REPUBLIC OF KENYA

IN THE HIGH COURTOF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 216 OF 2015

REPUBLIC.....APPLICANT

VERSUS

HILLARY OKEYO.....RESPONDENT

RULING

By Notice of Motion dated 16th October 2015, brought under **Article 165(6) (7), Section 362 of Criminal Procedure Code** and all other enabling provisions of the Law, it is prayed that this Court revises the decision of the **Chief Magistrate's Court Milimani Criminal Case No. 1719 of 2015** made on 16th October 2015 granting bail to the Respondent. The Respondent Hillary Okeyo was charged with defilement with an alternative count of indecent assault. He was released on a bond of Kshs. 2 million with one surety of a similar amount and an alternative of cash bail of Kshs. 500,000/=. The application first came before me for hearing Ex-parte on 19th October, 2015 when the order granting the Respondent bail was stayed. Hearing inter-partes proceeded on 28th October, 2015.

The Applicant who is the Republic was represented by learned Counsel Mr. Ondimu while the Respondent was represented by leaned counsel Mr. Juma. Mr. Ondimu urged the court to entirely cancel the Applicant's bond pending trial because there was likelihood that he would abscond if released on bail. He advanced the reason that the offence with which the Respondent was charged was serious and if convicted, carries a minimum sentence of 20 years and may be enhanced to life imprisonment. The complainant in the criminal case is said to be a girl in form one class aged 13 years. He submitted that there was a high likelihood that the Respondent would interfere with the witnesses because he still is a teacher in the school where the complainant is a student as well as a majority of the other prosecution witnesses. His case was that the Respondent had not yet been interdicted which implied that if granted bail he would still go back to the same school where the witnesses would be intimidated to testify against their teacher. He further submitted that the learned trial magistrate in granting bail to the Respondent failed to give weight to the factors that would negate the grant of bail as contained in an affidavit of Police Corporal Woman Agnes Muthee sworn on 14th October 2015. The latter is the Investigating Officer in the case.

Finally, Mr. Ondimu submitted that he was ready and amenable to taking an earlier hearing date other than 24th November, 2015 when the trial is slated to take off. His justification for this submission was that the prosecution did not wish to interfere with end of term exams preparations for the witnesses who are students. Again, the investigations had been completed and the prosecution would, by the end of the

week make all relevant disclosures that would enable the defence to prepare for the trial. Mr. Ondimu referred the court to rulings in **NAIROBI HIGH COURT CRIMINAL MISC. APPLICATION NO.100 OF 2015 – NICHOLAS CHEGE MWANGI & ANOR VS THE DPP** AND **HIGH COURT AT NAIROBI CRIMINAL REVISION NO. 43 OF 2015 – REPUBLIC VS MAKOY MADHAK DEER**, which I shall re-visit hereafter.

Learned counsel Mr. Juma opposed the application. He submitted that the submission that the Respondent would interfere with witnesses was based on the perception that the Respondent was employed by the Teachers Service Commission (TSC). The fact was that he is an employee of the Board of Governors (BOG) and in any case he did not wish to go back to the school after he is granted bail. He argued that the issue of whether or not the BOG should interdict the Respondent is a matter of the administration of the school which ought to determine his fate. He stated that so far, no letter of interdiction had been served upon the Respondent because he is still in custody. He further submitted that the right to bail pending trial is a Constitutional guarantee which cannot be taken away from an accused person. Although a court may deny bail/bond if there are compelling reasons, in the present case, the Applicant had not demonstrated the existence of such compelling reasons. He submitted that the burden squarely lay on the prosecution to prove the existence of those reasons. He urged that the Applicant had failed to prove that the Respondent was likely to interfere with witnesses. In this regard, he referred the court to the rulings in the cases of **REPUBLIC VS HARRISON NJUE NJOGU HIGH COURT AT KERUGOYA CR. CASE NO. 9 OF 2015 AND JOB KENYANYA MUSONI VS REPUBLIC HIGH COURT AT NAIROBI CR. APP. NO. 399 OF 2012** in which it was held that a compelling reason would be such a reason that is forcefully convincing to persuade the court to believe that something is true.

