REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 54 OF 2013

REPUBLIC::PROSECUTOR

VERSUS

ASBEL KIPROP MALEL::ACCUSED

RULING

The Applicant, **ASBEL KIPROP MALEL**, was charged with the offence of **MURDER**, Contrary to Section 203 as read with Section 204 of the Penal Code . The offence is alleged to have been committed on 1st June, 2013, at Yatia Village, within Elgeyo Marakwet County.

The applicant was first taken to court on 3rd June, 2013. At that time, the police officers had not yet completed their investigations. They therefore sought, and were granted, orders which mandated them to hold the applicant in police custody for a period of seven (7) days.

On 10th June, 2013, the court was informed that the police had completed their investigations. From that date, the applicant was held in custody at the Eldoret G.K. Prison.

When the plea was taken on 19th June, 2013, the applicant pleaded ***"Not Guilty".*** Thereafter, the case was set down for hearing on 11th December, 2013.

Whilst awaiting his trial, the applicant filed an application for Bail pending trial.

PC William Ekiru is the Investigating Officer in this case. He swore a Replying Affidavit, opposing the efforts of the applicant to be granted bail.

The primary reason given by the Investigating Officer, for opposing the application, was that three (3) of the prosecution witnesses were members of the applicant's family. Therefore, the respondent contends that there was a likelihood of the applicant interfering with the evidence of those 3 witnesses.

The Investigating Officer appreciated that the offence of Murder was bailable. However, he also emphasises that Bail was not an absolute right. It could be granted or denied at the discretion of the court.

When canvassing the application, Mr. C.F. Otieno, the Learned advocate for the applicant, submitted that the state's contention, that the applicant may interfere with witnesses, was simply speculation.

Relying on the authority of **JAFFER -VS- REPUBLIC [1973] 1 E.A. 39**, the applicant submitted, that when there was an allegation about the possibility of tampering with a witness, that allegation must be supported by facts which demonstrated tampering or an attempt at tampering.

The applicant also cited the authority of **PANJU -VS- REPUBLIC [1973] 1 E.A. 282**, to back his submission, that before the court can hold that there was tampering, there must be facts to back that position.

As far as the Applicant is concerned, the Respondent only had suspicions, because the Investigating Officer had not put forward facts to support his fears about the possibility of tampering with witnesses.

The applicant had told this court that his parents had already visited him at the prison.

That fact led the Respondent to contend that the visitations made by the Applicant's relatives made real the possibility that he could interfere with their evidence.

But the applicant's view was the very opposite. He says that even though he was in custody, he had a right to be visited by this family. In those circumstances, the Applicant argued that if he had wanted to interfere with the witnesses, he could have already done so, when they paid him a visit.

In the case of **JAFFER -VS- REPUBLIC [1973] 1 E.A. 39**, the prosecution had opposed the application for bail on the grounds that the accused was an influential person in town. Secondly, the prosecution was yet to interview 3 witnesses, so the prosecution feared that the accused would interfere with them, if he was released on bail.

Thirdly, the prosecution feared that the accused would abscond if released on bail.

In determining the application for bail, the learned trial magistrate rejected it because the offence with which the accused had been charged was under the Minimum Sentences Act; the accused was probably not a citizen of Tanzania; and he was not a member of the ruling party TANU.

The accused moved to the High Court, with a new application for Bail. In his ruling, Mnzavas J. expressed himself thus:

"Time and again this court has said that the true test of a bail application is whether the granting of the application will be detrimental to the interest of justice. It is for the prosecution to satisfy the court that this would be so if bail was granted. Dealing with the question of tampering with witnesses, Wilson AG C.J (as he then was) said in Bhagwanji Kakubhai -Vs- Republic, 1 T.L.R. 143:

'The tests laid down (in English Cases) were that there should be a definite allegation of tampering or attempted tampering with witnesses, supported by proved or admitted facts showing reasonable cause for the belief that such interference with the cause of Justice was likely to occur if the accused was released.'

In this case there was no more than mere assertion by the prosecutor that the applicant would interfere with prosecution witnesses if released on bail. There were also fears that he would abscond. There was no evidence whatsoever to support these hypothetical fears."

The state attorney did not oppose the application in that case. And the learned Judge agreed with him, and granted bail.

In the case of **PANJU -VS- REPUBLIC [1973] 1 E.A. 282**, the accused had been charged with the offence of Removing property under lawful seizure. He is alleged to have removed goods from the Tarime Police Station, where the goods had been kept after being lawfully seized.

When the accused applied for bail, the prosecution opposed his application on the grounds, inter alia, that the accused was influencing witnesses to move away. The trial court denied bail.

