Republic v Joseph Kuria Irungu alias Jowie & Jacqueline Wanjiru Maribe (Criminal Case 51 of 2018) [2019] KEHC 6062 (KLR) (Crim) (18 June 2019) (Ruling)

Republic v Joseph Kuria Irungu & another [2019] eKLR

Neutral citation: [2019] KEHC 6062 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL CASE 51 OF 2018

J WAKIAGA, J

JUNE 18, 2019

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

JOSEPH KURIA IRUNGU ALIAS JOWIE ..... 1ST ACCUSED

JACQUELINE WANJIRU MARIBE ..... 2ND ACCUSED

RULING

1. By a Ruling dated 30th day of October 2018 this court for reasons stated therein declined to grant the Applicant bond pending trial, having found that the Prosecution had established compelling reasons to enable it do so. The Applicant being aggrieved by the said Ruling, by a Notice of Motion dated 21st November 2018 under Certificate of Urgency sought orders that the court do recuse or disqualify himself from hearing the cause, which application was on 27th November 2018 withdrawn.

2. On 28th November 2018 the Applicant filed an application dated 27th November 2018 in which he sought among other orders that the Honourable court do exercise its discretion in revising its own orders denying him bond, which application was also withdrawn on 13th March 2019.

3. On 14th March 2019 the Applicant moved the court for an order that the Honourable court do exercise its discretion in revising its own orders denying him bond, on the ground that there were sufficient change of circumstances that warrant his release on bond on account that:-

    a) The Applicant's family had exhibited connection and fixed place of abode and or offered an alternative accommodation for the Applicant.

b) The Applicant is not a flight risk as his passport was in the custody of police.

c) The Applicant has no intention of interfering with witnesses who had been placed under Witnesses Protection.

d) The Applicant is not a threat to witnesses and the public as he had no access to guns and none had been recovered from him.

e) The investigations were complete.

4. The said application was supported by an affidavit sworn by Julius Irungu Mwangi, the Applicant's father who deponed that he was ready to offer the Applicant accommodation during the pendency of the trial and would make sure that he attends court whenever required.

5. It was further supported by the Applicant's own affidavit in which he confirmed that his family was willing to accommodate him at the family home in Nakuru where he was born and raised. He deponed that he was not a flight risk and his passport was still in the custody of the police and that he had no intention of interfering with witnesses.

6. The State opposed the application through a replying affidavit sworn by I.P Maxwell Otieno in which he deponed that in addition to the court finding that the Applicant had no fixed abode which the family is now willing to provide, the court further found that he lacked any deep emotional, occupational or economic ties in the country and that the mere fact that his passport was still with the police was no guarantee that he would not leave the country. It was stated that the investigations were still ongoing and would only be deemed completed at the close of the prosecution case. It was contended that there still remained a high possibility of the Applicant interfering and intimidating the key prosecution witnesses if released on bond or before they testify.

7. It was therefore deponed that the circumstances had not changed to allow the court to review its previous Ruling and therefore should not exercise its discretion in favour of the Applicant.

8. The family of the victim opposed the application through an affidavit sworn by George Kimani, the brother of the deceased in which he deponed that the family was still apprehensive that if the Applicant is released, there were high chances that he will threaten and intimidate members of the family some of whom were well known to him, as confirmed through an alleged message sent on WhatsApp to him just days before the murder in which he sought to know where the deponent was living. It was deponed that not all the prosecution witnesses were under protection.

9. It was contended that since the case had not started and none of the witnesses had testified, they might be afraid to testify should the Applicant be released on bond in a bid to ensure their safety and self preservation. It was therefore deponed that the circumstances considered by the court while denying the Applicant bond had not changed so the court should not review its decision.

