IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, MUSINGA & ODEK, JJ.A.)

CRIMINAL APPEAL NO. 113 OF 2018

BETWEEN

MICHAEL JUMA OYAMO.....1ST APPELLANT

CASPAL OJWANG' OBIERO.....2ND APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nairobi (Lesiit, J.) dated 24th October, 2018

in

HC. CR. Case No. 46 of 2018)

****

JUDGMENT OF THE COURT

Introduction

1. This judgment is in respect of an appeal by **Michael Juma Oyamo (the 1st appellant)** and **Caspal Ojwang Obiero (The 2nd appellant)** challenging a ruling by **Lesiit, J.** dated 24th October, 2018 denying the two appellants bail pending trial on two charges of murder in **Criminal Case No. 46 of 2018 at Nairobi.**

2. The appellants and one **Zacharia Okoth Obado** were jointly charged with murder of **Sharon Belyne Otieno** and **Baby Sharon.** The offences were said to have been committed between 3rd and 4th September 2018 at Owade Area in Rachuonyo Sub County within Homa Bay County.

3. The three accused persons sought bail pending trial but only one of them, Zacharia Okoth Obado, who is the first accused in the aforesaid criminal case, was granted bail on the following terms:

> ***" 1. The 1st Accused may be released upon deposit into court of cash bail in the sum of Kshs. 5 million.***
>
> ***2. In addition the 1st Accused will provide two sureties of Kshs. 5 million each.***
>
> ***3. The 1st Accused must deposit all his travel documents including his Kenyan, East African and Diplomatic passports which he holds.***
>
> ***4. The court will be at liberty to cancel this bail and bond and to remand the 1st Accused in custody if any of the following conditions, which I hereby set as part of the terms upon which he is released, are breached:***
>
> ***i. He shall not cause an adjournment in this case.***

ii. He shall report once a month to the Deputy Registrar of this court.

iii. He shall not go anywhere within 20 kilometers of Homabay County boundary on all sides of that County.

iv. He shall not contact or intimidate, whether directly or by proxy any of the witnesses in this case as per the Witness Statements and other documents supplied by the State to the defence.

v. He shall not intimidate the parents, siblings or other close relations of the deceased.

vi. He shall refrain from mentioning or discussing the deceased and or this case in gatherings or political meetings."

4. As for the two appellants, the learned judge delivered herself as follows:

"62. I find that there are compelling reasons not to grant the 2nd and 3rd Accused bail at this stage. I find releasing them may send fear, anxiety to potential witnesses and therefore lead to intimidation of which may adversely affect the case. The likelihood of these Accused absconding cannot be under rated. I also find that their release is likely to disturb public order, peace and therefore public security especially bearing in mind the reaction of the public at the time of their arrest and investigations into this case."

Appeal to this Court

5. Being aggrieved by the aforesaid ruling, each of the appellants filed a memorandum of appeal, which more or less raise similar arguments. The grounds of appeal were, *inter alia*; that the learned judge erred and misdirected herself in declining to release the appellants on bond or bail, thereby violating their right and fundamental freedom guaranteed under **Article 49(1) (h) of the Constitution of Kenya, 2010** (**the Constitution**); in finding that bail determination must balance the rights of the appellants and interests of justice and a consideration of the rights of the victim; by failing to uphold **Article 27 (1) and (2)** of the **Constitution** by pronouncing that the 1st appellant had acknowledged the evidence against him and thereby going against the principle of presumption of innocence; in holding that there were prevailing reasons not to grant the appellants bail; in relying on the evidence by the investigation officer that had not been tested by cross examination; and holding that the prosecution had a strong case against the appellants.

6. The appeal was largely canvassed by way of written submissions that were briefly highlighted by counsel. The 1st appellant was represented by **Mr. Muga, Mrs. Ashoya, Mr. Amollo and Mr. Abisai.** The 2nd appellant was represented by **Mr. Ongoya, Mr. Oronga** and **Ms. Ang'awa. Mr. Ondari, Deputy Director of Public Prosecutions** and **Mr. Imbani, Assistant Director of Public Prosecutions** appeared for the respondent.

7. The 1st appellant's written submissions were filed through the firm of **Amollo and Kibanya advocates** and Mr. Amollo made brief highlights on the same. The 1st appellant submitted that under **Article 49(1)** of the **Constitution** an accused person has a right to be released on bond or bail on reasonable conditions, pending charge or trial, unless there are compelling reasons not to be so released.

