



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 16 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

DOYO GALGALO.....1ST ACCUSED

GALMO GUYO GALGALLO alias MAKAYANGU.....2ND ACCUSED

BOKAYO DIDA BORU alias WARABO.....3RD ACCUSED

SOMO HUKA KANCHORO.....4TH ACCUSED

RULING

1. On 12th February, 2019, the trial court (Gikonyo J.) delivered a ruling on bail for the accused wherein it ordered that the accused remain in custody for the time being. In the meantime, the court ordered that the vulnerable witnesses whom the prosecution had claimed were likely to be intimidated be paraded and testify as soon as practically.
2. On 6th March, 2019, Counsel for the accused renewed the application for bail. The same was opposed vide the affidavit of **No. 236140 IP Ernest Mua** sworn on 6th March, 2019. He stated that, initially bail had been denied on the ground that all the protected witnesses should testify first before the issue of bail could be revisited.
3. He further stated that all the protected witnesses have not testified as an order dated 5th March, 2019 granted protection to one last vulnerable witness. The matter is coming up for hearing on 1st April, 2019, a date that is reasonably not far.
4. In his further affidavit sworn on 11th March, 2019, the 1st accused stated, on behalf of the 2nd and 4th accused, that they have not in any way interfered with the investigations and will not do so if admitted to bail. That there has not been any report made by the protected witnesses of being threatened or intimidated. That investigations have already been substantially concluded and that therefore there was no impediment threat.
5. This matter was referred to me by the trial court on 6th March, 2019 for the hearing of the renewed application for bail as Gikonyo J was proceeding on leave and was to be away for some time.
6. When the matter was canvassed before me by way of oral submissions, Mr. Angesa, Learned Counsel for the 1st, 2nd and 4th accused submitted that the discovery of a new vulnerable witness should not be a ground to deny an accused liberty. No report has been made to show that the witness who has been discovered has been intimidated, as mere suspicion is not a ground to deny the accused liberty. Counsel relied on the cases of **Republic v Danson Mgunya & another [2010] eKLR** and **Republic v Muneer Harron Ismail & 4 others [2010] eKLR** in support of his submissions.
7. Mr. Okeyo, Learned Counsel for the state, teaming up with Ms. Uhunga, submitted that there was an order giving protection to one more witness. That the said witness should be heard first before the application for bond can be renewed. He further submitted that the accused were denied bail because there were vulnerable witnesses and that if the bond is granted, it will defeat the earlier orders.
8. The issue before me therefore is whether or not to grant the renewed bail application. The right of an accused to be released on bond or bail is a constitutional right which can only be impeded where there are compelling reasons. It has to be demonstrated that there are compelling reasons before an accused can be denied bail.

9. The Constitution has not defined what is meant by *compelling reasons*. However, without attempting to make any conclusive list of what compelling reasons are; it will in my view include, interference with prosecution witnesses or investigations, personal security of an accused, the personal disposition of the accused, ie. the possibility of an accused repeating similar or other offences, the public interest whereby the court has to protect the community from an accused whose disposition may be dangerous to the community, the accused being a flight risks amongst like matters.

10. When the accused applied for bond at the time they took plea, it was denied for reason that there were vulnerable witnesses who needed to be protected from the accused. In **Republic v William Kipkorir Chirchir & Another [2018] eKLR** Mutuku J. held:-

“Likewise, intimidation, interference and threatening of witnesses are serious matters and are compelling reasons where evidence of such intimidation, interference or threats is provided to the trial court.”

11. In ruling on the accused’s application for bond, Gikonyo J held that the accused should remain in custody in the meantime but they court renew the application after all the vulnerable witnesses would have testified. The record shows that after the six vulnerable witnesses had testified, the accused renewed their application for bail. However, the prosecution stated that there was one more witness who is protected by an order of the court made on 5th March, 2019. I note that the trial court noted that the introduction of the said witness did not amount to malice or mischief on the part of the state.

12. Every witness who appears in court is very important. There is no lesser witness than the other before the eyes of the court. In **K. K. K. v. Republic [2017] eKLR**, Muriithi J. stated:-

“In considering the question of bail in this matter, the court must balance the right of the accused pursuant to presumption of innocence to be released on bail pending his trial against the public interest in prevention of crime and access to justice by the victims of crime by successful prosecution of offences, which would no doubt be adversely affected by interference with witnesses and evidence relied on by the Prosecution to prove its case. The key is in adopting a path that ensures prosecution of the offences in a manner that is least restrictive of enjoyment of the accused’s right to bail. Where an expedited hearing is possible, the same should be ordered; where the witness protection measures guarantees no interference of the complainant or other witnesses by the accused, he may be released on bail as with where the evidence may be secured; and where the witnesses are prone to interference by the accused or other persons for his benefit, the testimony of such witnesses should be taken before the accused is released on bail.”

13. The initial reason of denying the accused bail was because of the protection and vulnerability of the witnesses. Not all the witnesses have testified and only one remains. In my view, it is not far-fetched to see that, allowing the present application would be defeating the purpose of the initial order of 12th February, 2019.

14. It is not in dispute that the hearing of this matter is set for 1st April, 2019. That is slightly over a fortnight away. I am of the view therefore that the application is premature. It should have been renewed after the last vulnerable witness would have testified.

15. In this regard, the application is dismissed. The accused may renew the application at a future date.

DATED and DELIVERED at Meru this 14th day of March, 2019.

A. MABEYA

JUDGE