



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

CRIMINAL CASE NO. 57 OF 2016

LESITT, J

REPUBLIC.....PROSECUTOR

V E R S U S

FREDRICK OLE LELIMAN.....1ST ACCUSED

STEPHEN CHEBURET MOROGO.....2ND ACCUSED

SILVIA WANJIKU WANJOHL.....3RD ACCUSED

LEONARD MAINA MWANGI..... 4TH ACCUSED

PETER NGUGI KAMAU.....5TH ACCUSED

RULING ON BAIL REVIEW

1. This is the second application for bail pending trial by the accused persons. The first application was heard and the ruling delivered on the 6th July, 2016.
2. The 1st, 2nd, 3rd and 4th accused persons have each filed a notice of motion seeking to be admitted to bail/ bond pending the hearing of this matter. The Notice of Motions filed by the 1st, 2nd and 3rd accused persons seeking to be released on bond or bail and are dated 7th August, 2018 filed through Mr. Ombetta advocate. The notice of motion filed by the 4th accused through Mochere advocates is dated 30th November, 2018. Each application is supported by the affidavit of the respective Applicant.
3. The 1st, 2nd and 3rd accused set out eleven grounds upon which they rely. I have had the chance to consider the same. The 4th accused based his application on four grounds which I have had the liberty to consider.
4. Mr. Mochere learned counsel for the 4th accused person argued all four applications concurrently. Counsel urged that the accused persons had been in custody since 2016. He urged that all the protected witnesses had testified. Counsel urged that most of the evidence had been reduced into writing by the court and for that reason the accused could not interfere with the witnesses.
5. Counsel urged that all the accused were civil servants, and were being maintained on half salary hence they are not a flight risk. Counsel urged that if the accused were released on bail, they would be under the supervision of the station commanders and that their lives would not be jeopardized. Counsel further urged that the accused were not a danger to the families of the victims as they never knew them nor know them currently.
6. Counsel urged the court to consider the fact that the accused persons had been in custody for 4 years during which time 38 witnesses had been heard. Counsel however urged that in the year 2017 to 2018, the court had only heard two witnesses. Counsel urged that the amount of time that the remaining 6 witnesses yet to be heard would take was indeterminate. Counsel urged that the time was ripe for review of the bond ruling on grounds of the number of witnesses heard and also on the length of time it takes to hear the witnesses.
7. Counsel finally urged that the law presumed the applicants innocent and that the offence that they faced was bailable and that the conditions imposed by the court when granting bail would be sufficient to secure their attendance in court.
8. Mr. Mutuku learned Prosecution Counsel opposed the application. Counsel stated that the prosecution relies on the affidavit sworn by I.P Clement Mwangi dated 26th March, 2019.

9. Mr. Mutuku urged that since the accused were seeking a review of the ruling delivered on 6th July 2016 which denied them bail, what the court ought to determine in the current application is whether the circumstances prevailing in 2016 were still in existence or they had collapsed. Counsel urged that the prevailing circumstances existed to date.

10. Counsel urged that the fact that 38 witnesses had testified and only 6 were remaining, made the timing of the review application worse reason being the prosecution had already adduced overwhelming evidence against the accused persons. Counsel urged that were the prosecution to close its case at the current stage of the case, then a prima facie case would have been established as against the applicants.

11. Mr. Mutuku urged that it was not true that only 2 witnesses testified in 2017 to 2018. Counsel urged that indeed the prosecution was ready to proceed and had continuously brought witnesses to testify. Counsel further urged that the remaining witnesses may not take long if the prosecution and defence were committed and that two weeks would be sufficient to complete the trial.

12. Counsel urged that contrary to the contention by the accused that all witnesses under protection had testified hence there was no threat to witnesses, the prosecution had 6 witnesses remaining and though not under protection, they were as vulnerable as the witnesses under protection. Counsel urged that the remaining witnesses would feel safer if the accused remained in custody. Counsel urged that if the accused were released on bail at this stage, the same would cause anxiety amongst those who have testified.

13. Mr. Mutuku further urged that it may not be in the accused best interests if they are released on bail. Counsel urged that there were many demonstrations when the incident happened in 2016. Counsel urged that it would be difficult to foretell the public mood and reaction once the news of the accused release on bail hit the news. Counsel finally urged that the 5th accused who had not applied for release was still connected to the other four accused persons and the court should dismiss the application.

14. Mr. Ouma, counsel who made submissions on behalf of the victims associated himself fully with the submissions by the prosecution. He further urged that the accused would not present themselves for trial, reason being that the seriousness of the crime they were facing and likelihood of punishment to be meted out were still alive considerations. Counsel urged that on issue of time taken to finalize the case, the court should balance the right of accused and that of the victims.

15. I have considered the applications by the 1st, 2nd, 3rd and 4th accused persons to be released on bail pending their trial. I have considered the issues conversed by the defence, the prosecution and victims in this case.

