



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO.428 OF 2016

BONIFACE MWANGI NYAGA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, Boniface Mwangi Nyaga was on 12<sup>th</sup> October 2015 charged with the offence of **conspiracy to commit murder** contrary to **Section 244** of the **Penal Code**. He was arraigned before the trial magistrate's court at Makadara. He pleaded not guilty to the charge. His request to be released on bail pending trial was denied. It is common ground that since his arraignment in court, the trial, for one reason or the other, has failed to take off. Meanwhile, the Applicant has remained in custody awaiting trial. The Applicant's subsequent applications to be released on bail pending trial were denied by the trial court. This prompted the Applicant to file the present application for bail pending trial.

On 29<sup>th</sup> November 2016, the Applicant moved this court seeking the revision of the order issued by the trial court denying him bail pending trial. The Applicant asserted that he had the constitutional right to be released on bail pending trial unless there were compelling reasons. In his case, the prosecution had not put forward any compelling reasons to persuade a court of law properly applying its mind to the issue that there were compelling to deny him bail pending trial. On its part, the prosecution opposed the application. The investigating officer PC Mary Luchere of Shauri Moyo Police Station swore a replying affidavit in opposition to the application. She essentially stated that there was real possibility that the Applicant would interfere with prosecution witnesses if he were to be released on bail pending trial. The apprehension that the Applicant would interfere with witnesses was not merely speculative as some of the witnesses feared for their lives to the extent that they had sought and were granted witness protection by the court. As regards the complaint by the Applicant to the effect that the trial had unnecessarily been adjourned and therefore prejudiced him, it was the prosecution's case that they had always been ready to prosecute the case. The case has now been fixed for hearing and on the scheduled date the prosecution will be ready to proceed with the case. It was the prosecution's case that there were sufficient compelling reasons to deny the Applicant bail pending trial.

During the hearing of the application, this court heard the rival submission made by Ms Ngessa for the Applicant and Ms. Sigei for the State. Learned counsel essentially reiterated the contents of the application and the affidavits sworn in support and in opposition to the application. The issue for determination by this court is whether the Applicant made a case for this court to revise the decision of the trial court that denied the Applicant bail pending trial. That the Applicant is entitled to be granted bail pending trial is not in doubt. **Article 49(1)(h)** of the **Constitution** grants the Applicant right to be released on bond or bail on reasonable conditions unless there are compelling reasons. The statute does not define what constitutes compelling reasons. However, the courts have over time set out what ought to be taken into account in determining whether or not the prosecution has established compelling reasons to deny an accused person bail pending trial. Compelling reasons include the following: *the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with witnesses, the need to protect the victim of crime and the accused person, the relationship between the*

*accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives.* (See ALHAJI MUJAHID DUKUBO-ASARIN Vs. FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006). In addition, the **Bail and Bond Policy** recently published by the **National Council on Administration of Justice** requires the court to lean towards granting bail to accused persons unless the compelling reasons are such that the court will have no option but to deny such an accused person the right to be released on bail pending trial. The prosecution is required to provide evidence of the compelling reasons to deny the accused person bail.

In the present application, it was clear to the court that the Applicant has been in custody for more than one year while awaiting trial. Although the delay in commencement of trial, cannot not be solely blamed on the prosecution, this court is of the view that the Applicant has been prejudiced by the delay in trying him before the trial court. The Applicant is presumed innocent until proven guilty by a court of law. The prosecution objected to the release of the Applicant on bail pending trial for the sole reason that he would interfere with witnesses if he is so released on bail while awaiting trial. The evidence that the prosecution placed before the court was the fact that some of the witnesses have been placed on witness protection to assuage their fears that they would be harmed before they offered their testimony in court.

Having carefully considered the replying affidavit sworn by the investigating officer, this court is of the view that no evidence has been placed before it to directly connect the Applicant with the alleged threat to the prosecution witnesses. In any event, if such threat existed, all the potential witnesses who were under such fear have already been placed under witness prosecution. In this court's considered view, there exists no threat to witnesses which if the Applicant is released on bail pending trial that the Applicant can exploit. In the circumstances of this application, this court has taken into account the fact that the Applicant has been in custody for more than a year while awaiting trial. The trial is yet to commence. There is no assurance that the trial will commence any time soon. In the premises therefore, it is only fair that the Applicant be granted bail as he awaits trial. The court is of the view that if any compelling reasons existed, it was addressed when the witnesses were placed on witness protection by the court. The said witnesses will be availed to the court when they will be needed to offer their testimony.

For the above reasons, this court is of the view that the Applicant has established a case for this court to revise the decision of the trial magistrate's court to deny him bail pending trial. His application is allowed. He is hereby released on bail pending trial on condition that he posts a bond of Kshs.500,000/- with one surety of the same amount. In the alternative, he may deposit cash bail of Kshs.200,000/-. He shall be required to attend the trial court on the scheduled dates without fail or else his bond shall be cancelled. It is so ordered.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF FEBRUARY 2017**

**L. KIMARU**

**JUDGE**