



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 113 OF 2019

BENSON MWANGI MAINA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant is the 3rd accused person in **Milimani Cr. Case No. 353 of 2019**. He is jointly charged with other two persons with terrorism related offences under the **Prevention of Terrorism Act (POTA)**. The main charges are with respect to conspiracy to commit a terrorist act inside Kenya contrary to **Section 23(2) of POTA**. It is alleged that on or before 15th January, 2019 in the Republic of Kenya being persons inside Kenya conspired with others not before court who were outside Kenya to carry out a terrorist act within the Republic of Kenya.
2. He faces two other counts of aiding and abetting terrorist acts contrary to **Section 30E of POTA** in that between February and March 2018, he procured 3rd party insurance cover in his name and that of his father for motor vehicle Reg. No. KCN 340E and KCF 872R respectively which motor vehicles were recovered from the residence of Ali Salim Gichunge (slain attacker) and was used to commit terrorist acts at Dusit Hotel Complex on 15th January, 2019.
3. By a Notice of Motion dated 9th April, 2019 brought under **Article 49 of the Constitution, Section 72 of the Interpretation and General Provisions Act and all other enabling provisions of the law**, the Applicant has moved the court to invoke its discretion and revise the ruling of Hon. K. Cheruiyot (Mr.), Principal Magistrate delivered on 15th March, 2019 in which the learned magistrate declined to grant bond to the Applicant and thereby admit the Applicant to bail/bond. The application is supported by the affidavit of the Applicant sworn on even date. The gist of the application is that there were no compelling reasons advanced by the learned magistrate in denying him bail.
4. Learned counsel, Mr. Chacha who argued the application on behalf of the Applicant submitted that the learned magistrate misdirected himself in finding that the Applicant was a flight risk by virtue that he was facing serious offences thus denied him bail. He referred the court to a ruling of learned Hon. Kimaru J. delivered on 12th April, 2019 in **Mukta Ibrahim Ali and another v Republic [2019] eKLR, - High Court Misc. Cr. Application No. 62 and 63 of 2019**. The said ruling arose from a similar application as the instant one in which the Applicants therein were the 1st and 2nd accused persons respectively in Cr. Case no. 353 of 2019. In that case, the learned judge held that there were no compelling reasons that warranted a denial of bail to both Applicants. According to Mr. Chacha, since the Applicants therein were charged with similar offences, and are jointly charged with the instant Applicant, there would be no reason for the court to apply double standards by denying the Applicant herein bail.
5. According to Mr. Chacha, the main evidence against the Applicant is because he procured insurance covers for the two motor vehicles alleged to have been used during the infamous Dusit Hotel terrorist attack. He submitted that the Applicant had accounted for how he knew the owners of the motor vehicles after which he procured the insurance covers. Further, that this was not an isolated case where he had procured insurance covers in his names for other parties as he would do so for other clients either in his name or the name of his father. For this reason, he was of the view that there was no likelihood that he would interfere with witnesses if granted bail. Mr. Chacha added that the Applicant voluntarily cooperated with the investigators when he was called upon to record his statement. Additionally, he requested the court to take into account that he was an orphan and that he had learnt his mechanic trade from his father who was now deceased.
6. Learned State Counsel, Mrs. Odhiambo for the Respondent opposed the application. She submitted that the Applicant was a very close associate with Ali Salim Gichunge who was killed during the Dusit Hotel terrorist attack. She submitted that the Applicant personally procured insurance for one of the motor vehicle namely KCN 340E in his name which was used in the Dusit Hotel terrorism attack. The second motor vehicle KCF 872R had the insurance procured in the name of the Applicant's father. She submitted that the Applicant used to work with his father in the same garage. She submitted that investigations were still on-going because on 21st May, 2019, the charge sheet was amended and the Applicant currently faces 26 counts. In addition, Mrs. Odhiambo informed the court that the likelihood of interference with witnesses was real. She referred to paragraphs 12, 13, 14 and 15 of the investigating officers replying affidavits one Corporal Karanja

which discloses that some of the witnesses have declined to record statements or attend to pre-trial conference because they fear for their lives. Therefore, if the Applicant was granted bail, the result would be that none of the witnesses lined to testify against him would offer to come to court to adduce evidence.

7. In rejoinder, Mr. Chacha submitted that the prosecution had failed to demonstrate that the Applicant would interfere with witnesses, more so, by way of contacting them if he was granted bail. He underscored that no statements had been recorded from witnesses and attached to the Replied Affidavits of the investigating officers to buttress the submission that some witnesses would not testify because they feared for their lives.

8. I have considered the respective rival submissions. I have also drawn to my attention the ruling in the case of **Muktar Ibrahim Ali and Another (Supra)**. The main ground argued for denial of bail in that case was that both Applicants were a flight risk because the offences they faced were serious. This is in view of the attendant heavy penalties attached to the offences they are charged with. It was also argued that the Applicants were likely to interfere with witnesses and in any case, public interest demanded that the Applicants should not be released on bond.

9. In granting bail to the Applicants, the learned judge held that the Applicants were charged with peripheral offences related to terrorism. Further that, from the affidavit of the investigator, by the time the Applicants were charged, investigations were still ongoing to establish the actual connection between one of the terrorists who was killed in the Dusit attack and the 1st Applicant but that investigations in respect of the 2nd Applicant were complete. It was the view of the judge that nothing was placed before him to demonstrate that both Applicants are a flight risk.