16. The court has the power to hear and determine the accused persons application, which is a review of this court's ruling declining the release on bail or bond pending the conclusion of their trial, it being a second such application. It is important to state so because the considerations the court will make at this stage, as stated clearly by the learned Prosecution Counsel, are whether the circumstances prevailing in 2016, when the ruling under review was delivered were in existence in this case or had changed.

17. The defence contends that there have been changes for various reasons. The defence contends that the witnesses under protection had all testified, that all the evidence had been reduced to writing and therefore there was nothing for the accused to interfere with. The other argument raised by the defence was the fact the accused were civil servants who were under half pay and if released on bail would be under supervision of the station commanders, that they were not a danger to anyone and were not a flight risk.

18. In response Mr. Mutuku urged that the remaining witnesses were as vulnerable as the protected ones and felt safer if the accused remained in custody until they testified. Counsel urged further that given the level of demonstrations by the members of public when the incident occurred, there was no telling how the news of their release would be received.

19. The reasons for denial of bail to the accused in this case were not just based on the fact of some witnesses being under protection. I ruled that:

“74. In this case, there is glaring proof, by the very reason why this case is in existence that the likelihood of interference is not a myth, or like Mr. Ombetta wondered, a fertile imagination on the part of the prosecution. It is real...

75...Self-preservation is a natural reaction or response of any human being. That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes flight. Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may even lead to such witnesses refusing to testify due to genuine misapprehension of their safety.

76. The Applicants, or at least one of them was in the process of self-preservation when this incident occurred. The likelihood of a repeat of the same cannot be overruled. One because the stakes are now very high. Two because of the very nature of jobs and high degree of influence the Applicants can wield...

80. Finally, on the questions of the right to be presumed innocent until proved guilty, the mere fact that an accused is denied bail does not mean that he stands convicted. Such an accused is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty and not just on the necessity of having him available for trial but more importantly on the greater need to preserve the integrity of the prosecution evidence, the safety of the witnesses, victims and other interested persons whose lives may be in jeopardy including that of the accused.”

20. This court considered the need to preserve the integrity of the prosecution case, the safety of the witnesses, the accused and the victims because it was clear to the court that each of the factors mentioned were vulnerable for the reasons I advanced in that ruling. The other issue I considered was self-preservation which is a natural human reaction or response. The need to self-preserve in this case is heightened given the

fact that the case for the prosecution is drawing to an end, and the remaining witnesses are formal, thus critical.

21. These are the factors I considered and the reasons bond was denied. It is abundantly clear that the findings then subsist despite the effluxion of time, so to speak. That the accused are civil servants on half pay would not change the reason I advanced then in my ruling that due to their positions, they wield great power, even if they are under interdiction. The position is still the same now as it was then.

22. The defence urged that the court heard only two witnesses between 2017 and 2018, and that that being so, there was no telling how long it would take to hear the remaining 6 witnesses.

23. I did check the record of proceedings that matter and found as follows: The case started before me with PW3 on 14th February 2017. Between 14th February 2017 and 5th April, 2017, court heard 24 witnesses. Between 13th July 2017 and 31st July 2017, court heard 9 witnesses. Between 23rd October, 2017 and 29th November 2017 two witnesses were heard. PW37 was heard for three days on the 8th, 9th and 11th November, 2018. This year we have heard PW38 whose evidence is pending the outcome of a ruling on trial within trial.

24. For completion I also noted the number of adjournments we have had in the case. On 6th March 2017 the case could not proceed for absence of Mr. Mochere who had been summoned to the Court of Appeal. On 31st July, 2017 and on 16th October 2017 both days Mr. Ombetta had a personal problem and was abroad respectively. On 18th October, 2017 the 4th accused was unwell and was not produced for trial. On 29th November, 2017 Mr. Mutuku was not available. Between 5th and 11th December, 2017 Mr. Mochere was unwell. The dates scheduled for hearing between 15th to 23rd February 2018 and 15th November 2018 matter was taken out of the cause list due to Judges Conference. Between 11th to 16th April 2018 the case could not go on as Mrs. Kinyori was unwell.

25. In each of the days that the case was adjourned for the various reasons, the prosecution was ready with their witnesses.

26. What the above summary shows is that in 2017 the court heard 34 prosecution witnesses. It shows that in 2018 the case stalled and only two witnesses have been heard. The reason of stalling is traceable mostly at the doorsteps of the defence, due to illness at the greater time and unavailability of counsel, and in two occasions due to the court conferences.

27. Is it valid to say it is uncertain how long the case will take? The prosecution has assured us that the prosecution case can be completed in two weeks if we are all committed. That is not an awfully long time. We have come a long way and if we were all committed and patient, the matter can be concluded soon enough.

28. I have said enough. The conclusion of the matter is that nothing has changed. The situation, the factors and the concerns that led to denial of bail to the accused persons in this case still subsist now as were when the first bail application was heard. In the result, the application to grant the 1st, 2nd, 3rd and 4th accused bond is declined.

29. The result is that the Notice of Motions for all four accused are dismissed.

DATED AT NAIROBI THIS 16TH DAY OF MAY, 2019

LESIT, J.

JUDGE