



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL APPEAL NO. 46 OF 2017**

**ADEN ABDI SIMBA**

**ABDULKARIM MUSA ALI**

**JULIE MUNYASI MWAMUYE.....ACCUSED PERSONS**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. On 11<sup>th</sup> June, 2019 the 1<sup>st</sup> accused, Aden Abdi Simba, filed an application seeking to be admitted to bond/bail unconditionally or on such terms and conditions as this Honourable court may deem fit to grant. In arguing the application, Mr. Wamotsa Advocate relied on the supporting affidavit sworn on 10th June, 2019 and a further affidavit sworn on 4th July, 2019. He also placed reliance on a pre-bail report filed on 1st August, 2019.
2. The Office of the Director of Public Prosecutions (ODPP) on 23<sup>rd</sup> July, 2019 filed an affidavit to oppose bond being granted to the 1<sup>st</sup> accused. The said affidavit was sworn by No. 92425 PC Harun Okello of the County Criminal Investigation Office, Mombasa.
3. The Counsel for the 1st accused submitted that the pre-bail report dispelled the depositions made in the affidavit in opposition of the application. It was submitted that the 1<sup>st</sup> accused has strong family ties and has received support from his family throughout his stay in custody. He further stated that the 1<sup>st</sup> accused has a heart problem that leads to swelling of his feet. He is said to have hypertension and ulcers. Mr. Wamotsa further stated that Coast Province General Hospital (CPGH) had availed his outpatient number.
4. It was submitted that when in prison, the 1st accused had learnt painting and para-legal work which he can put into good use if released on bond/bail. In making reference to the pre-bail report, it was submitted that the prison department when interviewed reported that he was of good conduct.
5. Whilst referring to an averment contained in the affidavit of PC Harun Okello to the effect that the 1<sup>st</sup> accused was the mastermind in the commission of the offence he has been charged with, his Counsel responded by stating that was a matter of evidence.
6. Mr. Wamotsa submitted that the fact that the 1<sup>st</sup> accused person's co-accused had jumped bail does not mean that the 1st accused is a flight risk. It was suggested that he could be given a condition for reporting to a Police Station.
7. Ms Mbaeh, Prosecution Counsel opposed the release of the 1<sup>st</sup> accused on bond pending trial. She relied on the affidavit of No. 92425 PC Harun Okello. It was submitted that the 1<sup>st</sup> accused committed the present offence when he was in prison custody and there was nothing that prevents him from committing other offences if he was to be released on bond.
8. It was further submitted that the pre-bail report did not state who the 1st accused person would be residing with if he was released on bond and it would be difficult for the Investigating Officer to trace him if he was to jump bail.
9. On the issue of the 1<sup>st</sup> accused being unwell, it was submitted that Shimo-La-Tewa Prison has facilities with nurses and clinicians who can take care of the health of the 1<sup>st</sup> accused.
10. Mr. Wamotsa in response to the foregoing stated that the pre-bail report states that the 1st accused person will live with his brother-in-

law, one Suleiman, if he was to be released on bond pending trial.

## ANALYSIS AND DETERMINATION

11. The affidavit of No. 92425 PC Harun Okello sworn on 22<sup>nd</sup> June, 2019 portrays the 1<sup>st</sup> accused as a person who should not be released on bond because –

- (i) At the time the offence was committed, he and his co-accused persons were serving sentence at Malindi GK Prison but investigations revealed that he was the mastermind of the murder he was charged with;
- (ii) He is likely to commit more serious offences if released on bond as he will be free to roam and the general public will not be safe with him;
- (iii) The Prosecution is apprehensive that he is likely to abscond court as the 2<sup>nd</sup> accused had, which would impede speedy trial of this case;
- (iv) His abode and social or community ties were yet to be established, as such, his release could prejudice the prosecution's case if he failed to turn up in court; and
- (v) The interest of the public should be balanced against the 1<sup>st</sup> accused person's right to liberty.

12. This court notes that the pre-bail report filed on 1<sup>st</sup> August, 2019 is favourable to the 1<sup>st</sup> accused. A favourable pre-bail report does however not mean that the 1<sup>st</sup> accused automatically qualifies to be released on bond pending trial. This court has to take into account the contents of the pre-bail report as a whole and also consider the depositions filed on behalf of the DPP as well as the submissions made on behalf of the 1<sup>st</sup> accused. The pre-bail report presupposes that the 1<sup>st</sup> accused if released on bond pending trial, will live in Mombasa with his brother-in-law, one Suleiman. Ms Nyong'a, the Probation Officer, in the pre-bail report concluded that the 1<sup>st</sup> accused is not a flight risk.

