to be taken into account in deciding whether or not to grant bail, applicants must be presumed innocent until proved guilty or until that person has pleaded guilty. The court has to be satisfied that the applicant should not be deprived of his/her freedom unreasonably and bail should not be refused merely as a punishment as this would conflict with the presumption of innocence. The court must consider and give the full benefit of his/her constitutional rights and freedoms by exercising its discretion judicially…]. It is not doubted or disputed that bail is an important judicial instrument to ensure individual liberty. However, the court has to address its mind to the objective of bail. However, the court has to address its mind to the objective of bail and it is equally an important judicial instrument to ensure the accused person's appearance to answer the charge or charges against him or her. The objective and effect of bail are well settled and the main reason for granting bail to an accused person is to ensure that he appears to stand trial without the necessity of being detained in custody in the meantime. Under article 28(3) of the Constitution, an accused person charged with a criminal offence is presumed innocent until proved guilty or pleads guilty. If an accused person is remanded in custody but subsequently acquitted may have suffered gross injustice. Be that as it may, bail is not automatic and its effect is merely to release the accused from physical custody while he remains under the jurisdiction of the law and is bound to appear at the appointed place and time to answer the charge or charges against him."

38. As regards the same issue, **Ochieng, J** in **Republic vs. Ahmed Mohammed Omar & 6 Others [2010] eKLR** expressed himself as hereunder:

"Meanwhile, before the High Court of Kenya, at Nakuru, my Learned Brother Emukule J., has also had occasion to grapple with an application for bail pending trial. He did so in Republic vs Dorine Aoko Mbogo & Another, Criminal Case No. 36 of 2010; His Lordship expressed the view that;

'Murder, (like) treason, robbery with violence or attempted robbery with violence are offences which are not only punishable by death, but are by reason of their gravity, (taking away another person's life, disloyalty to the state of one's nationality, or grievous assault or injury to another person or his property), are offences which are by their reprehensiveness, not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kith and kin of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail.'

Notwithstanding those remarks, the learned judge went ahead to grant bail in that case. I therefore believe that the judge did not, and could not have meant that once an accused person is charged with an offence punishable by death, that is reason enough to deny him bond or bail pending trial."

39. If the allegation of interference emanates from the extended family rather than the accused, nothing stops action being taken against the said persons. It would however be unfair to deny the accused bail simply on allegations that his relatives have threatened the witnesses since the incarceration of the accused in such circumstances does not necessarily amount to cessation of such threats. In addition, the fact that an accused person is facing a charge of murder does not bar further charges being preferred against him his being in custody notwithstanding since obstructing a cause of justice itself is a criminal offence. It is the duty of the State to ensure that all persons enjoy their fundamental rights and this applies to both the victims and the accused persons. As for the allegation of interference by the accused himself, I associate myself with the opinion expressed in **Rep vs. Dwight Sagaray & Others High Court Criminal Case No. 61 of 2012** that:

"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must also show the Court for example the existence of a threat or threats to witness; direct or indirect incriminating communication between the accused and witnesses; close familial

relationship between the accused and the witnesses among others…, at least some facts must be placed before the court otherwise it is asking the court to speculate."

40. Therefore, the Court in making a determination must consider whether such safeguards, if invoked, are unlikely to have any impact of the safety of the witnesses including barring the accused from stepping in the jurisdiction where the witnesses are as was held in **Republic vs. Zacharia Okoth Obado & 2 Others [2018] eKLR**. In that case the Learned Trial Judge found that:

"On the whole question of the likelihood of interference with the case witnesses and intimidation this cannot be taken lightly. The Accused persons have been supplied with the witness statements and have the names and contacts of those who have adversely mentioned them in connection with the case. The manner in which the deceased met her death is in the public domain and the evidence has also been provided. I find that given the circumstances of this case the likelihood of the adversely mentioned Accused persons contacting the witnesses can inflict genuine fear and anxiety to them. I think that the mere release of the Accused is sufficient to inflict anxiety and fear leading to intimidation of potential witnesses."

41. *Notwithstanding that finding the Learned Trial Judge proceeded to grant the 1st Accused bail on the following terms:*

1. The 1st Accused may be released upon deposit into court of cash bail in the sum of Kshs. 5 million.

2. In addition the 1st Accused will provide two sureties of Kshs. 5 million each.

3. The 1st Accused must deposit all his travel documents including his Kenyan, East African and Diplomatic passports which he holds.

