REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION 137 OF 2016

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS…APPLICANT

VERSUS

BILHA NJOKI MWANGI…………….…………..…..............1ST RESPONDENT

JIMMY NDUNGU WAITITU…….….…………..............….2ND RESPONDENT

PETER MWANGI GAKUNGI……………….....................3RD RESPONDENT

LUCY WAITHERERO MWANGI……………....................4TH RESPONDENT

RULING

The Applicant by way of Notice of Motion dated 1st July, 2016 brought an application seeking, *inter alia*, that a ruling dated 1st June, 2016 in Criminal case 1738 of 2016 before the Chief Magistrate's Court at Makadara, granting the Respondents bond be set aside or revised and for a stay of the ruling pending the hearing and determination of the application. The grounds upon which the application is premised are primarily that the Respondents were facing serious charges which attract strict sentences which increased their chances of absconding once released on bail, that the granting of bail by the trial court was erroneous, that this court must take judicial notice of the increase in the number of attempted murder cases and that the court had discretionary powers under Section 362 of the Criminal Procedure Code to allow the application.

The application is supported by the affidavit of Lilian Ogwora, learned Principal State Counsel sworn on 1st July, 2016. She emphasized the fact that the 1st Respondent is an estranged wife of the complainant in Cr. Case No. 1738 of 2016 where she is charged alongside the other Respondents with attempted murder and in the alternative conspiracy to murder. She states that the offences are serious and attract stiff penalties as a result of which the Respondents would be compelled to abscond the trial. Furthermore, there was strong evidence against the Respondents and that incidents of attempted murder were on the rise in the country and it was in the interest of justice that bail be denied to them.

Learned counsel, Mr. Mwinzi for the Respondent swore a Replying Affidavit on 27th July, 2016 in which he deposed that there were no compelling reasons to warrant a denial of bail to any of the Respondents. Besides, he emphasized that bail pending trial was a constitutional right which cannot be derogated. He cited the cases of **Martin Kihuti Kibe *v.* Republic[2014] eKLR, Republic *v.* Kenneth Wathugi Karume[2016] eKLR, Republic v. Daniel Musyoka Muasya & 2 others[2010] eKLR, Arthur Mungai Mungai *v.* Republic[2016] eKLR** and **Samuel Ngaruiya Kabaru & 2 others *v.* Republic** to

buttress his submission.

In rejoinder, Ms. Lilian Ogwara swore a Supplementary Affidavit on 12th August, 2016 to counter the Respondents' reply. She was of the view that the charges facing the Respondents were serious being of attempted murder and conspiracy to kill. Further, the case was likely to succeed as the charges were not duplex. She was also of the view that the Respondents were granted bail by the trial court because the latter failed to take into consideration the submission made by the prosecution in opposing their release on bail. Furthermore, the trial court had misdirected itself by granting bail for serious offences. The court had therefore ignored the compelling reasons advanced by the prosecution that warranted a denial of bail. She deposed that in addition to other factors, it was in the interest of prosecution witnesses that the Respondents be denied bail because the case touched on the life of the complainant. That is to say that the Respondents were likely to threaten the witnesses so that they could not testify.

She further stated that the 1st Respondent had violated the terms of bail granted to her because she had proceeded to the complainant's house where she broke into his house and stole his personal belongings. This led to filing of **Makadara Cr. Case No. 1851 of 2016** where she was charged with the offence of house breaking contrary to **Section 304(1)(a) of the Penal Code**. It was alleged that on 13th July, 2016, she had broken into the dwelling house of Joseph Muraya Mwangi with intent to commit a felony namely stealing. In that respect, the 1st Respondent had violated the terms of bail in Cr. Case No. 1738 of 2016 as a result of which she was not entitled to bail.

In further reply to the Supplementary Affidavit, learned counsel Mr. Mwinzi filed a Further Affidavit sworn by himself on 22nd August, 2016. In brief, the gist of the affidavit was that it was not true that the 1st Respondent had violated the terms of bail by breaking into the house of the complainant. He urged the court to take into account the fact that both the 1st Respondent and the complainant were a husband and wife who were embroiled in a matrimonial battle including custody of their children. Both were separated and the children were in custody of the 1st Respondent. The house that the 1st Respondent was alleged to have broken into was their matrimonial home registered in their joint names. The 1st Respondent consulted him as her lawyer requesting that she goes back to the matrimonial house to collect clothes for her children. With the advice of her lawyer, the local chief and administration police officers were accordingly informed. Respectively, the 1st Respondent went to their matrimonial home, opened the house and collected children's clothes. Accordingly, at no time did she break into the house belonging to the complainant. Mr. Mwinzi further urged the court to look into the fact that the 1st Respondent no longer tolerated living with the complainant who was cruel to her. He mentioned instances when cases of assault against the 1st Respondent were reported at Buruburu Police Station.