Submissions

10. Mr. Ayuo for the Applicant submitted that his father had offered to accommodate him but had not annexed the title deed to his property for the sake of privacy. He contended that the Applicant was not a flight risk as he had no dual citizenship, neither did he have any business or property outside the country. It was submitted that he was a law abiding citizen whose character does not reflect the picture painted in the social and print media. It was submitted that it was in the best interest of the accused to be released on bond so as to prepare well for his trial and in support of the submissions herein the following cases were submitted:-

a) Republic v Danford Kabage Mwangi [2016] eKLR.

b) Republic v Robert Zippor Nzilu [2016] eKLR.

c) Republic V John Muchira Gatimu [2017] eKLR.

11. Ms. Mwaniki for the State submitted that no new grounds had been tendered by the Applicant to enable the court review the orders denying bail. She submitted that though some witnesses had been placed under protection, the application was premature as the said witnesses had not testified and it is the duty of the court to enable them testify without fear. It was submitted that the Accused's picture on his Instagram account holding a gun portrayed him as a person who would instill fear. It was contended that the court did not deny the Applicant bond on only one ground of fixed abode but on other grounds too. She proceeded to distinguish the authorities submitted by the Applicant as not applicable to the case herein as in one of the authorities the State had not opposed bond while in one bond had been granted and it is only terms which was reviewed while in another it was on whether pre-bail report was not mandatory.

12. On behalf of the victim's family, Mr. Omiti submitted that it was for the Applicant to establish that the circumstances prevailing at the time when he was denied bond had since changed which the Applicant had failed to do. It was submitted that the Applicant had simply repeated issues which the court had made a Ruling upon.

Analysis and Determination

13. Having read the affidavit in support and opposition, submissions and the authorities thereon, it must be stated for record purposes that the application before the court is not a fresh application for bond but an application for review of the earlier orders issued by the court herein in which the Applicant was denied bond. For an Applicant to succeed in review, he must show that there has been a material change in circumstances from the time the earlier order was made or that there was an error in law that was made during the initial hearing and or that the court did not consider some material facts.

14. The Applicant bears the burden on review to show on a balance of probability why the earlier order should be vacated and why it should be unjust not to vacate the order. He must show that the circumstances of the case are so altered that compelling reasons are disclosed for review of the earlier order. This position was clearly stated by Justice Muriithi in his well argued decision in Republic v Diana Suleiman Said & Another [2014] eKLR :-

> " 11. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof, the court as a court of justice must reserve for itself a power to revisit the issue in the interest of justice not only for the accused but also for the complainant and the society at large. In the same way that an unsuccessful Applicant for bail may repeat his application if his circumstances changed in such a manner as to favour his release on bail . . .
>
> 12. I find nothing in the provisions of Article 49(1)(h) of the Constitution or Section 123 of the Criminal Procedure Code to suggest that the court once grant or refuse bail becomes functus officio or that the issue of bail becomes res judicata upon decision to grant or refuse bail. Article 49(h) entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally

entitled to bail until and unless compelling reasons are demonstrated. If compelling reasons are arise or are demonstrated after the arrested person has been released or granted bail but not yet released, as in this case, the court may properly review the matter on the basis of the compelling reasons shown. Section 123 of the CPC [as amended by the Constitution of Kenya 2010 to permit bail for all criminal cases] makes bail available at all times - where any arrested person is presented at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail."

15. This position has been captured by the Judiciary in the Bail/Bond Policy Guidelines 4.2 6 (h) in which the court is required to consider the following additional features in deciding whether to grant an accused person bail:-

a. The period the accused person has already spent in custody since arrest.

b. The probable period of detention until the conclusion of the trial if the accused is not released on bail.

c. The reason or reasons for any delay in the conclusion of the trial and any role of the accused with regard to such delay.

d. Change of circumstances during the trial.

e. The maximum custodial sentence in case the accused person is convicted. (Emphasis added)

16. It must be clear in mind that the purpose for bond still remains as stipulated in Section 123 of the Criminal Procedure Code as read with Article 49 of the Constitution:- Section 123 of the Criminal Procedure Code provides as follows:-

> " When a person is accused of any offence under the Penal code or any statute and the Person has been arrested or detained without a warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided in this Code." (Emphasis added)
>
> "123A – Subject to Article 49 (1) (h) of the Constitution notwithstanding Section 123 in making a decision on bail and bond the court shall have regard to all the relevant circumstances in particular the nature and seriousness of the offence, the character, antecedent, associations and community ties of the accused person, the defendant's record in respect to the fulfillment of obligation under the previous grant of bail, the strength of the chance of his having committed the offence."