When the accused moved to the High Court, seeking bail, the prosecution still opposed the

application. This is what the learned Judge noted at page 283:

"The objection was based as follows. That the applicant *'will'* be charged with another offence *'Others'* too will be joined. The applicant will interfere *'with other suspects who have not been arrested hitherto.'* it was no longer alleged that the applicant would interfere with witnesses."

Thereafter, the learned judge addressed an issue which is similar to what was raised in this case. The issue that I am alluding to is the fact, as stated by the applicant, that his parents had already visited him in prison.

On the one hand, the learned state counsel, Mr. Mulati, sees the visits as a confirmation that the applicant would interfere with the witnesses. On the other hand, the applicant says that because he has a right to receive visitors in prison, and because he had already been visited by those whom the prosecution think he would interfere with, if he was granted bail, there was no justification for holding him behind bars.

El-kindy J. addressed the issue in the following manner:

"It was argued that the allegation of *'interference'* was not substantiated, as should, and it could have been done if it had any substance. It was said that the applicant was an old man. His age, in the charge sheet, is given as 51 years. That keeping him in remand does not prevent him meeting people. In other words, the applicant could meet people if he wanted to, irrespective of where he was. As I said to the Senior State Attorney, detaining a person in lock-up so as to prevent him from interfering with witnesses, is the least effective way."

I wish to re-echo those words. The applicant has already confirmed that those witnesses whom he is said to be capable of interfering with, if he was granted bail, had already paid him a visit in prison. Therefore, if the reason for keeping the applicant behind bars is to keep him away from his parents and siblings, that cannot be achieved.

The fact is that three (3) of the witnesses are close relatives of the accused; and considering that the deceased was also a close relative, there might arise a genuine possibility of the accused and those witnesses influencing one another. But the prosecution has not put forward any facts from which this court can make an objective assessment as to whether or not the accused attempted or intended to interfere with any of the witnesses.

In the Case of **PANJU -VS- REPUBLIC [1973] 1. E.A. 282, at page 284,** the learned Judge said:

"As for the allegation of interference with witnesses, I would say that it is not substantiated. It should not have been difficult to do this if such allegation has any basis. The investigator could have sworn an affidavit explaining what he had done and who he had contacted and what the results had been so far. Before any one can say there would be interference with vital witnesses, at least some facts should be led to the court, otherwise it is asking the court to speculate. Speculation has no limit, and it is for these reasons that I refrain from taking into account matters raised by the Senior State Attorney."

From those words, it is crystal clear that, in that case, the Investigating Officer did not swear an affidavit. The court was being asked to conclude that there would be interference, on the basis of statements made from the bar.

In contrast, the investigating Officer in this case, has sworn an affidavit. By his said affidavit, he has stated that there was a likelihood of the accused interfering with the 3 witnesses who were his close relatives.

I believe that it is safe to say that the nature of the relationship between the accused and the witnesses is an important factor, which must be taken into account.

By **"relationship"** I am not only making reference to persons who have a biological connection, through family. There is a relationship between an employer and an employee; a student and the institution at which he was learning; a priest and a member of his congregation; a doctor and his patient etc.

In my consideration view, the interest of justice demands that the court should safeguard witnesses from accused persons who may interfere with their evidence.

Therefore, if the accused was a person who was in a position of authority over the witness, it may be desirable to take steps to keep them apart. But that should not be automatic.

In this case the accused is a son and a brother to 3 of witnesses. He lived in his house, which is within his father's homestead. If he is granted bail, he will return to that house. Invariably, therefore, he will be in close contact with those 3 witnesses. Ordinarily, that could give rise to a legitimate fear that he could influence the witnesses.

But I also note that the 3 witnesses have, of their own volition, visited the acused in prison. Therefore, if he had wanted to influence them, that could already have taken place. On the other hand, if he was yet to try and influence them but was determined to do so, the continued detention in prison would not stop the accused person. He could always try and influence them when they visited him in prison.

Having given due consideration to the particular circumstances of this case, I find that the prosecution has not demonstrated any compelling reasons to warrant a denial of bail.

Accordingly, the accused is to be granted a personal Bond of Kshs. 500,000/- with two (2) sureties of similar sum.

The accused is ordered to take every step to ensure that he does not interfere with any of the prosecution witnesses. Interference, as used in this Ruling, shall be deemed to include making any efforts to influence the nature or scope of the evidence which the witness would otherwise willingly tender to the court, or the exercise of disuading any witness from giving evidence.

DATED, SIGNED AND DELIVERED AT ELDORET

THIS 6TH DAY OF FEBRUARY, 2014

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FRED A. OCHIENG

JUDGE