REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NUMBER 823 OF 2018

IDRIS ADEN MUKHTAR.....1ST APPLICANT.

CHARLES NJIRU KANJAMA.....2ND APPLICANT.

VERSUS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT.

AND

MOHAMMED HUSSEIN ADEN.....1ST INTERESTED PARTY.

JULIET CHARITY NJOKI.....2ND INTERESTED PARTY.

RULING.

1. The instant application was filed by the law firm of Muma & Kanjama Advocates on behalf of the complainants in **Milimani Chief Magistrate's court Criminal Case No. 1698 of 2018.** Learned Counsel, Mr. Kanjama appeared for both himself and one Aden Muktar who were described as both the complainants and victims. The accused persons **Mohamud, Hussein Aden and Juliet Charity Njoki** are for purposes of this application the 1st and 2nd Interested Parties respectively. The Office of the Director of Public Prosecutions (ODPP) which is prosecuting the trial is named as the Respondent.

2. Both Interested Parties are jointly charged in court I with the offence of attempted murder contrary to **Section 220(a) of the Penal Code**. It is alleged that on the 19th day of August, 2018 while at White Star Restaurant along Kandara Road in Kileleshwa within Nairobi County, jointly with others not before court unlawfully attempted to cause the death of Idris Muktar Adan by shooting and injuring the said Idris Muktar Adan.

3. In Court II, they are charged with conspiracy to murder contrary to Section 224 of the Penal Code in that on diverse dates between 1st July, 2018 and 27th September, 2018 at unknown place within Nairobi County, jointly with others not before court conspired to kill Charles Njiru Kanjama.

4. After the pleas were taken on 12/9/2018 an application for release on bail/bond was made. After submissions by both accused persons and the prosecutor, the learned trial Magistrate ordered that pre-bail reports be filed. A ruling was finally rendered on 25th September, 2018 granting each of the Interested Parties bond of Kshs. 1 million with two sureties of similar amounts. In the alternative, each accused person would deposit a sum of Kshs. 500,000/- as cash bail and make available two contact persons who would deposit copies of their National Identity Cards or Passports in court. Additionally, that they were to be examined by the court and their documents subjected to verification. They were also required to cooperate with the investigating officer.

5. The victims, hereafter the Applicants were aggrieved by the decision of the learned trial Magistrate granting bail/bond to the Interested Parties. The application herein was filed by way of two letters by counsel for the victims dated 25th and 26th September, 2018 respectively. The main contestation by the Applicants is that the learned trial Magistrate did not give sufficient time to the Probation Officer to file detailed pre-bail reports with sufficient information that would have enabled him determine the application for bail.

6. According to Mr. Kanjama, the pre-bail reports were to be presented in court on 1st September, 2018. The same were not ready and the court consequently granted 24 hours to compile the same which time, it is alluded, was not sufficient. The reports were tabled before the court on the due date, 19/9/2018. In the meantime, an affidavit sworn by one Nancy Wanjiru Wangui, wife of the 1st Interested Party, had been filed in support of the application for release of the 1st Interested Party on bail. The court directed the Respondent to file a response to it

if they so wished and that the same had to be done by 19th September, 2018.

7. The Respondent did not file an affidavit in response. Instead, one Dr. Aden Muktar Bare filed in objection to the Interested Parties' release on bail. In the meantime, counsel for the victims made an application to cross-examine Nancy Wanjiru Wangui who deposed that she was the wife to the 1st Interested Party (1st Accused as per the charge sheet). The trial court observed that its decision to allow or disallow the application would depend on 1st Interested Party's decision to maintain the affidavit on record. At this point, the counsel for the 1st Interested Party withdrew the affidavit at which point the court ordered that the affidavit sworn by Dr. Aden be expunged as the same was in response to that sworn by Nancy Wanjiru Wangui.

8. According to Mr. Kanjama, the withdrawal of the affidavit of Dr. Aden was improper as it also supported the victims' objection to the release of the Interested Parties on bail. He in particular cited that it alluded to the Interested Parties being a flight risk and their likelihood to interfere with evidence as other suspects were yet to be arrested. He also alluded to their (victims) safety. Additionally, that the 1st Interested Party had given untruthful information that he was a businessman and resident of Machakos County contrary to the affidavit sworn by Ahmed Aden Hire, a family friend of the 1st Applicant that he was a senior advisor to the Governor of Garissa County and was on the payroll of the Government of Garissa County. In this regard, it was submitted that it was improper and irregular to fail to admit the affidavit of Ahmed Aden Hire which constituted material information that would have informed the decision for bail application.