Mr. Mwinzi further deponed that the prosecution was applying selective justice in submitting that compelling reasons existed that warranted a denial of bail to the Respondents. He stated that the cases against the 1st Respondent were filed as a cover up for serious criminal charges the 1st Respondent had filed against the complainant with the police. He also stated that cash bail is a form of security which is open to a party to pay if the terms placed are affordable. Furthermore, none of the charges filed against the 1st Respondent had been proved. She was therefore innocent unless otherwise proved.

Oral submissions were made before me on 5th November, 2016. Nothing new arose from the respective counsel that was not canvassed in the respective affidavits. I would however wish to highlight on points emphasized by the rival sides. I also add that learned counsel, Mr. Wandugi was on record watching brief for the complainant. He supported the application and the submission by the Applicant's counsel. Learned State Counsel, Mr. Mong'are for the Applicant emphasized that there were compelling reasons why the Respondents should not be admitted to bail. He cited seriousness of the offence, attendant hefty penalties, interference with witnesses and violation of previous bond terms. In respect of the latter, Mr. Mongare submitted that the trial court had directed that the Respondents were not to interfere or get in touch with prosecution witnesses. In blatant violation of that order, the 1st Respondent had broken into the house of the complainant and stolen some of his personal belongings. This led to Hon. Ominde to counsel bond for the 1st Respondent in her ruling dated 16th July, 2016. Thereafter, counsel for the 1st Respondent

requested for review of that ruling but Hon. Ominde was engaged in Judicial Service Commission's tasks where she is a commissioner.

The matter was handled by Hon. Nyaga on 30th August, 2016 who indicated that in consultation with Hon. Ominde, the latter had no objection to the reinstatement of the bond for the 1st Respondent. Accordingly, the 1st Respondent was re-admitted to bail on terms earlier given. Mr. Mongare applied for stay of that order which the court declined to grant. This prompted the current application.

According to Mr. Mongare, the terms of bail granted to the 1st Respondent were lenient given that she had earlier breached the bond terms. In the respect of the 2nd, 3rd and 4th Respondents he urged the court to review their bond terms because the same were lenient. Each of them had paid a cash bail of Kshs. 500,000/=. He also emphasized that prosecution witnesses had been threatened. In addition, he was of the view that the affidavits filed on behalf of the Respondents explained extraneous matters unrelated to the case herein.

Learned counsel, Mr. Mwinzi in reply countered the fact that no arguments were made and no reasons were given when the bond for the 1st Respondent was reinstated. He submitted that he made an oral application on behalf of the 1st Respondent to which Mr. Mong'are opposed. The learned magistrate, Hon. Nyaga made a ruling after consulting with Hon. Ominde. He emphasized that none of the offences the Respondents were facing was a capital offence. Both were bailable as bond is granted even in capital offences. Moreover, he urged the court to take into account the circumstances of both cases. More importantly was the fact that the complainant in both cases and the 1st Respondent were an estranged wife and husband respectively. They were both engaged in matrimonial disputes which had culminated into the criminal cases. In addition, the Respondents had consistently attended all court sessions and it was not true that they were interfering with prosecution witnesses. He emphasized that the bond terms on which the Respondents were released were not lenient and that enhancement of the same would be tantamount to denying bail altogether. After all, the Respondents were of meager earnings and could not afford bail terms that were higher than already given.

I have accordingly considered the respective submissions alongside the case law cited. The underlying consideration for the grant of bail is to secure the attendance of the accused in court when required. As stated in the case of ***Republic v Danson Mgunya & Another*** **Cr. Case No. 26 of 2008 [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.'***

Denial of bail is a limitation on a fundamental human right and freedom as per the guiding constitutional principles under **Article 24(1)** which provides that:

> ***A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—***
>
> ***(a) the nature of the right or fundamental freedom;***
>
> ***(b) the importance of the purpose of the limitation;***
>
> ***(c) the nature and extent of the limitation;***
>
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
>
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive***

means to achieve the purpose.

