



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 5 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

1. CHILANGO KALAMA KITI

2. KITI NGOMBO TINGA

3. ZIRO LEWA NDUGO.....ACCUSED PERSONS

RULING

1. On 30th January, 2019 the law firm of A.T. Oluoch & Co. Advocates filed an application on behalf of the 1st accused. He seeks revision, review and/or the setting aside of the proceedings and subsequent orders on this court's refusal to release the said accused person on bail/bond. The application is supported by the affidavit of Chilango Kalama Kiti. The said application was not prosecuted until the 30th of April, 2019.

2. Mr. Lijoodi, Learned Counsel made an oral application for review of the decision of Judge Ongeri against his client, (the 3rd accused) and the 2nd accused person, who is represented by Mr. Gitonga.

3. The office of the Director of Public Prosecutions (DPP) filed an affidavit on 6th March, 2019 sworn on 5th March, 2019 by No. 76603 PC Diba Halake to oppose the application.

4. This court has been requested to review the orders issued by Judge Ongeri on 12th July, 2017 in which she declined to admit the accused persons to bail/bond. Against that backdrop, Mr. Lijoodi submitted that the application for the review of the said ruling is hinged on the provisions of Articles 49(1)(h) and 50(2) of the Constitution of Kenya and Sections 124, 125 and 126 of the Criminal Procedure Code.

5. With regard to the 1st accused, it was submitted that he is the sole breadwinner of his family, which was suffering due to his incarceration. Counsel further indicated that the 1st accused has a fixed abode and he would abide by all the orders given.

6. Mr. Lijoodi further submitted that despite the 1st accused being presumed innocent until proved guilty, he had remained in remand for 2 years. He contended that the court failed to consider that the pre-bail assessment report was favourable to the 1st accused but one witness complained that he had been threatened. Counsel stated that no Occurrence Book (OB) number was given of the report made to the police by the said witness.

7. He stated that if indeed a report was made at Banda Vadasulama Administration Police (AP) Camp, the Officer who recorded the report made by the said witness did not file an affidavit in court. It was argued that the witness who had allegedly been threatened had already testified and that such a serious allegation should not have been taken lightly as the police did. It was stated that the affidavit filed to oppose the release of the accused persons on bail/bond did not disclose the identities of the other witnesses who had testified.

8. On the oral application to review Judge Ongeri's ruling, Mr. Lijoodi submitted that the 3rd accused person has blood pressure and evidence was adduced to that effect.

9. He submitted that the release of the 2nd and 3rd accused persons on bail/bond would not hinder the smooth flow of the case. Counsel further stated that only 2 civilian witness were yet to be called.

10. Ms Marindah, Prosecution Counsel, opposed the application for review of the ruling by Judge Ongeri. She stated that 7 witnesses had

already testified and in her view, there were high chances of the accused persons being convicted. She urged this court to take into account the strength of the prosecution's case.

11. The Prosecution Counsel submitted that 4 witnesses who live close to the accused persons were yet to testify. She submitted that one Pascal Khamisi was yet to adduce evidence and that vide OB No. 30/23/11/2016, he made a report to Kijipwa Police Station about a threat to his life.

12. It was also submitted that before his death, the deceased had been threatened by the 1st accused. Ms Marindah pointed out that the 1st accused wielded influence in the community he used to live in before his arrest, even over the chief of that area. It was therefore argued that when the deceased reported to the Chief about the threats to his life, he took no action. She stated that those were some of the considerations which were taken into account when the court declined to release the accused persons on bail/bond.

13. Mr. Lijoodi responded by stating that the report made vide OB 30/23/11/2016 was in the year 2016 but the offence herein was committed on the night of 22nd-23rd January, 2017. He submitted therefore that no compelling reasons had been given by the prosecution to persuade this court to review the orders made by Judge Ongeri. He also argued that at this stage of the trial, the court cannot rule on whether there is a likelihood of a conviction in this case or not.