9. An affidavit sworn by the 1st Interested Party on 27th September, 2018 was lodged in opposition to the application. The gist of the affidavit is that the application was unmerited, bad in law and does not meet the threshold for grant of the orders sought.

10. Learned State counsel, M/s Mwaniki for the Respondent entirely supported the application premised on a number of facts. First, that 1st Applicant was admitted in hospital in critical condition and the 2nd Applicant was to be executed on account of his responsibilities as an advocate of the 1st Applicant in the course of his duties.

11. Second, that the information given to the Probation Officer as reflected in the pre-bail report with respect to the 1st Interested Party was incorrect; specifically that he was a resident of Garissa and not Machakos. It was submitted that the trial court disregarded this material information in reaching its decision to grant bail to the Interested Parties. She was of the view that the trial court hurriedly arrived at its decision without giving sufficient time to both the investigating officer and the probation officers to verify the information given by Applicants.

12. Third, that the Applicants were compelled to withdraw the affidavit sworn by Ahmed Aden Hire, which carried crucial information that would have enabled the court to arrive at an informed decision. That therefore, the failure by the trial court to consider material information occasioned an injustice both to the rule of law and the Applicants.

13. Four, in response to the Interested Parties' assertion that the matter was not properly before the court, Miss Mwaniki submitted that **Section 364 of the Criminal Procedure Code** was amended at **Sub-section (1)** to add **clause (c)** which provides that any party aggrieved by the decision of a subordinate court had a right of revision. It was her plea that bond be cancelled until key prosecution witnesses testified.

14. Learned Counsel, Mr. Githinji and Olaha appeared for the Interested Parties. Their main submission was that of the application was premised on material misrepresentation of what transpired before the trial Court. He pointed to the assertion by the Applicants and the Respondent that the Probation Officer was not given sufficient time to prepare a pre-bail report. He submitted that they had close to one week to supply all the necessary information to the Probation Officer. In any case, the delay by one day to file the report was occasioned by lack of typing facilities.

15. Mr. Githinji argued that the Interested Parties took issue with the late filing of the affidavit by Dr. Aden Muktar Bare on 18/9/2018. Further, that they withdrew the affidavit of the 1st Interested Party's wife because she resided at Machakos with her children, hence it would be difficult to procure her attendance. That consequently, the Applicants conceded to withdrawing their affidavit filed in response to that of Nancy Wanjiru Wangui. The court then handed over the respective affidavits to the parties.That no complaint was raised by any party including the Respondent in this regard.

16. Counsel added that on the date of the ruling, 21/9/2018, the court requested parties to make submissions on the pre-bail reports. The submissions were reserved for 24/9/2018. He argued that this was the first instance that Mr. Kanjama brought up issues that were outside the pre-bail reports. He referred to the affidavit of Ahmed Aden Hire sworn on 24/9/2018 filed on the same date, an affidavit that was never on court record.

17. Counsel argued that the learned Magistrate considered the relevant law and found that there were no compelling reasons to warrant a denial of bail and that the matters being raised in the instant application are collateral to the ruling of the trial court.

18. With respect to the 1st Interested Party's preferred place of custody, Mr Githinji submitted that following the death of one of the suspects in police custody, it was in the interest of his security that he be remanded in police custody.

19. Finally, counsel urged the court to set aside its stay order as a stay on a revision application cannot issue unless in offences provided under **Section 364(1)(c)** of the **Criminal Procedure Code**. Furthermore, the same ought not to have issued before all parties were heard.

20. Mr. Olaha in supporting Mr. Githinji emphasized that bail/bond should only be denied where compelling reasons exists. He underscored the fact that the task of granting bail/bond is an exercise of discretion of the trial court which an appellate court should not fetter unless it is demonstrated that the discretion was not exercised judiciously. A ruling in **R-v-Musaba Mohamed Haji Osman [2008]eKLR** was cited to buttress this submission.

