



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 44 OF 2015
(Consolidated with Criminal Case No. 64 of 2015)

REPUBLIC

VERSUS

GERALD MUTUKU NYALITA 1ST
ACCUSED

JACKLINE MWENDE MUTUA ALIAS JACKLINE MWENDE KITHOME 2ND
ACCUSED

RULING

The Applications

[1] This is a ruling on bail applications by the accused persons facing a murder charge contrary to section 203 as read with section 204 of the Penal Code in the consolidated charge dated 23rd September 2015. The accused were initially separately charged, respectively, in Criminal Case No. 44 of 2015 by Information dated 20th May 2015 and Criminal Case No. 64 of 2015 by Information dated 20th July 2015. The accused persons had in their separate filed Notice of Motion respectively dated 16th October 2015 and 30th July 2015 sought to be released on bail pending trial. The DPP has by replying affidavits sworn by Inspector Benjamin Katumo, respectively on 3rd November 2015 and 7th October 2015, opposed the accused persons' prayer for bail

[2] The State's principal grounds in opposing bail are that there is a likelihood of the accused persons absconding on account of the severity of the sentence of death upon conviction for murder and a likelihood of interference with the two of the crucial witnesses are relatives of the accused persons, respectively grandsons of the 1st accused and sons of he 2nd accused, and therefore 'there is likelihood that [the accused persons] may interfere with them.' There were no concerns of the accused persons' fixed abode.

[3] Counsel for the 1st and 2nd accused persons, Mr. Okuro and Mr. Makundi, respectively, and Counsel

for the State, Mr. Machogu, made oral submissions on the application and ruling was reserved.

Factors to be Considered

[4] I consider that the likelihood or incentive to abscond by reason of the severity of the sentence is a ground not for refusal of bail but imposition of strict terms of bail to ensure that the accused attends his trial. Otherwise, no person charged with murder would be released on bail on account of its severest sentence of death.

[5] In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49 (1) (h) of the Constitution of Kenya, the Prosecution must, in my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant.

[6] The prosecution did not provide details as to the ages of the witnesses and their control-relationship with the accused persons or the nature of their testimony to enable the court determine compellability of the ground of likelihood to interfere with witnesses. Giving the nature of the evidence to be led by the witnesses need not call for the filing of the witness statements with the danger as submitted by counsel for the DPP of interfering with the impartiality of the court. Only the nature, not the details of it, need be disclosed in an affidavit by the Investigating Officer. From such information and that of the details of relationship of the accused and the accused, the Court would be able to determine the likelihood, or otherwise, of interference.

[7] The court has weighed the accused's constitutional right to bail against the propensity of interference on the basis of the evidence before the Court and found in favour of granting bail to the accused persons who although related to the said crucial witnesses as grandfather and mother respectively, the information as to the ages, mental dependence of the witnesses to the accused and influence-control quotient of the accused persons over the witnesses was not disclosed.

Availability of less restrictive means of achieving protection of witness

[8] The court agrees that interference with prosecution witnesses may go to the root of the prosecution case and its ability to procure successful prosecution of the case in the interests of justice both in Public Interest generally and for the benefit of the relatives of the deceased in the murder case. From the point of view of Article 20 of the Constitution and the duty of the Court to ensure the greatest enjoyment of the rights in the Bill of Rights, the court considers, however, that there are less restrictive means of protecting the witnesses and thereby ensuring a fair trial.

[9] The Case Management requirement of Article 50 (2) (j) of the Constitution requiring that the Prosecution supplies 'in advance of the evidence the prosecution intends to rely on', also removes the ability of accused persons to interfere with witnesses as the witnesses' statements has already been recorded in writing and supplied to the accused, and the likelihood to giving different version of evidence accordingly reduced.

[10] The State may make provisions for the witnesses to be placed on the Witness Protection programme to forestall any likelihood of interference by the accused persons, as it is empowered to do under the Witness Protection Act, 2006 cap. 79. For this purpose, the execution of the order for the release of the accused on bail will be stayed for a period of seven (7) days only to facilitate the arrangements for the placement of the witnesses in the protection programme.

Orders

[11] Accordingly, for the reasons set out above, the court makes the following orders on the accused persons applications of 16th October 2015 and 30th July 2015, respectively:

- a. **Each accused person will be released on bail upon terms that each executes a bond of Ksh.500,000/- with two sureties of similar amount.**
- b. **Each accused will during the period of their bail and pendency of their trial report to the Officer Commanding Police station for the area where the offence was committed every 14 days.**

[12] **The matter will be mention on 17th December 2015 for purposes of fixing a hearing date for the trial.**

DATED AND DELIVERED THIS 3RD DAY OF DECEMBER 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Makundi for 2nd accused and holding brief for Mr. Okuoro for 1st accused

Mr. Abuga for the Respondent

Ms. Doreen - Court Assistant.