



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 49 OF 2016

REPUBLICPROSECUTOR

VERSUS

LEONARD KANARI GITAUACCUSED

RULING

1. By a Ruling dated 6th July, 2016 denying the Applicant bail, this court found as compelling the following reasons to deny the Applicant his Constitutional Right to bail:-

a) The special relationship between the accused and potential witnesses who were identified as E.W.K who was alleged to be a girlfriend of both the deceased and the Applicant, her house help, her two taxi driver friends and the caretaker at the flat wherein she lived at the time of the alleged incidence.

b) The fact that the applicant is an influential member of society who is a licenced gun holder and was likely to create fear in the potential prosecution witnesses.

2. Based upon the above reason the court held that:-

“The accused shall therefore remain in remand custody until two key prosecution witnesses namely E.W.K and her house-help testify, thereafter the accused shall be at liberty to renew his bail application”

3. By an application dated 26/7/2016 the Applicant sought the following orders:-

1) THAT the Honourable court be pleased to grant and/or admit the Applicant to bond/bail pending hearing and determination of the criminal case herein.

2) THAT the Honourable Court be pleased to review the ruling and order given on 6th July, 2016 and give reasonable conditions as it deems fit and just to admit the applicant for bail.

3) THAT if necessary, in the alternative, the Honourable court be pleased to order for a bail assessment report to assist in making a fair decision.

4. The application was supported by the annexed affidavit sworn by the applicant allegedly on 26th July, 2016 before John Katiku Advocate, in which it was deponed that the applicant has no intention to

interfere with prosecution witnesses if released on bail and will no attempt to contact any of them in any manner. It was further stated that his incarnation in remand had meted immense suffering causing his health to deteriorate so badly.

5. It was deponed that the relationship between him and E.W.K was not that of a boyfriend-girlfriend but purely business oriented and that the applicant will not make any contact with her, neither will he visit the location of her residence. It was deponed further that the applicant had since surrendered his firearm together with ammunitions to the custody of the police and did not intend to apply to be given it back until the case is heard and determined.

6. The application was opposed by the wife of the deceased I.N.B through an affidavit sworn on 6/9/2016 in which it was deponed that the applicant had failed to give reasons as to why he could not abide by the court's earlier Ruling.

7. The State, through Cpl. Kimanzi Mutiki, opposed the said application in which it was deponed that the circumstances had not changed to warrant a review of the bail/bond.

8. When this application was placed before the court for hearing on 29/9/2016 I deferred the hearing of the said application until the two named witnesses had testified and on 19/12/2016 the matter proceeded for hearing before Lesiit J, who heard the evidence of the two key prosecution witnesses and referred the file back to me for Review of the bail application whereupon I gave directions that the application be heard and granted leave to parties to file further affidavits.

9. By a further affidavit sworn on 17/1/2017 the applicant deponed that the same shall undertake not to contact, visit or communicate or associate in any manner with the remaining prosecution witnesses if granted bond. He further stated that his health had not improved and therefore required specialized treatment that was not possible in custody.

10. The wife of the victim filed a further affidavit in reply on 11th January, 2017 and deponed that whereas two key prosecution witnesses had testified, the testimony of other prosecution witnesses should be a key factor to be considered safe for their interference, influence and intimidation by the applicant and that the court should consider the testimony of the two key witnesses who had already testified as their evidence was vital pointing towards the character of the applicant.

11. It was deponed that the testimony of PW1 and PW2 on record directly pointed towards the applicant to the exclusion of any other person being that it is the applicant who was the only person seen involved in a scuffle with the deceased and that the Applicant having had knowledge of the serious nature of the offence and the severity of the sentence in relation thereto, stand to abscond court if released.

PRE-BAIL REPORTS

12. To assist the court in determining the application herein, I ordered for pre-bail report in which the following were stated:- That the accused is married to one Ruth Wanjiru with whom they have three children and was managing Regional Royal Transmission Company based in Nakuru as at the time of his arrest. It was stated that the company had a high financial turnover and therefore the accused could not flee from the court's jurisdiction. The report further confirmed that the investigating officer did not oppose to the accused being released on bond since the key witnesses had testified and that the accused person was easily accessible and would be very easy to bring to court.

13. It was further stated that the father of the accused was willing in addition to any other surety ordered by the court to be personally bonded to ensure that the same avails himself for trial until its logical conclusion. It was stated that the accused enjoys strong ties with both his family and the community at large.

14. On the victim impact, it was stated that the deceased was the sole breadwinner for his immediate and extended family and therefore his death was very painful to them. They were therefore opposed to the

accused being released on bond since he was likely to escape court proceedings and deny them justice since he only surrendered because the media blew up the cases and that had the same applied some mercy and assisted the deceased to seek medical attention his life would have been saved.

SUBMISSIONS

15. On behalf of the applicant it was submitted that two key prosecution witnesses had testified and therefore the applicant ought to be released on bond. It was submitted that there was no allegation of interference with any prosecution witnesses on the part of the applicant and in support of the application the following cases were submitted:-

- 1) Republic Vs Patrick Thurania Kimonye High Court at Nairobi Cr. Case No. 101 of 2015.
- 2) Republic Vs Joseph Lentrax Waswa, High court at Bungoma Cr. Case No. 24/2014.
- 3) Republic Vs Thomas Muthui Nzii, High Court at Nairobi Cr. Case No. 13/2010
- 4) Republic Vs Dwight Sagaray, High Court at Nairobi Cr. Case No. 61/2012
- 5) Republic Vs Titus Kathurima, High Court at Meru Cr. Case No. 105/2013.
- 6) Republic Vs Nahashon Mutua, High Court at Nairobi Criminal Case No. 84/2015.
- 7) Republic Vs Pascal Ochieng Lawrence, High Court at Kisii Cr. Case No. 129/2013.
- 8) Republic Vs James Kiprotich Bore, High Court at Eldoret Criminal Case No. 67 of 2012.