Mr. Juma also submitted that it was not sufficient for the Applicant to advance the reason that the trial can proceed as soon as possible because investigations were complete in mitigating a denial for bail. He justified this owing to the fact that Article 50 of the Constitution guarantees an accused person the right to a fair trial which include the right to be admitted to bail and to be presumed innocent until proved otherwise. In that case, the main reason for granting bail pending trial is so as to ensure that an accused is available for the said trial. The prosecution had so far not demonstrated that the Respondent would jump bail. Mr. Juma submitted that the Respondent was not arrested but he presented himself to the police station to record a statement. Mr. Juma also referred the court to the cases of **REPUBLIC VS DANSON MUGUNYA & ANOTHER HIGH COURT AT MOMBASA CR. CASE NO. 26 OF 2008** in which the accused despite facing a charge of murder were granted bail. Also in the case of **ABOUD ROGO MOHAMED** and **ABUBAKAR SHARIF AHMED ABUBAKAR VS REPUBLIC HIGH COURT AT NAIROBI CR. CASE NO 793 OF 2010** in which the Applicants were charged with Al-Shabaab like activities which, if convicted would have been jailed for life imprisonment but were granted bail. Turning on to the evidence in the affidavit sworn by the investigating officer Corporal Agnes Mutheu, Mr. Juma urged the court that averments in an affidavit do not comprise evidence that the court can rely on denying an accused person bail. He urged the court to dismiss the application.

I have accordingly considered the rival submissions and I take the following view of the application. It is trite that the right to bail pending trial is enshrined under **Article 49(1)(h)** of the Constitution which provides that an arrested person has the right to be released on bond/bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. Such compelling reasons have been emulated to include the following; the accused person being a flight risk, the seriousness of the offence, the gravity of the punishment in the event of a conviction, the likelihood of further charges being preferred against an accused, the security of an accused upon his release, that is, the detention of accused for his protection, personal reasons such as the health of an accused, the weight of the evidence against the accused, that is to say the likelihood of a conviction and the likelihood of interference with witnesses the prosecution would call. Let me emphasis that these reasons are not exhaustive and the court is called to evaluate the circumstances and the merits of any one individual case. The reasons I have enunciated are all brought out in the case of **REPUBLIC VS DANSON MUGUNYA & ANOR (SUPRA).** The learned Judge Ibrahim (as he then was) observed that it did not matter what the accused person was charged with. What was of paramount importance was whether an accused would avail himself when called upon to do so.

I am of a concurrent view that what the court ought to majorly consider is whether an accused person would avail himself for the trial if granted bail. In the present case, the Applicant has advanced the reason that, firstly, due to the gravity of the offence and the attendant punishment in the event of a conviction, the Respondent would abscond the court if granted bail. Secondly, is the likelihood of interference with witnesses. On the issue of the seriousness of the offence, suffice it to say, the Respondent is facing a charge of defilement which by no means is a serious offence. The age of the Applicant who is 13 years will determine the penalty and of course if convicted the Respondent is liable to a minimum of 20 years imprisonment but which can be enhanced to life imprisonment. Learned State Counsel Mr. Ondimu was of the view that the offence had become prevalent and the court ought to be stringent in not granting bail to the offenders. Whilst I agree that the offence is on the increase, the Respondent is not the only offender and cannot be isolated amongst other offenders to teach the society a lesson. Furthermore, although the gravity of the attendant punishment is serious, that of itself, may not mitigate the case for the Applicant. That then leaves me to look into whether the Respondent will avail himself for trial if granted bail.

Under this head, the Applicant advances the reason that the Respondent is likely to interfere with witnesses who are students at High Ridge Girls Secondary School where he worked as a teacher. This means that if he is granted bail, he shall go back to teach in the same school because the employer had not interdicted him. This is a fact that was not disputed by the Respondent's counsel. The only rider to this fact was that the Respondent was not interested in going back to the same school if released on bail. It was also advanced by the Respondent's counsel that the Respondent had not been served with an interdiction letter because he was in custody. This implies that the Respondent's employer (Board of Governors of the school) is still willing and ready to continue receiving the services of the Respondent once he is released on bail. It is common sense that if the BOG was concerned with the plight of the school students who are witnesses and the victim herself, it would do anything within its means in ensuring that the witness do not interact with the Respondent. A letter of interdiction can still be served in prison through his lawyer. If it must be personally given to the Respondent, the BOG ought by now to have done a letter asking the Respondent to collect it from the school. As at the time of canvassing this application, counsel for the Respondent had nothing to show that the school BOG had either written the interdiction letter or was willing to interdict the Respondent. This ultimately means that if the Respondent is released on bail, he shall go back to teach in the same school where the victim and the witnesses are students. As submitted by Mr. Ondimu, the victim and witnesses are form one students and owing to their age, would definitely be intimidated to testify against their own teacher. It is also not imaginable how the Respondent is expected to stay face to face with a person who is crying foul against him for sexually assaulting her.