21. Mr. Olaha urged the court to resist an invitation to consider new evidence in the name and style of an affidavit after the parties had closed submissions. He submitted that at this juncture, the court was '***factus officio'*** flying in the face of **Section 9(2)(b) of the Victim Protection Act** which provides that the view of a victim should not be considered to the prejudice of an accused. The case of **R-v-Ummulkheir Sadri Abdalla & 3 others [2015] eKLR** was cited in support therefore.

22. Additionally, counsel stated that the Applicants had consented to the withdrawal of the additional evidence and could not now turn around and ask the court to rely on it. This, he submitted, was in total disregard to candour and colour of basic legal process. The case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Ltd & Anor [1998] eKLR** was cited in this regard.

23. Other cases relied upon by the Interested Parties were **R-v-Jack Alexander Wolf Marran & Anor [2016] eKLR, R-v-Richard David Alden [2016] eKLR, R-v-Baklash Akasha Abdalla & 3 others [2014] eKLR and George Aladwa Omwera-v-R [2016] eKLR**.

24. Learned Counsel Mr. Karera for the 2nd Interested Party entirely supported the submission of the 1st Interested Party. He added that the pre-bail reports were requested for pursuant to the Judiciary Bail and Bond Police Guidelines. He submitted that the two pre-bail reports that were filed before the Magistrate were detailed and concise. That the failure to find any compelling reason(s) in the said reports clearly indicates the competence of the work carried out by the probation officer. After all, the probation officers did not allude to being time constrained while performing their duty. Furthermore, the views of the victims were taken into consideration whilst the reports were being considered.

25. Mr. Karera underscored the fact that the Interested Parties were unlikely to interfere with investigations as the Respondent had indicated that they were no longer needed in assisting the police with investigations. He also submitted that the strength of the prosecution evidence could not be a basis for denying bail to the Interested Parties as the latter had not yet been supplied with prosecution witness statements.

26. In rejoinder, Mr. Kanjama submitted that the Applicant's affidavit submitted on 24/9/2018 was intended to qualify the pre-bail reports. Further, that as at the time of its submission a ruling had not been delivered and so the court was not *factus officio.*

27. He added that as at 18/9/2018, the victims had been interviewed but the investigating and probation officers did not have sufficient time to investigate the information given to them. In this respect, reliance on the affidavit filed by the Applicants to supplement the pre-bail reports was proper. As such, in granting bail, the trial magistrate did not properly exercise his discretion.

28. With respect to the application of **Section 364 of the Criminal Procedure Code**, counsel argued that a stay order under the provision would only apply where a revision application is yet to be filed. Furthermore, **Sub-Section (1) (c)** is permissive as opposed to being restrictive. And therefore, nothing stops the High Court for granting a stay order in respect of any offence pending the hearing of a revision application.

Determination

29. I have appraised myself with the respective oral rival submissions. I have also perused the record of proceedings of the trial court. I have deduced that the following issues arise for determination.

a. Whether the application is properly before the court.

b. Whether the court should revise the ruling of Hon. Andayi W. F, Chief Magistrate delivered on 25th September, 2018 granting bail to the Interested Parties.

c. Whether the Interested Parties should be detained in either police custody or prison remand pending the hearing and determination of the trial.

Is the application properly before the court?

30. This issue is argued under two limbs. First, in light of the Security Laws (Amendment) Act 2014 which amended Section 364 of the Criminal Procedure Code by adding clause (c) at Sub-Section (1). The argument by counsel for the Interested Parties is that the High Court cannot stay an order granting bail to an accused person with respect to an offence other than is indicated in the provision. The said provision reads as follows:

> **"(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may—**
>
> > **(c) in proceedings under section 203 or 296(2) of the Panel Code, the Prevention of Terrorism Act, the Narcotic Drugs and Psychotropic Substances (Control) Act, the Prevention of Organized Crimes Act, the Proceeds of Crime and Anti-Money Laundering Act, the Sexual Offences Act and the Counter-Trafficking in Persons Act, where the subordinate court has granted bail to an accused person, and the Director of Public Prosecution has indicated his intention to apply for review of the order of the court, the order of the subordinate court may be stayed for a period not exceeding fourteen days pending the filing of the application for review."**