13. Article 49(1)(h) of the Constitution of Kenya provides for the release of accused persons on bond pending trial unless compelling reasons exist for denying them bond/bail. Section 123 of the Criminal Procedure Code also makes provisions for the release of accused persons on bail/bond in certain instances. Subsection 2 thereof states that the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

14. Section 123A of the said Act gives exceptions to the right to bail. It states 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 of the offence;***

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

***(c) The defendant's record in respect of the fulfillment of obligations under previous grants of bail; and***

***(d) Strength of the evidence of his having committed the offence.”*** (emphasis added).

15. Section 123A(2) provides as follows:-

***“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 certain conditions) it is likely that he would fail to surrender to custody;***

***(b) Should be kept in custody for his own protection.”*** (emphasis added).

16. The issue raised by the prosecution that the 1<sup>st</sup> accused person should be denied bail/bond because he committed the present offence when in prison custody cannot hold he is presumed innocent until proved guilty. The hearing of this case has not begun and it is therefore difficult for this court to have knowledge of the type of evidence that is lined up by the prosecution against the 1<sup>st</sup> accused. Previously, he could not have been released on bail/bond pending trial as he was serving sentence for 2 counts of robbery with violence. He had been sentenced to death but the said sentence was substituted with 15 years imprisonment during resentencing.

17. A letter dated 3<sup>rd</sup> July, 2019 from Shimo-la-Tewa Maximum Security Prison is to the effect that the 1<sup>st</sup> accused has served the sentence of 15 years imprisonment. Mr. Wamotsa was of the view that the 1<sup>st</sup> accused is a good candidate for being released on bail/bond pending trial. The prosecution thought not and their reasons are captured on the body of this ruling.

18. I have carefully considered the arguments put for and against the 1<sup>st</sup> accused as well as the pre-bail report. Inasmuch as the said report is

favourable to him, there is one reason that this court considers relevant and which militates against the 1<sup>st</sup> accused being granted bail/bond pending trial. The first one is that the pre-bail report does not disclose the 1<sup>st</sup> accused person's place of residence. The immediate family of the 1<sup>st</sup> accused is fragmented as he separated with his wife after he exhausted all avenues of appeal in 2008 in the robbery with violence case. The pre-bail report indicates that he released her to get on with her life. It cannot therefore be said that if he is released on bail/bond he will go to live with his wife in a particular place in Kenya.

19. The Probation Officer in the pre-bail report was not sure of where the 1<sup>st</sup> accused was going to live if he was released on bail/bond pending trial. She stated thus in the pre-bail report -

***“He has a brother in law known as Suleiman Abdalla who lives in Mombasa and he had been visiting the accused person constantly. It is expected that the accused person will reside in Mombasa County or Sargoi-Kipande area during the trial period.”***  
(emphasis added).

20. The above statement in its literal interpretation means that the Probation Officer was making assumptions that the 1<sup>st</sup> accused person would go to live with his brother-in-law at a place known as Sargoi-Kipande in Mombasa.

21. The Land reference No. of the property where the said Suleiman Abdalla lives is not given as well as the name of the sub-county or constituency. The name of the Chief of the area is not given. The Probation Officer gave the telephone number of the said Suleiman Abdalla. What would happen if this court was to release the 1<sup>st</sup> accused person on bail/bond in the expectation that he will go to reside with Suleiman Abdalla in a place whose geographical location has not been properly captured in the pre-bail report? In case Suleiman Abdalla was to change his cell phone number and relocate to another place with the 1<sup>st</sup> accused, the court would be left with no information about his whereabouts.

22. The contents of the pre-bail report indicate that this court is being asked to release the 1<sup>st</sup> accused to be “*at large*” as he has no fixed abode. One of the conditions for releasing an accused person on bail/bond pending trial is that the court has to be assured that such a person will attend court for the hearing of his case.

23. In this case, the court is not satisfied that the attendance of the 1<sup>st</sup> accused will be secured if he is released on bail/bond pending trial. If this court was to release him and he absconds, the Investigating Officer would not know where to start looking for him in this vast Republic of Kenya. He would be looking for a needle in a haystack, so to say.

24. The said Suleiman Abdalla did not commit himself by way of affidavit that he was going to accommodate the 1<sup>st</sup> accused throughout the trial. I hold that the fact that the 1<sup>st</sup> accused person has no fixed abode or a person who has come forth to offer him accommodation if released on bail/bond works against him. This court holds that a compelling reason exists not to admit the 1<sup>st</sup> accused person to bail/bond pending trial.

25. On the issue of him suffering from a heart condition, being hypertensive and having ulcers, this court is of the view that nothing stops the 1<sup>st</sup> accused from receiving treatment from CPGH. He has been in prison serving sentence for 15 years, which means he has been receiving treatment. It is therefore my finding that the condition the 1<sup>st</sup> accused is suffering from can be treated at CPGH.

26. The application dated 10th June, 2019 is hereby dismissed. The 1<sup>st</sup> accused person shall remain in Shimo-la-Tewa Prison remand pending the hearing and determination of this case. He is at liberty to appeal within 14 days of this ruling.

**DELIVERED, DATED and SIGNED at MOMBASA on this 4th day of October, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ist accused person

Mr. Muthomi for the DPP

Mr. Oliver Musundi - Court Assistant