This court is minded that an accused person is presumed innocent unless and until the contrary is proved. That obtains in the present scenario. However, when an accusation of the magnitude facing the Respondent is at hand the court must deal with caution in interpreting **Article 49(1)(h) of the Constitution.** Thus, where the court is convinced that there exists a compelling reason not to grant the bail, an application for bail must not succeed. I am fully satisfied that for the reason the Respondent is likely to interfere with witnesses, this application is not merited.

I am also in total agreement with observations of my sister judges in their rulings in **R VS HARRISON NJUE NJOGU AND JOB KENYANYA MUSONI VS REPUBLIC (SUPRA)** who defined compelling reasons as;

> ***"as not just any reasons but a reason that must be convincing as to justify the refusal to grant bail pending trial."***

In the **JOB KENYANA MUSONI CASE,** Learned C. W. Githua, J. while citing **REPUBLIC VS MOHAMED HAGAR ABDIRAHIMAN & ANOTHER, 2012 @ KLR** was persuaded that a compelling reason is:

> ***"a compelling reason would be such a reason that is forcefully convincing to persuade this court to believe that something is true.''***

In adopting this definition, *vis a vis* its application in the present case, the facts herein are such that the compelling reason is not only convincing as to believe it to be true but is indeed factually true. I need not belabour to restate that the Respondent has not dislodged the fact that without an interdiction he will revert to teaching in the same school where the victim and witnesses are students. This court needs no further evidence in persuading it that that fact would definitely twist the case into another direction through intimidation and interference of witnesses.

In distinguishing this case with that of **REPUBLIC VS DANSON MUGUNYA AND ANOTHER (SUPRA)**, apart from outlining the paramount considerations as compelling reasons for not granting bail, the court also observed that an Applicant who contests an application for bail must not necessarily rely on an affidavit. For this reason, this court was urged not to be persuaded by the affidavit of the investigating officer in disallowing the application. I concur with the then learned judge in that case that an application of this nature can be considered by oral submissions, the record of the court and any other material that can be placed before it. But again, an affidavit adds weight to any other evidence that may be tendered before the court. The affidavit of the Investigating Officer does reiterate at paragraphs 14, 15 and 16 that the Respondent remains an employee of the school where the victim and witnesses are students. As earlier noted, this fact has not been rebutted; not just sufficiently but not at all. For that reason, it remains a compelling reason why bond must not be granted to the Respondent.

In the case of **NICHOLAS MWANGI CHEGE & ANOR VS REPUBLIC (SUPRA)**, although the Applicants therein were charged with indecent act in addition to robbery with violence, the principle consideration in disallowing bond pending trial was public interest. In the **REPUBLIC VS MAKOY MAKHAK DEER CASE (SUPRA)**, bond pending trial was disallowed mainly because the Respondent was a foreigner and therefore a flight risk. These two factors do not relate to the instant case.

In the foregoing, I hereby revise the decision of the learned magistrate to release the Applicant pending trial which is hereby set aside. The same is substituted with an order denying the Respondent bail pending trial. The Respondent shall remain in custody until the hearing and determination of the case. On the issue of the hearing date, I do not see the need to rush it up because the 24th November, 2015 is not too far away as would prejudice the Respondent. In the intervening period, the Respondent will definitely have sufficient time to prepare for the trial.

I therefore direct that the trial be concluded within a period of six months. If this is not achieved, the Applicant shall be at liberty to request the court for extension of the trial period and also for the Respondent to renew his application for bond before this court. It is so ordered.

DATED and DELIVERED this **2nd** day of **November, 2015.**

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Juma for the Applicant

2. Muriithi holding brief for Ondimu for the Respondent.