



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 23 OF 2014

REPUBLIC VERSUS DIANA SALIM SULEIMAN

RULING

0. The accused who has been charged with 12 counts of murder contrary to section 203 as read with section 204 of the Penal Code seeks to be released on bail in accordance with section 49 of the Constitution.
0. In opposing his release on bail counsel for the DPP, Mr. Muteti, offered as compelling reasons three reasons, namely, that
 - i. That the accused is a flight risk and if released, he may not turn out for trial and because of the magnitude of the violence visited on the people of Mpeketoni on the night of 15/16 of June, 2014, there is likelihood that the suspect may be tempted to flee from justice.
 - ii. Instigations into the Mpeketoni incident are still ongoing and we anticipate bringing more charges. We are looking at another 42 charges of murder against the accused. It would be inappropriate to release the accused person on bail at this stage particularly in the circumstances of more charges lined up that he shall be required to answer.
 - iii. Likelihood of interference with witnesses. Investigations are still ongoing and there is every reason to keep away the accused person so that there is no interference to defeat justice.

An affidavit sworn by IP Elvis Charo, the Investigations Officer on the 2nd July 2014 sets out the above matters as raising compelling reasons adding that the accused's own security may not be guaranteed as the ground is still volatile.

0. Counsel submitted that the right to bail is not absolute. Citing the Uganda case of **Paul Kawanga Ssemogerere and 2 Ors v. AG** Constitutional Appeal No. 1 of 2002 and **R v. El Mann** (1969) EA 357 respectively for the propositions of harmonious and liberal interpretation of the Constitution, counsel submitted that Article 24 of the Constitution makes it clear that the enjoyment of rights should not prejudice the rights of others, and that therefore if the accused jumps bail, the victims will be denied justice. He urged that the court should remain alive to the wide interests of justice being served and avoid situation of accused avoiding trial when granted bail and emphasized that the victims of the attacks have a right to know who perpetrated the attacks and have the persons held to account.
0. Counsel for the accused, Dr. Khaminwa, in making an application for the release on bail of the accused, submitted that the court is under a duty to uphold the Constitution and the Law of the land and relied on Article 49 of the Constitution which provide for the release on bail of arrested persons unless there are compelling reasons against the grant of bail. see **R v. Mgunya and Another (2011) (2) EA 265**. Counsel gave the circumstances of the accused as follows - that the accused in the present case has a home in Malindi; he is a diabetic; and he is a driver of matatu

plying between Lamu and Malindi. Accused was born in this country. He has got brothers in Kenya. His parents were born in Kenya although they are deceased. He speaks only one language Kiswahili. He knows of no other language. He cannot run to any other country. His other brother is employed as tuk tuk driver. Counsel requested that court may release the accused on terms including reporting at police station at regular intervals, and his Travel documents may be deposited in court.

0. Counsel assisting Dr. Khaminwa for the accused, Mr. Olaba, gave an alibi notice on behalf of the accused and set out the particulars of the alibi as follows:

The accused was a victim of hijack by thugs or a gang of thugs. He was beaten and left for the dead. He was robbed of the motor vehicle Nissan matatu KBL 684J. The vehicle was later found burnt to the shell. After the accused was left by the gang who left with his vehicle on 15.6.2014 at around 8 - 8.30 pm a few kilometers from Witu just after the junction to Kipini. The accused then came on the road to seek assistance from anybody who would be passing by. Luckily a bus traveling from Mombasa to Lamu owned by Tawakal company came by and the accused waved the driver to stop. When the conductor opened the door, the conductor recognized the accused and gave him a lift. The accused gave the detail of what had befallen him to the driver, the conductor and the passengers in the bus. Once passenger Mbarak Mbwana took a keen interest in the story of the accused. He telephoned the OCS Mpeketoni. We shall be availing him as a witness. The information was ignored. The accused requested to be taken to Mokowe police station to make a report on what happened to him. The bus stopped at Mokowe police station and the accused together with Mbwana alighted. The accused was showing visible signs of injury. They went to make a report. The officer in charge refused to record the report and chased him away. The accused was then hospitalized at Lamu district Hospital in Lamu Island for 3 days being 15, 16, and 17 June, 2014. According to doctor's reports of 30.6.2014 the accused discharged himself against the doctor's advice on the 18.6.2014. The accused has volunteered to go to Mpeketoni police station to make a statement. He was received by OCS, the Inspector General of Police and the Cabinet Secretary, Interior.