7. Mr. Amollo submitted that the prosecution had not advanced any compelling reasons as would have disentitled the 1st appellant grant of bail as prayed. He went on to say that where the prosecution contends that an accused person is a flight risk, evidence must be tendered that the accused hid or fled before he was arrested, and where the contention by the prosecution is that the accused shall interfere with the case, evidence must be tendered that the accused has previously done so or has the propensity to do so. Counsel cited **Republic V William Kipkorir Kipchirchir & Another [2018] eKLR** where Mutuku, J. held:

"Under Article 49(1) (h) an arrested person has the right to be released on bond or bail, on reasonable conditions pending charge or trial, unless there are compelling reasons not to be released. It is clear from the wording of this Article that the right to bail is not an absolute right. Where compelling reasons are advanced and the court is persuaded by those reasons, the right to bail is curtailed. …. In my view the likelihood that an

accused person may abscond because of the seriousness of the offence and strong evidence against him is a compelling reason when there is evidence to proof (sic) that the accused has attempted to flee the jurisdiction of the court or has been in hiding. Likewise, intimidation, interference and threatening of witnesses are serious matters and are compelling reasons where evidence of such intimidation, interference or threats is provided to the trial court. I have carefully considered the evidence placed before me to support the allegations that the accused persons may interfere, intimidate and threaten witnesses and in my view and in the absence of the evidence to support the same, these are just suspicions and fears harbored by the prosecution that this may be the case."

8. Similarly, in the Tanzanian case of **Panju v Republic [1973] E.A. 282 at page 283** the court expressed itself as follows:

"It is clear that the magistrate could not accept that the allegation that the accused was to interfere with witnesses had any substance at all. The magistrate was right in discounting such allegations which are now becoming stock allegations against accused persons, as such allegations need to be substantiated by affidavits as it has often been held by the courts….. If the courts are simply to act on allegations, fear or

suspicions, then the sky is the limit and one can envisage no occasion when bail will be granted whenever such allegations are made."

9. It was further submitted on behalf of the 1st appellant that no pre-bail reports were ever called for to afford the prosecution a chance to present cogent evidence after interviewing the appellants, members of their families, the local administration and persons who deal with and know the accused and are able to put forward useful material to help a court determine whether or not to grant bond and/or bail.

10. Mr. Amollo argued that the decision to grant bail to the 1st accused, Zacharia Okoth Obado, and refuse to grant the same to the 2nd and 3rd accused persons (the appellants herein) was on the face of it discriminatory and contrary to **Article 27 (1)(2)** of the **Constitution**. Counsel further faulted the learned judge for holding that:

> ***"60. The investigating officer has shown the kind of evidence he has against the accused persons. At this stage the court has no duty to make any conclusive findings as to the weight of it. The strength of the prosecution case is a primary factor to guide the court in making its decision on bail. In this case, the evidence affecting the 2nd and 3rd accused has been acknowledged by both of them. They each went forward and made responses in their affidavits. It is therefore acknowledged that such evidence exists and cannot be brushed aside."***

11. Counsel submitted that in holding as above, the learned judge presupposed that the witness statements assembled by investigators constitute evidence, yet the materials in those statements had not been tendered in evidence through the process of examination in chief and subjected to cross-examination and re-examination; the finding goes against the constitutional right of the 1st appellant to be presumed innocent until the contrary is proved; and also goes against the express provisions of the Evidence Act; ignored the fact that in several paragraphs of the 1st appellant's replying affidavit sworn on 3rd October 2018 he had unequivocally objected to several paragraphs of the investigating officer's affidavit and consequently the finding by the learned judge as regards acknowledgement of the prosecution evidence was unlawful and without any foundation.

12. Lastly, it was submitted that the learned judge had no basis for holding that granting bail to the appellants may send fear and anxiety to potential witnesses as there was no evidence to that effect.

13. Mr. Ongoya highlighted the 2nd appellant's submissions that were filed on his behalf by **Odhiambo, Oronga and company advocates**. In the written submissions the 2nd appellant restated the legal principles for grant of bail as submitted by the 1st appellant. Counsel submitted that denial of bail should be subjected to the strict test for limitation of rights under **Article 24** of the **Constitution** as well as the principles set out in **Articles 19 and 20** of the **Constitution.**

14. Mr. Ongoya highlighted various instances where the learned judge misdirected herself in arriving at the impugned decision. The first instance was where the learned judge held:

> ***"52. On the whole question of the likelihood of interference with the case witnesses and intimidation this cannot be taken lightly. The accused persons have been supplied with witness statements and have the names and contacts of those who have adversely mentioned them in connection with the case. …. I think that the mere release of the accused is sufficient to inflict anxiety and fear leading to intimidation of potential witnesses."***

Counsel submitted that if the above stated position were to hold true, then no accused person would ever be eligible for release on bond because all accused persons have a right to pretrial disclosure of the evidence that the prosecution intends to rely on at a trial; and all accused persons have names and contacts of those who adversely mentioned them in connection with the case.

