



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT KIAMBU HIGH Court MISC. CRIMINAL APPL. NO.
27OF 2017**

WALFORD NGUGI.....1ST APPLICANT

EUNICE WAITHERA.....2ND APPLICANT

SALOME NJERI MUTHEE.....3RD APPLICANT

VERSUS

REPUBLIC..... RESPONDENT

BAIL RULING

1. The three Applicants were presented before the Honourable Onsarigo in Kikuyu PMCC No. 439 of 2017 on 28/04/2017 charged with the offence of assault causing actual bodily harm contrary to section 251 of the Penal Code. They promptly applied for bail. The Prosecution opposed bail. The Honourable Onsarigo reserved ruling which he delivered on 02/05/2017 denying bail.
2. The Applicants are aggrieved by the refusal to grant bail and have approached this Court for reconsideration as by law entitled.
3. The Applicants filed a Notice of Motion dated 04/05/2017 with a Supporting Affidavit of even date. They filed a Supplementary Affidavit thereafter.
4. The State has persisted in opposing bail and orally opposed the Application during the hearing on 16/05/2017. Mr. Gacheru, Advocate for the Applicants, also orally submitted in support of the Application.
5. Both parties agree that bail is a constitutional right enshrined in Article 49(1)(h) of the Constitution. The test the Court is required to use to deny bail in appropriate cases is similarly stated in the Article 49(1)(h): it is only upon the showing of compelling reasons by the Prosecution that the Court will deny bail.
6. Hence, the Constitutional standard for denying bail is “compelling reasons” test. The burden is on the Prosecution to establish the existence of the “compelling reasons” that would justify denial of bail. Our emerging jurisprudence on the question is clear as to the kind of evidence needed to establish the “compelling reasons”: the evidence presented must be “cogent, very strong and specific evidence” and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. See, for example, ***R v MuneerHarron Ismail & 4 Others [2010] eKLR***. However, it is also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons for purposes of bail beyond reasonable doubt. Indeed, such a standard would be impossible to meet at this point in the trial. See, ***Bail and Bond Policy Guidelines*** at p. 19.

7. The question presented here, then, is whether the Prosecution did, on a balance of probabilities, demonstrate compelling reasons to deny bail. The Prosecution's argument in the Court below, which it has reiterated in this Court, is that there is a high likelihood that the Applicants will interfere with the Prosecution witnesses by threatening and intimidating them.

8. To demonstrate this likelihood, the Prosecution argued in the Court below that this is the second case in the series where the Complainant is the victim of the Applicants. In a previous case to wit Kikuyu PMCC No. 496 of 2016 the 1st and 3rd Applicants were charged with creating disturbance in a manner likely to cause a breach of peace contrary to section 95(1)(b) of the Penal Code. The particulars of that offence are that the 1st and 3rd Applicants created disturbance in a manner likely to cause a breach of the peace by threatening to beat up the Complainant (Eunice Wanjiru) and by calling her a prostitute.

9. In that case, the 1st and 3rd Applicants were admitted to bail in the sum of Kshs. 5,000/= on 12/05/2016.

10. In the present case, all the three Applicants are charged with the offence of causing actual bodily harm to the same Complainant. Hence, the Prosecution argued successfully before the Learned Magistrate that it is quite likely that the Applicants will again threaten or harm the Complainant if admitted to bail.

11. The Learned Magistrate considered the evidence before him and after correctly noting the outer limits of the right to bail, accepted the reasons given by the Prosecution as sufficient to form compelling reasons to deny bail. In pertinent part, the Learned Magistrate stated:

Taking all issues in totality, it is not in dispute that the Accused Persons had earlier been charged in Criminal Case No. 496 of 2016 which is on-going and the Complainant is the same one in the present matter. The State has a duty to ensure public safety between the time of arrest and trial of Accused Persons, and a duty to protect the integrity of the Criminal Justice System.

This means that where there is convincing evidence that an Accused Person may undermine the integrity of the Criminal Justice System by intimidating witnesses, then the Court may deny bond [or bail] to the Accused Person.

12. I am unable to say that there is any part of the Learned Magistrate's reasoning which I disagree with. The Learned Magistrate's reasoning cannot be faulted.

13. As the Bail/Bond Policies guide, where there is strong evidence of the likelihood of interfering with prosecution witnesses, and the court cannot impose conditions to the bail or bond to prevent such interference, that provides compelling reason for denying bail. Additionally, on occasion, it is necessary to deny bail so as to protect the integrity of the Criminal Justice System. This is so, for example, where an Accused Person has shown a propensity to disobey conditions placed by the Court on his or her admittance to bail. Additionally, the need to protect the victim of the crime from the Accused Persons constitutes a compelling reason for denying bail. See **R v Margaret Nyaguthi Kimeu [2013] eKLR** for this proposition

14. In the present case, both the elements of likelihood of interfering with crucial witnesses and the need to protect the victim of the crime are present and are demonstrated to the requisite threshold by the acceleration of the conflict – from mere threats to actual bodily harm. On the basis of these facts, a Court is able to conclude, without breaching the presumption of innocence, that on a balance of probability there is a likelihood that the witness will be interfered with or that the Complainant needs to be protected during the pendency of the trial.

15. However, I would quickly point out, as Mr. Gacheru submitted, that the evidence of this likelihood to interfere with witnesses and the need to protect the Complainant is only present as regarding the 1st and 3rd Applicants who are the Accused Persons in PMCC No. 496 of 2016. The 2nd Applicant is facing charges for the first time. She was entitled to individualized consideration of her bail application. If the

Learned Magistrate had done so, he would have concluded that, on balance, she was entitled to bail.

For this reason, I will proceed to admit the 2nd Applicant to bail in the sum of Kshs. 20,000.

16. In addition, the 2nd Applicant is ordered to refrain from contacting the Prosecution Witnesses – and, in particular, the Complainant -- in any way whether directly or indirectly and whether electronically, in person, through agents or by phone. Any breach of this condition will lead to an automatic cancellation of bail.

17. Consequently, the directions of the Court will be as follows:

a. The decision by the Learned Trial Magistrate to deny bail to the 1st and 3rd Applicants is hereby affirmed. The 1st and 3rd Applicants shall remain in custody during the pendency of the trial.

b. The 2nd Applicant shall be admitted to bail in the sum of Kshs. 20,000/=.

c. The 2nd Applicant shall refrain from contacting the Prosecution Witnesses – and, in particular, the Complainant -- in any way whether directly or indirectly and whether electronically, in person, through agents or by phone. Any breach of this condition will lead to an automatic cancellation of bail.

d. In view of the denial of bail, the criminal case shall be fixed for hearing on a priority basis. This being a simple case of assault causing actual bodily harm, the Learned Trial Magistrate shall do all in his power to complete the trial within forty-five days of today.

18. Orders accordingly.

Dated and delivered at Kiambu this 12th day of June, 2017.

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JOEL NGUGI

JUDGE