Article 24(1) must be read together with Article 49(1)(h) which provides as follows:

> ***"An arrested person has the right-***
>
> ***(h) to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released***

Section 123A of the Criminal Procedure Code gives further guidance on considerations to be made in determining whether or not bail should be granted, in the following terms:

> ***'(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.'***

The factors for consideration in granting bail pending trial listed under Section 123(A) above are not cast in stone. Case law jurisprudence has settled on many more factors such as the security of the accused, the seriousness of the penalty upon conviction and public interest. Each case must therefore be considered on its own merit.

From the foregoing, it is trite that bail pending trial being a constitutional right cannot be denied unless there are cogent reasons for denial. In the present case, the Applicant cites the seriousness of the offence and the attendant penalties, interference with witnesses and violation of previous bail terms. I would then have to grapple with the question of whether the Applicant advanced cogent reasons supporting each of the reasons warranting a denial of bail.

My view is that the Applicant did not meet the threshold required by the law to warrant an interference with bail terms accorded to the Respondents. Although the offences the Respondents face are serious, they are bailable. The only reason that would accompany a denial of bail is if the Respondents have demonstrated that they cannot avail themselves for trial or have interfered with witnesses since their release on bail. The record of the trial proceedings bear witness that none of them has ever absconded from court so as to warrant this court to deny them bail.

I emphasize that the allegation of interference with witnesses was not substantiated. The Applicant alluded that the 1st Respondent broke into the house of the complainant and stole some of his personal belongings. But the court cannot shut its eyes to the circumstances of **criminal case no. 1851 of 2016** in which the 1st Respondent is charged with another with house breaking. What is factual is that both

herself and the complainant are estranged wife and husband respectively who are currently embroiled in a matrimonial dispute as well as dispute of custody of their children. It was not controverted that on the date it is alleged she broke into the complainant's house, she actually went into their matrimonial house owned jointly by herself and the complainant and using a set of her keys, opened the house and collected her children's clothes. Indeed, a copy of the Certificate of Lease for the house Nairobi/Block 79/795 was exhibited on the further affidavit by learned counsel for the Respondent. The same clearly shows that the house is jointly registered in their both names. With respect, the court cannot fathom how the 1st Respondent could go to her own home to steal. If that is the evidence the prosecution alleges is strong against her, then they may have to scratch their heads further in proving their case.

Be that as it may, this court has not seen the prosecution witness statements so as to ascertain the nature of the evidence likely to be tendered not only against the 1st Respondent but all the Respondents. I am unable, in the circumstances, to deduce that there exists strong evidence for the prosecution. In the same spirit, the fact that the 1st Respondent went into her own home cannot be equated to interference or threatening of witnesses. She had revisited her house for a good course; to collect clothes for her children. Moreover, the local administration was aware about what was happening. Again, it is not lost in the court's mind that the presumption of innocence until conviction is a benefit owed to an accused person in a trial. The Respondents must therefore not be viewed in the light that they are guilty persons who do not deserve bail.

On whether the bail terms granted were lenient, I am of a different view. A cash bail of Kshs 500,000/ is by no means little money. The mere fact that the Respondents afforded the cash bail does not imply that it should be revised upwards. I emphasize that bail terms granted to an accused person must be affordable short of which amounts to a denial of the same. I put a rider that nevertheless, bail/bond terms must be commensurate with the offence. In the present case, this guideline was properly observed by the learned magistrates handling both criminal case Nos. 1851 and 1738 of 2016.

From the foregoing, it follows that this is an application that must fail. I must note however that the mere fact that Hon. Nyaga reinstated the bail for the 1st Respondent on behalf of Hon. Ominde was a procedural administrative duty. Hon. Nyaga clearly recorded that he had consulted the trial magistrate Hon. Ominde who had given authority for reinstatement of the bail. He did nothing wrong or unusual. It is gainsaid then that there was nothing irregular, illegal or incorrect that was done by the trial court in admitting the Respondents to bail that would necessitate this court to invoke a revision of such an order.

In the result, I dismiss the application. The 2nd to the 4th Respondents remain on the bond terms given by the trial magistrate. I order that the 1st Respondent be and is hereby forthwith released from custody. Both files in Makadara Criminal Case numbers 1738 and 1851 of 2016 shall be mentioned on 16th March, 2017 before the respective trial magistrates for purposes of taking hearing dates. It is ordered that the files be remitted back to the trial courts.

DATED AND DELIVERED THIS 7TH DAY OF MARCH, 2017

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. M/s Atina h/b for Mr. Mong'are for the Applicant.

2. Mr. Mwinzi for the Respondents.