31. My understanding of this provision leads me to concur with learned counsel, Mr. Kanjama that it only directs the court that where a stay is sought in respect of the outlined offences, the court must grant it pending the formal filing of a revision application. It does not fetter the supervisory powers of the High Court to grant a stay in any other offence where such a prayer is made. The other observation is that the

issuance of the stay order under the provision only relate to an application by the Director of Public Prosecutions. Therefore, this court is not barred from issuing a stay order in regard to the offences other than those listed in the provision where the Applicant is a party other than the DPP. This is in view of the fact that other statutes that accord a right of access to court have not been ousted by this provision. For this reason, the court properly stayed the order of the learned trial magistrate pending the hearing and determination of this application. It follows that if the court had lifted the stay order before a determination was made, the application would have become spent.

32. The second limb of argument under this head is that the Applicants ought to have filed an appeal. I believe the Interested Parties were referring to Section 364(5) of the Criminal Procedure Code which provides:

> **"When an appeal lies from a finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."**

33. The revisionary powers of this court are borrowed from Article 165(6) of the Constitution and Section 362 of the Criminal Procedure Code. Article 165(6) provides that:

> **"The High court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."**

Whilst Section 362 reads:

> **"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."**

34. In the present case, the argument by the Applicants is that the information given to the trial court leading to the grant of bail was tainted with insufficient information leading to the court granting an improper order. This submission aptly describes one of the tasks of this court when clothed in its supervisory jurisdiction; the duty to revise orders arising from a Magistrate's Court. I have also previously delivered myself on the revisionary powers of this court which are wide ranging and not subject to limitation on the basis of an appellate process being open to the parties. The instant application is hinged on the propriety of the information which the trial court relied on in granting bail. This is an ingredient which squarely falls under Section 362 of the criminal Procedure Code. Furthermore, the court should focus on is the need to do justice by interrogating the propriety of that information. It should not be limited by unnecessary technicalities at the cost of doing substantive justice. See Article 159(1)(d) of the Constitution.

35. Having made the above observation, it is my view that the application herein is properly before the court.

Whether the application is merited

36. The prayer sought herein is merely to revise the order of the learned trial magistrate granting bail the Interested Parties. It is settled law that the grant of bail to an accused person is purely at the discretion of the trial court. The trial court on the other hand must have regard to the fact that bail/bond is a constitutional right available to an accused unless there are compelling reasons. See Article 49(1)(h) of the Constitution.

37. Over time, courts of concurrent and higher jurisdiction have outlined what may constitute compelling reasons, the underlying consideration being to secure the attendance of the accused in court when required. See: **Republic v Danson Mgunya & Another [2010]eKLR** where the court delivered itself as follows:

> **"The main function of bail is to secure 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 criteria enumerated above."**

Section 123A of the Criminal Procedure Code on the other hand provides that;

> **(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 or seriousness 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)the strength of the evidence of his having committed the offence;**
>
> **(2) 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 conditions) it is likely that he would fail to surrender to custody;**

(b) should be kept in custody for his own protection.

38. I shall not belabor in considering all factors that are deemed as compelling under Article 49(1)(h) as this application zeroes in on those outlined in Section 123A (1)(b) above. The Applicants submissions revolve around the failure by the trial court to consider relevant evidence which they contend disclosed compelling reasons why the Interested Parties should not be admitted to bail or bond. Their initial submission relates to the expunging of an affidavit sworn by Dr. Adan Muktar Bare from the record on 19th September, 2018. In the letter dated 25th September, 2018 they contend that the decision to expunge the affidavit was entirely improper. In his submissions, Mr. Kanjama toned down the sentiment and while agreeing that the affidavits, including one filed by the 1st Interested Party were voluntarily withdrawn submitted that this was done under pressure.

39. It is clear, as set out by the advocate for the 1st Interested Party that the withdrawal was a compromise agreed upon by the parties as can be clearly discerned from the proceedings before the trial court where Mr. Githinji and Ms. Owano all agreed to accept the affidavits back. In light of the voluntary nature of the withdrawal of the affidavits this court would be hard pressed to find that this was occasioned by coercion at the hands of the court. I find that there was no impropriety on the part of the court in the expunging of the affidavits.