15. Another instance where the learned judge was said to have misdirected herself is in relying on parts of the investigating officer's statement that highlighted the general conduct of the local people upon the arrest of the 1st and 2nd appellants to refuse bail to the 3rd accused (the 2nd appellant). At paragraph 28 of the investigating officer's affidavit, **INSPECTOR CLEMENT MWANGI**, he stated that:

> ***"Following the arrest of the Personal Assistant Michael Juma Oyamo, the situation in Homa Bay was so tense forcing the police to evacuate the suspect and defence counsel under tight security."***

In paragraph 29 of the said affidavit, the Investigating Officer was stated:

> ***"Following the summoning of the Governor to Kisumu DCI offices, members of the public quickly assembled outside the DCI headquarters in Kisumu forcing the police to remove the Governor under tight security for his own safety and that of the police facility."***

Counsel stated that there was no similar report of any disturbance of public order, peace and security upon the arrest of the 2nd appellant. There was therefore no basis for the trial court to find that his release **was "likely to disturb public order, peace and therefore public security especially bearing in mind the reaction of the public at the time of their arrest and investigation into this case".**

16. Counsel further pointed out that the investigating officer had opposed the release of the 2nd appellant on bond pending trial because he **"wields influence and power at the behest of the governor".** However the governor, who is the primary depository of power, was released on bond pending trial. It therefore amounts to an unfair misdirection of the part of the trial court to order the continued detention of the secondary depository of power, counsel submitted.

17. Lastly, Mr. Ongoya submitted that prior to his arrest, when the 2nd appellant was telephoned by the police had requested to avail himself he promptly did so, he did not run away. There was therefore no indication or evidence that he was a flight risk.

18. **Mr. Ondari**, Deputy Director of Public Prosecutions, told the Court that the full affidavit of Mr. Clement Mwangi, the investigating officer, was not on the record. The affidavit had several annextures that the Court ought to peruse; that the learned judge, having some of those annextures refused to grant bail to the appellants herein. To cure that omission, the Court called for the High Court file for perusal.

19. Mr. Ondari submitted that the learned judge considered all the relevant factors in her ruling and discounted the appellant's contention that she had misdirected herself. He added that the learned judge considered all the evidence on record and the role played by each of the accused persons and having done so arrived at a well considered decision.

20. Mr. Ondari further submitted that the right to bail under **Article 49 (1) (h)** is not absolute. In his view, there were sufficient compelling reasons to justify refusal of bail to the appellants.

21. Lastly, Mr. Ondari submitted that there was no discrimination in granting bail to the 1st accused and denying it to the 2nd and 3rd accused; the trial court considered the peculiar circumstances as relates to each of the accused persons.

22. In a brief reply, Mr. Ongoya told the Court that the investigating officer's affidavit was actually on record and referred us to various paragraphs where Mr. Mwangi had made reference to the appellants. He urged the court to allow the appeal and admit the appellant's bail.

Determination

23. We have carefully considered the record of appeal, the submissions by counsel and the various authorities cited. **Article 49(1) (h)** of the **Constitution** states that an arrested person has the right **"to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons".** It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person. We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in **R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009** as follows:

> ***"….. The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution."***

24. According to the recently launched publication, **Crimianl Procedure Bench Book** at pages 48 – 51 paragraph 105, compelling reasons may include the likelihood that the accused will fail to attend court; commit or abet the commission of, a serious offence; endanger the safety of victims, individuals or the public; interfere with witnesses or evidence; endanger national security or public safety; and where it is necessary for the protection of the accused.

25. Further, **section 123 A(1)** of the **Criminal Procedure Code** which is to be read with **section 123** thereof provides as follows:

> ***"123A(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular -***
>
> ***(a) the nature and seriousness of the offence ;***
>
> ***(b) the character, antecedents, associations and community ties of the accused person;***
>
> ***(c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;***
>
> ***(d) the strength of the evidence of having committed the offence."***

Subsection (2) thereof stipulates that a person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person –

> ***"(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;***
>
> ***(b) should be kept in custody for his own protection."***

26. This Court has had occasion to pronounce itself on all these constitutional and statutory principles regarding bail in **Republic v Nuseiba Mohammed Haji Osman [2018] eKLR** where the Court stated,

inter alia:

> ***"Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed at curtailing the constitutional right to liberty must not be made on speculation or conjecture."***

27. Turning to the impugned ruling, the learned judge found that there were compelling reasons for denying bail to the appellants. She stated the reasons as being that they may **"send fear, anxiety to potential witnesses and therefore lead to intimidation of which may adversely affect the case".** The learned judge further stated that the appellant's were flight risk and were likely to disturb public peace, order and

security. In making those findings the learned judge relied, inter alia, on the affidavit of Inspector Clement Mwangi, the investigating officer and the victims' affidavits.