ANALYSIS AND DETERMINATION

The issue for determination is if the ruling declining to admit the accused persons on bail/bond should be reviewed.

14. This court has considered the provisions of Article 49(1)(h) of the Constitution of Kenya as well as Section 123 of the Criminal Procedure Code. This is not a fresh application for the release of the accused persons on bail/bond. The 1st application was rejected by Judge Ongeri who found that compelling reasons existed as per the affidavit sworn by Sgt. Kadzomba on 7th March, 2017.

15. Going by the submissions made before this court, since then, one of the witnesses who had been threatened has testified. Ms Marindah spoke of 4 other witnesses who are yet to testify. PC Diba Halake in his affidavit sworn on 5th March, 2019 deposed that PW2 had been threatened by being told that once the accused persons are released on bail/bond, they would kill him. The said matter was reported at Banda Vadasulama Administration Camp.

16. The decision by Judge Ongeri was to the effect that the accused persons would not be released on bond until the circumstances changed. In my assessment of the circumstances prevailing as at the time of writing this ruling, nothing much has changed save for the fact that PW2, Mlanda Ziro, has testified. There are other witnesses who are yet to be called by the prosecution to testify. Even after they have testified, their safety cannot be assured if the accused persons are admitted to bail/bond.

17. Section 123A of the Criminal Procedure Code provides as follows on the issue of bail/bond pending trial:-

“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, antecedent, associations and community ties of the accused person;

(c) The defendants record in respect to the fulfillment of obligations under previous grants of bail; and

(d) The strength of the evidence of his having committed the offence.”

18. Article 49(1)(h) of the Constitution provides that an accused person has the right to be released on bail/bond, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

19. In this case, the pre-bail assessment reports were favorable to the accused persons being admitted to bail/bond. The averments in the affidavits sworn by No. 37859 Sergeant Winston Kadzumba on 7th March, 2017 and by No. 76603 PC Diba Halake on 5th March, 2019 however paint a different picture about the character, antecedents, associations and community ties of the accused persons.

20. It is apparent that if the accused persons are admitted to bail/bond, the safety of witnesses who are lined up to give evidence against them cannot be guaranteed. PC Diba Halake in paragraph 5 of his affidavit deposed that PW2 was threatened after testifying in court. The depositions made by the two Investigating Officers cannot be wished away or swept under the carpet. Human life is sacred and precious and in view of the facts given by the prosecution, this court will not expose the witnesses to danger following the death threats made to some of them.

21. In writing this ruling, I have considered the authorities in the case of **Dr. Christopher Ndurathi Murungaru and KACC and Another [2006] eKLR** and **Rodgers Nzioka and Others vs Republic [2018] eKLR**, which were relied on by Mr. Lijoodi. The said authorities shed light on the considerations that courts have to take into account in applications for the admission of accused persons to bail/bond.

22. This court is however not persuaded by the said authorities as each case must be determined in accordance with its own peculiar circumstances. One size does not fit all. It is therefore my finding that the accused persons have failed to persuade this court that they are

entitled to a review of Judge Ongeri's ruling.

23. I hold that compelling reasons do exist to decline granting orders admitting the accused persons to bail/bond pending trial. The application dated 17th January, 2019 made by the 1st accused person is hereby dismissed.

24. The oral applications made on behalf of the 2nd and 3rd accused persons are also dismissed. The 2nd accused shall be escorted to Coast Province General Hospital (CPGH) for medical treatment of high blood pressure, as he is said to be suffering from the said disease.

25. Owing to the circumstances of this case, the accused persons shall remain in prison remand until this case is heard and determined.

DELIVERED, DATED and SIGNED at MOMBASA on this 3rd day of July, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Masila holding brief for Ms Marindah, Prosecution Counsel for the DPP

Mr. Odeng holding brief for Mrs Kipsang for the 1st accused

Mr. Gitonga for the 2nd accused

Mr. Lijoodi for the 3rd accused

Accused persons present

Mr. Oliver Musundi - Court Assistant