



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KABARNET**  
**CRIMINAL CASE. 70 OF 2017**  
**(FORMERLY NAKURU HC CR. CASE NO. 5 OF 2017)**

**REPUBLIC**

**VERSUS**

**PETER KIBE WAMUGI.....ACCUSED**

**RULING**

1. I have considered the Notice of Motion dated 12<sup>th</sup> June 2017 for review of the ruling of this court of 20<sup>th</sup> April 2017 refusing bail to the accused person herein. Bail was refused on the ground of the want evidence on the fixed abode of the accused person as recommended by the Probation Officer's report filed herein. The Court, however, gave liberty to apply in terms that the ruling was "without prejudice to any subsequent application by the accused showing his place of abode and otherwise demonstrating security for his attending his trial while out on bail."

2. The Prosecution filed an affidavit by the Investigating Officer of 20<sup>th</sup> June 2017 principally urge that the accused will when released interfere with their key witnesses who was his girl-friend and that there are no changed circumstances to warrant the review of bail.

3. In his supporting affidavit to the application for review the applicant's father and mother who offer to stand surety for the accused have demonstrated without rebuttal by the Prosecution that he has fixed abode at Makutano village of Koibatek Sub-county where he lives, according to a letter by the Area Chief, with his wife, children and other members of the his parents' family. Although the letter of the Area Chief is not made on oath neither is the probation officer's report which had indicated that the accused had no fixed abode. Both are prepared by public officers and the court is not able to discount one for the other.

4. The accused should have produced this evidence at the hearing of the first application for bail in response to the probation officer's report. However, this default is not fatal as to bar reconsideration of the bail application when weighed against the right to bail as a constitutional right under Article 49 of the Constitution and considering that the applicant has now demonstrated fixed abode. As observed in its earlier ruling in this matter, the Court also considers the caution by the Court of Appeal in *Kyalo v. R* (2009) KLR 325 in accepting wholesale probation officer's reports which are not made on oath or subjected to cross-examination, the same as with the Chief's letter.

5. In these circumstances, I consider that there is sufficient material before the Court now as to constitute

changed circumstances to enable it to exercise discretion in allowing the accused bail upon terms suitable to secure the attendance to court by the accused.

6. The Court is, however, concerned with the alleged threat to prosecution's evidence by reason of likely interference with their key witness who is said to be the accused's girlfriend. The nature of a relationship between boy and girlfriend does not amount to a relationship of husband and wife within the meaning of section 127 (4) of the Evidence Act as would render the girlfriend incapable of being a competent and compellable witness for the Prosecution under sub-section (3) thereof. Being a competent and compellable witness, the prosecution's case will be affected if the accused's girlfriend's testimony is interfered with by the accused.

7. Article 20 (3) (b) of the Constitution requires the Court however to adopt an interpretation that most favours the enforcement of the Bill of Rights, and consider that the accused's right may be upheld in a manner that takes care of the prosecution's concern and public interest in successful prosecution of criminal cases.

8. Any threat to the witness's life must be dealt with by the police in the usual fashion pursuant to the police service's duty to protect the life, limb and property of the citizen.

### **Orders**

9. The Accused shall be released upon execution of his own bond of Ksh.300,000/- with two (2) sureties of the same amount.

10. The grant of bail is conditional upon further condition that the accused shall not make any contact, physical or tele or other communication, in person or by proxy, with any of the prosecution witnesses and the Prosecution is at liberty to apply for cancellation of the bail upon any breach of this condition.

11. The accused shall attend the Deputy Registrar of the Court every thirty (30) days pending hearing and determination of his trial.

**Dated and delivered this 13<sup>th</sup> day of July 2017.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

Mr. Terer Advocate for the Accused

Ms. Macharia, Assistant Deputy Director of Public Prosecutions