10. Back to the instant case, the paramount consideration in granting bail is whether an accused person would honour attendance to the hearing when and if required to do so. This cardinal principal was enunciated by a court of concurrent jurisdiction in case of **Republic vs Danson Mugunya and another [2010] eKLR:**

“The main function of bail is to ensure the presence of the accused at the trial...Accordingly, this criteria is regarded as not only the omnibus one but also the most important. As a matter of law and fact, it is the mother of all the criteria enumerated above.”

11. The Court went on to observe as follows:

“As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the great incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from the jurisdiction of the court than one charged with a misdemeanor, like affray. The distinction between capital or non-capital offence is one way crystalized from the realization that the atrocity of the offence is directly proportional to the probability of the accused absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature.”

12. It is not lost in the mind of the court that bail pending trial is a constitutional right of an accused person under **Article 49(1)(h)**. It provides that every arrested person has the right to be released on bond/bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. The constitution does not spell out what constitutes compelling reasons. One thing is clear though is that the onus of discharging the burden of demonstrating that there exists compelling reasons lies with the prosecution.

13. In the present case, Mrs. Odhiambo submitted that the investigations were incomplete as could be discerned from the amendment of the charges so that the current charge sheet constitutes 26 counts. A look at the charge sheet shows that the amendment was made on 21st May, 2019. The proceedings of the trial court of even date before Hon. Andayi, CM does not reflect that a plea was taken in respect of the new charge sheet. Subsequent proceedings do show that there was an application to consolidate **Criminal Case No. 353 of 2019** with other files. That may then explain the intended substitution of the charge sheet.

14. Be that as it may, the court is enjoined to consider what constitutes compelling reasons and whether any of the compelling reasons relates to the present Applicant. What constitutes compelling reasons has been settled by case law and is also spelt out in the Judiciary Bail and Bond Policy Guidelines. Amongst the major factors for consideration include; the nature of the charge, the seriousness of the attendant penalty to the charge itself, the strength of the prosecution case, the likelihood of interference with the witnesses, the need to protect either the victim of the crime or the accused person, the antecedent of the accused person, whether the accused person is in gainful employment, the previous record of conviction of the accused person, and for public order, peace and interest. Each case must however be considered on its own merit.

15. I am mindful that an accused person remains innocent until otherwise proved. It is also trite that plea in the amended charge sheet may not have been taken place because this court called for the trial court proceedings. Nevertheless, it is enjoined to look at the charges relating to the Applicant in the intended amended charge sheet. Just to cite a few charges he faces, they include conspiracy to commit an offence under POTA, several counts of committing a terrorist attack contrary to **Section 4(2) of POTA**, two counts of aiding and abetting terrorist acts contrary to Section 30E of POTA, two alternative charges to the latter of handling stolen goods contrary to **Section 322(1)** as read with **322(2) of the Penal Code** and one count of stealing a motor vehicle contrary to **Section 278A of the Penal Code**.

16. The main bone of contestation as argued by the Respondent is that two motor vehicles that were used during the Dusit Hotel terrorist attack namely; Reg. No. KCN 340E and KCF 872R were insured in the name of the Applicant and that of his father respectively. In respect of count 51 he is said to have stolen a motor vehicle Reg. No. KCN 568X from one John Mwangi Karoki.

17. The Applicant advances a defence that he and his father carried on insurance broking business in which they procured insurance covers

in their names. Whereas, the statement in this regard was not substantiated it raises eye brows how and why the Applicant would procure an insurance cover in his name for a vehicle he does not own and that vehicle is later used in a terrorist attack. More disturbing is the fact that, his father is deceased, yet he was able procure an insurance cover in his name for a vehicle that was never owned by him. That alone sounds alarming. In fact, this is a case that even investigators ought to dig in deeper why an insurance company would allow procurement of insurance covers in the names of parties who do not own the vehicles.

18. Under **Section 4(2) of POTA** if a person is convicted for the offence of committing a terrorist act is liable to imprisonment for life. Further, under **Section 23(4)** if a person is convicted for an offence of conspiracy to commit a terrorist act he is liable to an imprisonment for a period not exceeding 20 years. I have just cited the two penalties to highlight that the offences the Applicant faces carry stringent penalties which would entice him to abscond. It is true that he is a Kenyan but that notwithstanding, in view of the seriousness of the offences, and the role he likely played in the Dusit Hotel terrorist attack by insuring motor vehicles which were used in the attack, I doubtful that if released on bail he shall not abscond.

19. I am therefore of the view that the Applicant has failed to demonstrate that the learned trial magistrate did not apply the law properly or disregarded the facts of the case in denying him bail. I find no reason to warrant the setting aside of the ruling of the learned trial magistrate delivered on 15th March, 2018 denying the Applicant bail.

20. As a point of emphasis, it is important to note that the ruling in **Mukta Ibrahim Ali and another (Supra)** was delivered on 12th April, 2019 before the proposed consolidation of charges and amendment of the charge sheet was intimated to the court. As at that time, no serious charges had been leveled against the Applicants, and I would agree with the court that no cogent reasons then warranted a denial of bail.

21. The only thing I would wish to mention is that the Respondent should go to the drawing board in their draftsmanship of the proposed amended charge sheet. This is because they may have unnecessarily overloaded the charge sheet. I say so because there was only one act of terrorist attack in which several people died. It may not be necessary to consider each of the deaths occasioned to constitute a singular count in the charge sheet. I however leave that to the prosecution to think about it.

22. On the whole, I find the instant application unmerited and dismiss it. The Applicant shall remain in custody until the hearing and determination of the trial.

DATED and DELIVERED this 10th day of **December, 2019**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Ikua h/b for Mr. Okach for the Applicant.*
2. *M/s Akunja for the Respondent.*