4. The court will be at liberty to cancel this bail and bond and to remand the 1st Accused in custody if any of the following conditions, which I hereby set as part of the terms upon which he is released, are breached:

i. He shall not cause an adjournment in this case.

ii. He shall report once a month to the Deputy Registrar of this court.

iii. He shall not go anywhere within 20 kilometers of Homabay County boundary on all sides of that County.

iv. 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 supplied by the State to the defence.

v. He shall not intimidate the parents, siblings or other close relations of the deceased.

vi. He shall refrain from mentioning or discussing the deceased and or this case in gatherings or political meetings.

42. What comes out from the said decision is that there are in place constitutional and legislative mechanisms in place to protect witnesses who are shown to be under real threat if an accused person is released.

43. While my view is that once an accused is arraigned before the trial court, whether or not an application for release on bail is made, it is the duty of the trial court to deal with the issue, where compelling reasons are given nothing bars the court from denying the release of the accused on bail for a definite period. In other words, the trial court may find from the material placed before it that at that stage it would not be just to release the accused on bail and that the application may be renewed at a latter stage when the circumstances have changed, for example where vulnerable witnesses have testified. Either way, the court is obliged to make a ruling on the application. In other words, the Court ought to make a specific finding as to whether or not it is satisfied that compelling reasons exist that militate against the admission of the accused to bail at any particular stage of the proceedings.

44. In this case, it is clear that this is exactly what the learned trial Judge, as she was clearly entitled to, did. The problem is that the subsequent intervening events such as the unavailability of the learned trial Judge and the COVID19 pandemic have made it impossible for the said decision to be complied with. In my view where the Court declines to admit the accused on bond pending the testimony of some witnesses or the occurrence of certain events the said witnesses' testimonies ought to be taken as soon as possible and the event in question ought to be accelerated as fast as possible in order not to unduly limit the accused person's constitutional rights. It is clear that at the time the learned trial Judge delivered her ruling, the supervening events were not in her contemplation. As things stand now, there is no telling how soon the hearing will resume so that the evidence of the two witnesses mentioned in the said ruling can be taken. Apart from that one of the witnesses in question, **Esther Wanjiru Njau**, the 1st accused's wife has since moved from the 1st accused's house and sought residence in her parents' homestead in Kipipiri. While she alleges that the place is not out of reach by the Applicant, in my view proper measures may be taken to further secure her security if necessary.

45. In the proceedings before me, nothing has been said about the wife of the deceased. Despite having given the victims an opportunity to respond to the application, they did not take advantage of the same in order to place on record their sentiments but were satisfied with the filing of submissions. In the said submissions, the victims contended that by revisiting the order made by **Mutende, J**, this Court would be sitting on appeal. With due respect that position is misconceived. An order made on an application for bail may be reviewed at any stage of the proceedings as long as circumstances are shown to have changed since the last order was made. In this case, the Learned Trail Judge did not even purport to make a final order. She instead deferred the determination of the issue pending the testimony by two witnesses. As I have said, that order was premised on the fact that the said testimonies could be taken expeditiously so as to pave way for the determination of the

issue of bail. That however has not occurred due to reasons beyond the control of the Applicant. In my view a right conferred by the Constitution cannot be limited simply on the ground that there are other people whose rights are similarly limited or restricted as the victims herein believe.

46. In the premises, I find that in the absence of any factual averments from the victims that militate against the release of the Applicant on bail, and in light of the period that the Applicant has spent in custody before his application for release on bail is finally determined due to reasons not of his own making and in light of the changed circumstances, it is no longer tenable to continue holding the Applicant in custody.

47. Accordingly, I hereby admit the Applicant to bond of Kshs 500,000.00 with 2 sureties of similar amounts to be approved by the Deputy Registrar of Kitui High Court. I further direct the Applicant not to visit Kipipiri or to be within 5 kilometre radius of Kauwi Subcounty Hospital where the said **Esther Wanjiru Njau** is currently stationed, unless otherwise ordered by the Court. The Applicant is further directed not to interfere with the prosecution witnesses or the manner in which the prosecution's case is being conducted either directly or indirectly. He is directed to appear in court at least once every month or as directed by the Court. In the event of violation of any of these terms, his bond shall be liable to cancellation and he will attend to the hearing of the rest of his case while in custody.

48. The Applicant or any other party is at liberty to make an appropriate application if the circumstances change.

49. This Ruling is delivered online through Skype video link due to the circumstances occasioned by the prevailing restrictions resulting from Corona Virus Disease 19 (COVID 19) pandemic.

Read, signed and delivered in open Court at Machakos this 9th day of July, 2020.

G.V. ODUNGA

JUDGE

Delivered in the presence of:

Mr Langalanga for Mr Kimuli for the victim's family

Mr Mutua for Mr Mwalimu for the 1st Accused/Applicant

Mr Ngetich for Mr Okemwa for the State

CA Geoffrey