



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KABARNET

MISC CRIMINAL APPLICATION NO. 56 OF 2017

REPUBLIC.....RESPONDENT

VERSUS

A A M.....APPLICANT

RULING

1. This is a ruling on an application for revision of the decision of the Senior Resident Magistrate Eldama Ravine in Sexual Offence Case No. 6 of 2017 made on 10th April 2017 where the court cancelled bond earlier granted to the accused on allegations of threats to the complainant. The trial Court was informed by the Prosecutor that a report had been made by the mother of the complainant under Police Station Occurrence Book OB No. 24/2/4/2017 “that on 02.04.2017 a man known physically to her came to their house while armed with a panga while shouting he will kill all her family if they do not ensure the release of his relative A M who is the accused herein who was suspected to have defiled complainant herein.”

2. The trial Court cancelled the bail previously granted to the accused ruling as follows:-

“Court: Considering the intense of the offence and the status report and in particular the prosecution statements of threats against the complainant and victim, I find that the accused should remain in custody pending hearing and determination of the suit herein and as such the earlier bond terms awarded are cancelled.”

3. The accused then filed the Notice of Motion dated 14th June 2017 seeking orders for the revision of the said ruling as follows:

“That this honourable court do exercise its discretion in revision of the ruling by the Hon Senior Resident Magistrate R. Yator made on the 10th April 2017 wherein the said magistrate cancelled the bail/bond terms earlier issued to the accused /applicant on the 6th April 2017 in contravention of the applicant’s constitutional rights.”

4. In opposing the review of bail the DPP filed a replying affidavit sworn by PC (W) JACKLINE KEMUMA on the 27th June 2017 the Investigating Officer offered as grounds for refusal of bail, in material part, as follows:

“4. That I therefore humbly request this honourable court to deny the accused person family bond because of the following ground:

(i) That the accused has been using his family member to threaten the complainant and her family so that the case can be withdrawn.

(ii) That the accused is using his family to seek reconciliation with complainant family hence coursing them to withdrawal the matter which is contrary to sexual offences act.

5. That the case of threatening have been reported to E/Ravine police station wide OB No. 24/2/2017 where the complainant and the family were forced to relocate from [particulars withheld] where they reside to [particulars withheld] where they felt secure and also the victim was transferred from [particulars withheld] Primary which is within [particulars withheld] School for safety.”

5. The Investigating Officer attached extracts of the Occurrence Book showing the reports of the threats made on the complainant’s family. Significantly, OB. No. 28 of 2nd April 2017 at 21.45 hrs. records as follows:

“Return: IP Kerio, PC Ijaka and PC (Drv) Michemi back from scene at [particulars withheld] and established that the family vide OB24 of date [2/4/2017] were indeed in a state of worries from the neighbouring community, they had packed their belongings and we ferried them to Kapdening estate where they had found a house to rent. We took them and their belongings and are now safe. Now back to Station.”

6. Counsel for the accused urged the court to grant bail in revision of the trial court’s order to give effect to the accused’s right to innocence until proved guilty and to education as a secondary school Form 4 candidate who is scheduled to sit for his exams in October later in the year, and further that it was not the accused who had threatened the complainant and in any event the complainant had been moved to safety. For the DPP, while conceding that the accused was a Form 4 candidate, it was urged that, in view of the threats on the complainant and her family, the Court should direct an expedited hearing of the case to enable the complainant to testify before a consideration of release of the accused on bail.

Determination

7. It was clear from the OB reports that the alleged threats were made by persons other than the accused. Even if the threats were made for his apparent benefit, responsibility for such threats should be placed where it falls on the makers of the treats themselves and not the accused as a beneficiary. The accused does not incur liability for the actions of others unless a common intention within the meaning of section 21 of the Penal Code can be demonstrated at the trial. As of now, where no charges have been preferred for the alleged threats, to withdraw bail previously granted to the accused is to punish him for the alleged wrongs of others even before their criminal responsibility has been proved in a court of law.

8. The Police should investigate and personally prosecute the offenders with respect to the threats on the complainant.

9. The Police have confirmed that the complainant and her family are now safe, and the prosecution’s fear that they will be coerced into withdrawing the criminal complaint is now without basis. Moreover, a complainant cannot withdraw a sexual offence charge by compromising the case with the accused.

10. In view of the short period before the Form 4 Examinations commence in October, the applicant understandably requires time and facility to prepare for the examinations and the denial of bail will clearly affect his studies.

11. The Court considers that the interests of the accused based on right to innocence and the Prosecution’s public interest concerns for effective prosecution of crime will in the circumstances of this case properly be balanced so as to allow the accused time and opportunity to prepare for his forthcoming examinations and at the same time maintaining the prosecution’s case against him by protecting their key witnesses. Such balance will be achieved in my view by an order restoring bail subject to a condition that the accused shall not personally or by proxy communicate with the prosecution witnesses pending trial.

Orders

12. Accordingly for the reasons set out above, the Courts makes the following orders:

1. The applicant's Notice of Motion dated 16th June 2017 is granted in terms that the Ruling and order of the Senior Resident Magistrate Eldama Ravine in Sexual Offence Case No. 6 of 2017 made on 10th April 2017 cancelling bail previously granted to the accused is revised and set aside pursuant to section 364 (1) (b) of the Criminal Procedure Code.

2. The accused shall remain on the bond terms previously granted by the trial court.

3. The grant of bail is conditional upon the further condition that the accused shall not personally or by proxy communicate or otherwise make contact with the prosecution witnesses in his case.

4. The Prosecution shall have liberty to apply in this respect.

13. There shall be no order as to costs.

DATED AND DELIVERED THIS 14TH DAY OF JULY 2017.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mr. Moranga Advocate for the Applicant

Ms. Macharia Ass. Deputy Director of Public Prosecutions.