0. For the accused's counsel the alibi demonstrated the weakness of the prosecution's case against the accused while for the prosecution, it was further demonstration of the need for further investigations as it had intimated and of the need to hold the accused until the investigations are complete, stating that the nature of the investigations stretched from financiers, organizers and the minds behind the attacks.
0. As I understand it, the constitutional provisions on bail under Article 49 (h) for arrested persons **'to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released'** is designed to give effect to the constitutional right to fair hearing under Article 50 (2) (a) **'to be presumed innocent until the contrary is proved.'** In accordance with this provision, the burden of demonstrating compelling reasons for denial of bail is upon the prosecution. It is not for the accused to demonstrate want of compelling reasons or existence of special circumstances such as a medical condition warranting release on bail. Such might be the case for bail pending appeal when the applicant is already a convict but not so for bail pending trial when accused is presumed innocent until proved guilty. Moreover, it is never the duty of an accused to prove his alibi.
0. I have considered the application for bail in this case and while I agree that the primary object of bail is to ensure that the accused attends court for his trial, see **R v. Danson Mgunya and Anor.** Mombasa High Court Criminal Case No. 26 of 2008 and **R. v. Issa Timamy** Mombasa High Court Misc. Criminal Application No. 52 of 2014, there is an equally important consideration with regard to due administration of justice in the criminal cases before the court. Successful prosecution of criminal cases depends on the investigations into crimes and the presentation of the evidence to the court. Interference with the investigations or witnesses by an accused may lead to dismissal of charges even where the accused committed the offence charged. There is a clear line of causation between interference with investigations and witnesses leading to lack of sufficient evidence to support a conviction and this in turn leading to acquittal of culpable persons and miscarriage of justice for the victims of the crimes, and the general failure of the criminal justice

- system in deterring future crime.
0. The Investigating Officer has deponed that “*intensive investigations are still going on in areas of Mpeketoni and other affected areas following the attack on the 15th June 2014 and that the gravity and complexity of the crimes committed coupled with the vast areas to be covered by the investigations delayed the speeding conclusion of investigations.*” (sic)
 0. In these circumstances, and considering the magnitude of the Mpeketoni attacks as disclosed by the present charges and the proposed 42 additional charges, I would agree that there is cause for allowing the investigations to be concluded, and in the meantime to hold the accused to avoid his interfering with the investigations. I, however, do not agree that the investigations should be delayed indefinitely or that they should be so delayed as to excuse unduly long continued detention of the accused. I think that a period of 30 days since the attacks is reasonable time for the police authorities to have concluded investigations into the matter, and I do not see why the accused should remain in custody on the ground of likelihood of interference with investigations any time beyond one month after incident, that is after the 14th July 2014.
 0. Accordingly, in upholding the accused’s constitutional right to bail, and balancing it against the constitutional principle of the rule of law and its requirement for due administration of justice, I consider the appropriate order of the court in the circumstances of this case to be an order for the grant of bail for the accused subject to a short stay in implementation thereof for seven (7) days to permit the prosecution to conclude its investigations into the matter without possibility of the accused interfering. The prosecution will, depending on the outcome of such investigations, be at liberty to increase the charges as they have intimated and seek review of the grant of bail, if compelling reasons are disclosed by the said investigations.
 0. For now, there is no compelling reason to refuse bail for the accused, save for the delay of its implementation to permit conclusion of the investigations. Accordingly, the accused is granted bail upon terms that the accused executes a bond of Ks. 500,000/- with three (3) sureties of the same amount each, and that he reports to the investigating officer of the case every seven (7) days pending trial or until further orders of the court. This bail order will take effect on 14th July 2014. In the meantime, the accused will continue to be held at the Malindi Police Station to facilitate his access to private medical attention and immediate family members, until further orders of the court.

Dated and delivered this 7th day of July, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... for the Accused

..... for the State

..... Court Assitant