40. I also take note of the fact that the contents of the withdrawn affidavits formed the bulk of Mr. Kanjama's submissions when commenting on the pre-bail reports on 24th September, 2018. While it appears that Mr. Githinji did object to the scope of the submissions it is clear that his objection was not sustained. Thus, the need to admit the affidavits is dispensed with as their content already forms part of the evidentiary evidence on record of proceedings.

41. Be that as it may, clearly the submissions in question impugned the correctness of the information that was set out in the Pre-Bail Reports. The information called into question the Interested Parties' antecedents as set out in the reports. As pointed out by Mr. Kanjama there exist material contradictions in the evidence that warranted an interrogation of the Interested Parties' candour. For instance, each of the parties giving varied information as their relationship.

43. With regards to the timeframe within which the reports were made, it is clear that the court made an order for the Pre-Bail Reports be produced on 12th September, 2018. No timeline was given for their production but it would appear implied by the setting of the hearing date on 17th September, 2018. The matter was not heard on 17th September, 2018 but on 18th September when one Mwenda and one Makori, probation officers, submitted that they were not ready with the reports as they were unable to get through to the victims. Mr. Mwenda asked for two days to complete the 1st Interested Party's report. Ms. Makori on the other hand submitted that she had only interviewed the 2nd Interested Party the previous day without indicating when the report would be ready. At the end of the hearing the court directed the probation officers to complete the reports on the same day. When the matter came up for hearing on 19th September, 2018 the Court informed the parties that it had received the Pre-Bail Reports for both accused persons. The proceedings devolved into questions about the expunging of affidavits ending with an order that the ruling would be delivered on 21st September, 2018. However, later that day there were further proceedings with the court granting the parties the opportunity to submit on the Pre-Bail Reports on 24th September, 2018.

43. It is clear from the above that the Probation Officers did not indicate that they were under severe time constraints although it raises questions how the victims' views, which were obviously recorded on 18th September, 2018 were evaluated and included in the report in less than a 24 hour period. This lends credence to the Applicants' submission that the Officers did not take into account information furnished by the victims which formed the basis of the submission, thus questioning the propriety of the reports.

44. The court accordingly arrives at a conclusion that the submissions made before this court point to discrepancies in the information tendered before the trial court that ultimately was determinant of the decision arrived at. The propriety of relying on the said Pre- Bail Reports is called into question. The information specifically relates to the antecedents, character and residence of the Interested Parties. The failure to accord sufficient time to interrogate it through investigation means that the grant of bail was premised on improper information. The rationale is simple; the veracity of it will determine whether or not the Interested Parties warranted the admission to bail.

45. My view is that the probation and the investigating officers should be accorded sufficient time to interrogate and investigate the information given by the Applicants after which, I believe, the trial court will be in a position to arrive at an objective ruling.

Place of detention of the Interested Parties

46. I already addressed this issue on 28th September, 2018 when the application was canvassed. Whereas I need not say more, it is a legal procedure that every person standing trial should be remanded in a prison remand home save that with an order of the court the remand place may be varied for a specific reason and period. The reason advanced by the Interested Parties regarding their security was unfounded and not supported by evidence. Be that as it may, should they feel that their lives are in danger while in prison, they shall be at liberty to apply for enhanced security. They shall therefore remain in the respective remand prisons until their trial is concluded or other orders of the court are granted.

Conclusion

47. In view of the foregoing, I set aside the order of the learned trial Magistrate issued on 25th September, 2018 granting both Interested Parties bail/bond. I substitute the same with an order that comprehensive pre-bail reports in respect of the Interested Parties be filed in court within two weeks of mention of the matter before the learned trial magistrate, Hon. Andayi, CM after which the parties shall make submissions regarding the reports. The learned trial Magistrate shall thereafter make a ruling on the suitability of the Interested Parties for admission to bail or bond based on the reports. Mention before the said Magistrate on 4th October, 2018. The trial court files shall be remitted back to the court for this purpose.

Dated and Delivered at Nairobi this 1st October, 2018.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of;

1. Miss Owano for the Applicants

2. Miss Mwaniki for the Respondent.

3. Mr. Githinji for the 1st Interested Party.

4. Mr. Karera for the 2nd Interested Party.