REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 36 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

SILAS MUKIRA.....1ST ACCUSED/APPLICANT

STANLEY THIAINE.....2ND ACCUSED

R U L I N G

1. Before me is a Notice of Motion by the 1st accused ("the applicant") brought pursuant to ***Article 49 (1) (h) and 159 of the Constitution of Kenya, 2010 and Rule 3, 4, 5, 8, 19, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, 2013) Section 358 of the Criminal Procedure Code CAP 75 of the Laws of Kenya***. The applicant seeks to be released on bond pending trial.

2. The applicant contends that since he was granted bond on 10th October, 2016, he has been attending Court diligently as required of him; that the complainant cannot substantiate her allegations of being threatened by the applicant which had led to the cancellation of his bond.

3. The application was opposed by Mr. Mungai for the State who relied on the grounds of opposition dated 10th July, 2018. It was contended for the state that the application was bad in law; that the prayers sought offends the laid down sound judicial principles; that the application is res-judicata and as such, the applicant ought to move to the Court of Appeal.

4. I have carefully considered the application, the affidavit in support and the rival contentions by the parties. This is an application for reinstatement of bail pending trial. The provisions of **Article 49 (1) (h) of the Constitution** provide that an arrested person may be released on bond or bail on reasonable conditions pending trial unless there are compelling reasons not to be released.

5. I will first deal with the contention by the Prosecutor that the matter is res judicata. In ***Republic v Diana Suleiman Said & another [2014] eKLR,*** the court held that there was nothing in **Article 49 (h) of the Constitution** or **Section 123 of the Criminal Procedure Code** to suggest that once a court grants or refuses bail, it becomes functus officio or that it becomes res judicata upon a decision to grant or refuse bail. The court found that ***Section 123 of the Criminal Procedure Code,*** permitted bail for all criminal cases at all times. This position was restated in the case of ***Abdallah Swaleh Saaib v Director of Public Prosecutions [2017] eKLR.***

6. In the premises, the court can still entertain the applicant's application on good grounds.

7. The question for determination is whether the applicant's bond which was cancelled on the basis that the Accused had threatened the Complainant, forcing her to move to a different location, should be re-instated.

8. In ***R Vs. Dwight Sagaray & 4 others (2013) eKLR,*** **on an allegation that the accused were likely to interfere** with witnesses, the court held:-

> ***"For the prosecution to succeed in persuading the court on this criteria (of interference), it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others."***

9. **In** ***Republic v Joktan Mayende & 3 others [2012]*** **eKLR** the court delivered itself thus:-

> ***"[24] In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of***

safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya, 2010.

….For purposes of Article 49(1) (h) of the Constitution, a compelling reason hinged on interference with witnesses does not necessarily require strict medical proof of, where assault is claimed as the act of interference with witnesses since the court is not determining a criminal charge of assault the way we know it in a criminal trial. Where there is evidence that a person is accosted, physically or otherwise, by an accused person in the case where the person is a witness, it suffices to prove that the accused did act(s) tending or intended to interfere with a witness. The court is then entitled, if not bound, to infer that the intention of the accused in accosting the witness had been to dissuade the witness from giving evidence. Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schemed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice.

All that the law requires is that there is interference in the sense of influencing or compromising or inducing or terrifying or doing such other acts to a witness with the aim that the witness will not give evidence, or will give particular evidence or in a particular manner. Interference with witnesses overs a wide range; it can be immediately on commission of the offence, during investigations, at inception of the criminal charge in court or during the trial; and can be committed by any person including the accused, witnesses or other persons. The descriptors of the kind of acts which amount to interference with witnesses are varied and numerous but it is the court which decides in the circumstances of each case if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused".

10. In the present case, the Complainant appeared in court on 20th June, 2018 during the mention of the case. She raised her hand to address the court. The court directed her to address it through the prosecutor. The prosecutor then informed the court that the accused had threatened her. That as a result of the threats, she had been forced to move out of her residence.

11. The court then asked both accused to respond to the said allegations. In response, the applicant stated that his father had gone to Nchuri Ncheke to report the matter but he had allegedly told him not to report. The 2nd accused was content in stating that since he left court the previous time, he had not addressed the issue.

12. From their responses, the court was convinced that they did not address the allegation directly as put to the court by the complainant. By a ruling made on that day which is on record, the court cancelled the accused's bonds and remanded them in custody. That then is the background to the present application.

13. The question that arises is, whether the applicant has satisfactorily addressed the allegation made against him. The application was made through an advocate. This court expected that since an advocate was now involved, and for the reason that the applicant has had sufficient time to reflect on the complainant's allegations, he would succinctly disclose to the court what his father went to do at the Nchuri Ncheke, what the reaction of Nchuri Ncheke was, what his role was, what the intention of the report to Nchuri Ncheke was and what it had achieved. This is so considering the hold the Nchuri Ncheke has on the accused's community around.

14. The applicant has not been candid in his affidavit in support about the alleged threats made to the complainant. I consider that there has been no change of circumstances from those existing on 20th June, 2018 when the bonds were cancelled.

15. Accordingly, the application is declined.

SIGNED at Meru

A. MABEYA

JUDGE

DATED *and* ***DELIVERED*** *at Meru this 11th day of October, 2018.*

A. ONG'INJO

JUDGE