Section 124 provides:-

> " Before a person is released on bail or on his own recognizance, a bond for such sum as the court or police officer thinks sufficient shall be executed by that person, and, when he is released on bail, by one or more sufficient sureties, conditioned that the person shall attend at the time and place mentioned in the bond and shall continue so to attend until otherwise directed by the court or police officer.

17. The Supreme Court of India in the case of Masroor v State Of Uttah Pradesh & Another [2009] 14 SCC 286 states as follows:-

> " 13. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the Courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned."

18. In the case of Ram Govind Upadhyay v Sudarshan Singh Air2002 SC 1475 the Supreme Court of India stated as follows:-

> " Grant of bail though being a discretionary order but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for Bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the matter being dealt with by the Court and facts however do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic consideration for the grant of bail more heinous is a crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter."

19. From the approach taken by Mr. Ayuo for the Applicant, it is clear as a cloudless sky that his attempt was at making a fresh bail application with the only change of circumstances present being that the Applicant's father was willing to provide for him an alternative accommodation at Nakuru where he was born and bought up. All the other issues submitted upon was an attempt to answer the issues the court raised and ruled upon while declining to grant the earlier order, viewed in light of the fact that it is not an appeal against the earlier decision, I do not think that this is an attractive approach as it is a kin to telling the court that you were wrong or unjust at the initial Ruling, which is not the domain of the court at review but that of the Appellate Court.

20. The immediate linguistic context of the Ruling in issue as submitted by Ms. Mwaniki clearly shows that in declining to grant the Applicant bond, the court based its Ruling on accumulative grounds and not only on the issue of fixed abode and the witnesses in need for protection. Save that there may be a change of circumstances as regards the Applicant's fixed abode, there still remains the issue of those witnesses under protection, in which there is reasonable apprehension of being tampered with whose evidence the court ought to secure, as their being placed under protection shows that they are already frightened and consequently may not come before court to dispose against the accused, in which event justice may suffer.

21. I am therefore not persuaded that the Applicant has placed before me adequate materials in support of change of circumstances at this stage as the alternative means of accommodation offered by the accused has not been verified. I am in agreement with Odunga J. in Republic V Robert Zippor Nzilu[2018] eKLR, that where limitation to the right to bail exists, 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 denial of bail, that is in other words, the court is required to explore the possibility of achieving the primary objection 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. (emphasis added)

22. Since the matter is now fixed for hearing, I am of the considered view that all the prosecution witnesses under protection should testify first upon which the court should reconsider the application herein for release of the Applicant on bond. In view of the context of the affidavit sworn by the Applicant and his father, I am further of the considered view and hold that the Probation Department conduct further social inquiry thereon and present to court a further Pre-bail report for consideration by the court.

Disposition

23. In the circumstances of the matters stated herein, it is my view that the application by the 1st accused is premature at this stage and lacks merit. I therefore make the following orders therein:-

    a) The prosecution to line all the witnesses under protection for hearing between 25th and 26th of June 2019 when the cause is fixed for hearing and or soon thereafter as is practically possible.

    b) The probation officer to submit a further pre-bail report in respect of the alternative mode of accommodation offered by the Applicant.

    c) The court to review orders herein upon fulfillment of order (a) and (b) above.

    It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF JUNE, 2019.

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha/Ms. Mwaniki for the State

Mr. Ayuo for the 1st Accused

Mr. Katwa/Njoki/Kaloki for the 2nd Accused

Mr. Omiti for the family of the victim

1st Accused person - present

2nd Accused person - present

Court assistant - Karwitha