16. On behalf of the prosecution it was submitted that the medical report produced in support of the applicants medical condition did not disclose any life threatening issue that could not be attended to while in prison, it was submitted that the sentiments of the victims family should be taken into account. The advocate watching brief for the family of the victim was not present at the hearing and therefore made no submission.

ANALYSIS AND DETERMINATION

17. From the affidavits and submissions herein the following issues have been identified by court for determination in this application:-

- a) Whether the conditions upon which the applicant had been denied bail have since changed.
- b) If the answer to the above is in the affirmative, whether there still exist compelling reasons to enable the court deny the same his constitutional right to bail.
- c) If the court is inclined to grant the accused bail, what would be the reasonable terms in respect of the same.

18. From the ruling under review, it is clear that this court declined to grant the applicant bond on the ground that there was possibility of the same interfering with two key prosecution witnesses based on the special relationship between them and the accused and further due to the fact that the same was an influential member of society who was a licenced gun holder who was likely to create fear in the potential prosecution witnesses.

19. From the material placed before the court, the said two witnesses have since testified before Lady Justice Lesiit and their evidence is now safely on record. It has further been deposed by the accused person, which has not been controverted, that upon his arrest he surrendered his firearm to the police. This therefore means that the circumstances prevailing as at the time when the same was denied bail have

since changed thereby entitling the same to right of review.

20. From the medical report produced by the Remand prison officer in charge of medical facility it has been indicated that the blood pressure of the applicant continues to fluctuate eliciting fear of complications of impeding multiple organ failure..... which necessitates the need for specialized intervention unavailable within the inmate medical center coupled with Doctor's strike. In the case of **Republic Vs Patrick Thurania Kimonye** I had this to say on a similar situation:-

“The applicant who is in law presumed to be innocent at this stage is under Article 28 of the Constitution of Kenya 2010 entitled to inherent dignity and right to have that dignity respected and protected. The applicant is further under Article 43(1)(c) entitled to the highest attainable standard of health which includes the right to health care services. Taking these fundamental rights into account against the confirmation by the prison authorities that their health facilities cannot afford further treatment to the accused, I am satisfied that the same has made up a case for Review of the orders herein denying bond.”

21. On the issue as to whether there still exist compelling reasons to enable the court deny the applicant his constitutional right to bond, it is clear that the only issues advanced are the sentiments of the family of the victim which must be balanced against the rights of the accused person as was stated by Justice H. A. Omondi in **Republic Vs Joseph Lextrix Waswa (Supra)** as follows:-

“... I only wish to add for the benefit of the deceased family whose counsel was rather agitated at the thought that bail application was being argued in their absence that:-

a) The Constitution of Kenya has now opened a new chapter for any individual who come into conflict with the law – unlike pre-2010 now all offences are bailable unless there are compelling reasons.

b) Consideration of bail should not be used as some form of punishment on the accused person or as a way of appeasing the injured party.

c) The provisions for bail in all offences is based on the long recognized principle that anyone charged in court is presumed innocent until proved guilty.”

I have nothing more to add to the above and hold that there are now no compelling reason to enable the court deny the accused bond.

22. Having so found that there are no compelling reasons, the next issue for determination is as to what will constitute reasonable bail terms; on this issue, the fundamental consideration for court is as to whether the accused person will be able to avail himself for trial. From the material presented to court it is not in dispute that the accused person is a business man with regional and international connections. One of the documents presented to court by the probation officer confirms that in one tender for supply of concrete polls a company associated with him was awarded tender worth close to two hundred million shillings (Kshs.200,000,000/-).

23. With the above in mind, I take the view that the bond terms granted to the same must be those that will compel him to show up for his trial. See **Republic Vs Thomas Muthui Nzii (supra)** where Ochieng J had this to say:

“In setting up conditions, the circumstances of each accused person shall help the court to determine on what was reasonable. For instance, if two persons were charged with murder and one of them was very wealthy whilst the other was a person of modest means, the court may impose heavier conditions upon the wealthy person. I say so because the man of modest means may not be able to raise the high amount of bail, whilst the rich man would not only raise it easily but he might also not feel the pinch, even if he had to forfeit the bail amount.” (Emphasis added)

24. Having taken into account the circumstances of this case including the sentiments of the family of the victim, I am of the considered view and hold that the accused be released on bond pending trial on the following terms and conditions:-

- a) Bond of Kenya shillings ten million (Kshs.10,000,000/-) with one surety of similar amount or in the alternative;
- b) Bond of Kshs. five million (Kshs.5,000,000/-) with two sureties of similar amount;
- c) To report to the Deputy Registrar of this court for mention once after every 30 days at dates to be set by the said Deputy Registrar while approving sureties.
- d) Not to make any contact with any of the prosecution witnesses including those who have testified, either directly or otherwise during the period of his trial.
- e) Not to leave the jurisdiction of this honourable court without the written consent of the Deputy Registrar.

DATED, DELIVERED and SIGNED at Nairobi this 16th day of February, 2017

.....

J. WAKIAGA

JUDGE

In the presence of:-

Miss Mwaniki for the state

Mr. Opiyo for the accused

Mr. Oloo for Kamande for the family of the victim

Accused present

Tabitha court clerk