



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISC. CRIMINAL APPL. NO.22 OF 2015

(Consolidated with Const. Pet. No.6 of 2015)

ALEX ONYANGO OTIENO.....APPLICANT

VRS

DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

RULING

The applicant is charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act. The alleged incident occurred on 29th March, 2015. He was arrested on 13th April, 2015. Since then he has been in custody as the trial court declared his request to be released on bail.

The application dated 19/5/2015 seeks to have the applicant released on bail pending the hearing of Criminal Case Number Malindi 206 of 2015: It is supported by his affidavit sworn on the same date. Mr. Mayaka, counsel for the applicant submitted that the trial court declined to release the applicant on bail as it was waiting for a pre-bail report. Counsel maintains that the absence of such a report cannot be a reason to deny the applicant bail. It is further submitted that the applicant's Constitutional rights are being violated as there are no compelling reason to deny the accused bail.

Mr. Nyongesa, prosecution counsel, opposed the application. Counsel relied on the replying affidavit of Mr. Vincent Monda, Assistant Director of public prosecution. Mr. Nyongesa contends that the applicant is interfering with witnesses. The complainant's mother has sworn an affidavit to that effect. It is also submitted that the prosecution applied to have the applicant's passport deposited in court and this request was readily accepted. Mr. Nyongesa maintains that there is a possibility that the applicant will run away as he is a flight risk. The trial court noted that the rights of a minor are paramount. It is also submitted that the application is premature as the trial court is waiting for reports from the probation officer and children officer before making its finding.

I have read the replying affidavit of Mr. Monda. The main issues being raised are that the conduct of the applicant and his agents or representatives makes it difficult for the accused to be released on bond as they are interfering with witnesses. It is also stated the complainant is traumatized and fears the applicant. The prosecution is willing to fast track the matter.

The starting point in any legal dispute of this nature is reference to the Constitution. The applicant is charged with the offence of defilement. The offence is bailable both under the current Constitution and the previous Constitution. Article 72 of the old Constitution outlawed bail in cases where the accused

persons were charged with offences punishable by death. Article 49 (h) of the 2010 Constitution literally makes all offences in Kenya bailable. The only limitation is compelling reasons. In other words, where there are compelling reasons in relation to the case at hand, the accused person can be denied bail. In essence therefore, despite bail being a Constitutional right, it can be deprived where compelling reasons are established. As to what constitutes compelling reasons is not defined in the Constitution and has to be determined by the dictates and circumstances of each case.

I have gone through the record of the trial court. Two witnesses have so far testified. The complainant and her mother have testified. On 22/4/2015 the trial ruled that the complainant and her mother were to testify and a pre-bail report plus a children officer's report were to be filed before the court could consider releasing the accused on bail. On 9/6/2015, the trial court made a second ruling and declined the applicant bail. It is indicated in the ruling that the accused is a flight risk and that he has been interfering with witnesses.

The probation officer's report is dated 29/5/2015. The report indicates that the remaining witnesses are state officers who are unlikely to be compromised. It is also indicated that the release of the accused is unlikely to disturb public orders or undermine peace and security. It is concluded that there are no cogent reasons and facts not to release the accused on bail.

The District Children's Officer also prepared a report dated 29/5/2015. It recommends that the child undergoes counselling and that measures should be put in place to ensure her protection.

Since the applicant was charged with the offence, he has been in custody. It is quite difficult to understand how he could send emissaries to influence the prosecution witnesses. The two vulnerable witnesses have so far testified. I do agree with the probation officer's report that measures can be put in place in the bond terms. I have gone through the evidence on record. However, my view is that one should not be deemed as having been convicted even before the case is concluded. An accused person is deemed to be innocent until when the judgment convicting him is read. The prosecution has not closed its case. The accused has not told the court his side of the matter. The case is not listed for hearing on 24/9/2015. The trial magistrate is on maternity leave and is expected to be back by that time.

Since the complainant has testified, the issue of interfering with witnesses seems to be settled. The only remaining issue is whether the applicant is a flight risk. It is quite difficult to ascertain the intentions of a human being. It only takes a minute thought and one decides to run away. Even those charged with minor offences at times abscond. Whenever bail is granted, there is the residual worry as to whether the accused would turn up during the hearing of the case. That is why sureties are called into play to ensure availability of the accused. If such worries are expounded to the extent of concluding that the accused would not turn up for his/her case, then one will be released on bail. The end result would be clawing back a Constitutional entitlement.

The accused has been in custody since April 2015. It is over four (4) months now. The next hearing date is in September. That is two months away and it is not clear whether the case will be concluded on that date. Given the circumstances of this case, I do hereby grant the accused bail in the following terms and conditions:-

1. The accused person to execute a personal bond of Kenya shillings ten million (Ksh.10,000,00/-).
2. The accused person to deposit his passport in court which should be kept under lock and key by the executive officer.
3. The accused to provide a Kenyan surety of Kenya shillings fifteen million (Ksh.15,000,000/-).
4. The accused to report to the DCIO, Malindi Police Station or his representative twice each month, that is to say on the 15th and 30th day of each month.
5. The accused persons to cease any contact with the complainant's family or any expected witness.

6. The trial court shall be at liberty to cancel the accused's bail terms should it feel that there is any form of non-compliance with the same.

In the end, the applicant's application for bail is granted in the above terms.

Dated, signed and delivered at Malindi this 11th day of June, 2015.

SAID J. CHITEMBWE

JUDGE