

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.284 OF 2015

DAVID OTIENO OTIENO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant, David Otieno Otieno was charged with seven (7) counts under both the **Penal Code** and the **Firearm Act**. The Applicant pled not guilty to the charges when he was arraigned before the trial magistrate's court. His application to be released on bail pending the hearing of the case was disallowed by the trial court. The Applicant has moved to this court seeking to have the said decision revised and for this court to admit him on bail pending trial. The application is opposed. The investigating officer of the case, Corporal Nicholas Warui swore a replying affidavit in opposition to the application. This court has also seen an affidavit sworn by one of the victims of the alleged crime, Francisca Munyiva Nyamai who deponed that since the Applicant's arrest and arraignment in court, he has, through his relatives, made phone calls to her with a view to intimidating her into withdrawing the complaints that she and her son had lodged against the Applicant. The assertion made by the victim tallies with the prosecution's objection to the Applicant being released on bail pending trial as it is of the view that the Appellant will likely interfere with the witnesses.

During the hearing of the application, this court heard the submission made on behalf of the Applicant by his advocate Mr. Mathenge. He submitted that the prosecution had not established an iota of evidence the allegation that the Applicant had interfered with the witnesses. He stated that the allegations that the Applicant had communicated through his relatives to the witnesses was not supported by any evidence. He urged the court to take into account that the Applicant and the complainants were known to each other prior to the commission of the alleged offence. The incident that is the subject of the criminal case resulted in the Applicant being dismissed from the police service. The Applicant gave an undertaking that he would not interfere with witnesses if released on bail pending trial. He promised to reside far away from where the witnesses live. Learned counsel submitted that the court should take into consideration that the Applicant is considered, in law, to be innocent until the charges brought against him are established in a court of law. If the court is of the opinion that the Applicant may interfere with witnesses, it may impose appropriate conditions which the Applicant was ready to abide by.

Ms. Aluda for the State opposed the application. She submitted that there existed a love relationship between the Applicant and the mother of the complainant. She urged the court to take into account the circumstance which the offence occurred. She also submitted that the interest of the victims of the crime should be taken into account. There was sufficient evidence placed before the court that indeed the Applicant, if released on bail pending trial, will interfere with the witnesses. The Applicant lived in the same neighbourhood with the complainant and other witnesses. There is likelihood therefore that the Applicant would interfere with the witnesses. She urged the court to take into consideration the injuries that the victims of the attack sustained and the fact that there is a possibility that the offences were crimes of passion. For the safety of the witnesses, it was important that the Applicant remains detained in custody until the hearing and determination of the case.

The principles to be considered by this court in determining whether or not to release the Applicant on bail pending appeal is well settled. The principles to be considered by this court in deciding whether or

not to release the Applicant on bail pending appeal were set out by the Court of Appeal in Jivraj Shah – vs- Republic [1986] KLR 605 at page 606:

“There is not a great deal of local authority on this matter and for our part such as we have seen and heard tends to support the view that the principal consideration is if there exist exceptional or unusual circumstances upon which this court can fairly conclude that it is in the interest of justice to grant bail. If it appears prima facie from the totality of the circumstances that the appeal is likely to be successful on account of some substantial point in law to be urged, and that the sentence or a substantial part of it, will have been served by the time the appeal is heard, conditions for granting bail will exist. The decision in Somo –vs- Republic [1972] E A 476 which was referred to by this court with approval in Criminal Application No.NAI 14 of 1986, Daniel Dominic Karanja –vs- Republic where the main criteria was stated to be the existence of overwhelming chances of success does not differ from a set of circumstances which disclose substantial merit in the appeal which could result in the appeal being allowed. The proper approach is the consideration of the particular circumstances and the weight and relevance of the points to be argued. It is almost self-defeating to attempt to define phrases or to establish formulae. There is a helpful passage in Archbold, Criminal Pleading Evidence and Practice, 41st Edition page 783, paragraph 7 – 86.”

In present application the prosecution alleges that the Applicant will likely interfere with witnesses if he is released on bail pending trial. On the other hand, the Applicant has forcefully submitted that the prosecution placed no evidence before the court to support its claim that he would interfere with witnesses if he is released on bond. Having evaluated the facts of this case as averred by the parties to this application in their opposing affidavits, it was clear to this court that the prosecution established to the satisfaction of this court that indeed the Applicant is likely to interfere with witnesses if he is released on bail pending trial. What persuaded this court was the averment made by the investigating officer to the effect that the Applicant had previously assaulted the mother of the complainant in 2013. However, charges were not brought against him because the Applicant reached an out of court settlement with the mother of the complainant. That the Applicant again is alleged to have assaulted the complainant and his son, this time using a firearm, clearly convinced this court that the Applicant is a person who has a propensity for violence against the complainant and members of her family. In the assessment of this court, it will not be beyond him to intimidate the said witnesses before they offer their testimony in court. Although the law presumes the Applicant to be innocent, this court cannot overlook the fact that the Applicant may subvert the course of justice by intimidating prosecution witnesses before they testify in court. The fact that the Applicant is a former police officer, persuaded this court when reaching this determination.

In the premises therefore, this court upholds the decision of the trial court in denying the Applicant bail pending trial. The Applicant shall be at liberty to renew his application to be released on bail pending trial after all the civilian witnesses (including the complainant and his mother) have testified. Meanwhile, the Applicant shall remain in custody until the said witnesses have testified. It is so ordered.

DATED AT NAIROBI THIS 11TH DAY OF FEBRUARY 2016

L. KIMARU

JUDGE