28. It is trite law that the prosecution bears the burden of proving to the required standard that in any case an accused person ought not to be admitted to bail pending hearing of a criminal case. We must therefore consider whether the respondent discharged that burden in the matter that was before the learned judge.

29. We wish to start by considering the argument that the appellants were likely to interfere with witnesses through threats and intimidation. The offences that the appellants were charged with were allegedly committed between 3rd and 4th September 2018. The 1st appellant was arrested on 4th September 2018 and was produced before the magistrates'

court on 5th September 2018, when the police sought leave of the court to hold him beyond 24 hours to enable them complete investigations. The court allowed that plea but required that the 1st appellant be held upto 10th September 2018. Come that day the office of Director of Public Prosecutions applied to have him held for a further 10 days but the court declined that application and directed that he presented before the High Court at Homa Bay on 11th September 2018 to take a plea or be released. That was not done. Instead, he was arraigned in the High Court at Nairobi on 12th September 2018 and the prosecution applied for leave to continue holding him for a further 14 days so as to afford them sufficient time to complete investigations. That plea was granted.

30. On 26th September 2018 the 1st appellant was formally charged with murder and his prayer to be released on bond was declined.

31. Likewise, the 2nd appellant was summoned by the police and he presented himself at Oyugis police station on 18th September 2018 and recorded a statement. Since then he has remained in custody.

32. In the investigating officer's affidavit the prosecution did not demonstrate how the appellants were likely to interfere with prosecution witnesses. Mr. Mwangi merely stated that the 1st appellant, being a Personal Assistant to the governor **"wields influence and power at the behest of the governor"** and therefore there is real risk that if released on bail he may reconnect with other persons who may have committed the offence jointly with him and put prosecution witnesses at risk. He also contended that some key witnesses came from the same area as the appellant, and thus there existed chances of interference with the witnesses. He further contended that the victim's family was under threats and intimidation and they believed that the three accused persons were behind those threats and intimidation.

33. In agreeing with the prosecution, the learned judge held that since the accused persons had been supplied with witness statements which contained the names and contacts of the prosecution witnesses there was likelihood of the appellants contacting the witnesses and inflicting genuine fear and anxiety upon them.

34. We find this explanation insufficient. Paragraph 106 of the **Criminal Procedure Bench Book** states as follows:

> ***"106. The fact that the accused has been supplied with witness statements does not warrant the denial of bail, unless there is evidence of a real likelihood of the accused interfering with witnesses (R V Peter Mawia High Court at Machakos Criminal Case No. 48 Of 2015). Bail should not, therefore, be denied on weak grounds but on real and cogent grounds that meet the highest standards set in the Constitution. Allegations of witness interference must be supported by evidence. (R V Anthony Mgendi Mbungu & Another High Court At Embu Criminal Case No. 34 Of 2015)."***

We find and hold that the reasons advanced by the prosecution and upheld by the trial court were neither sufficient nor proved to the required threshold.

35. As regards the strength of the prosecution case as revealed from the witness statements, the learned judge rightly held that at the stage of the proceedings the court had no duty to make any conclusive findings as to the weight of it. This is one of the guiding factors in the exercise of a trial court's discretion under **Section 123 A(1)** of the **Criminal Procedure Code**. The learned judge however observed that the appellants had acknowledged the evidence affecting them and had made responses thereto in their affidavits. She concluded:

> ***"It is therefore acknowledged that such evidence exists and cannot be brushed aside***."

36. With great respect to the learned judge, we must state that evidence as contained in a witness statement before it has been subjected to cross-examination and careful analysis thereafter bears very little weight, unless where an accused person has expressly and voluntarily admitted the correctness of the witness statement. In this case the appellants in their replying affidavits denied crucial parts of the prosecution evidence. It follows therefore that the veracity of the witness statements can only be tested during the trial. It is a constitutional principle that an accused person is presumed innocent until the contrary is proved.

37. Lastly we do not think that the respondent adduced sufficient evidence that the release of the appellants on bail was likely to disturb public order, peace and security. The appellants were jointly charged with Zachariah Okoth Obado, the Governor, Migori County. Since October 2018 when the Governor was granted bail to 9th January 2019 when this appeal came up for hearing there was no indication whatsoever that the public order and peace had been disturbed at all. It is obvious that the Governor wields considerable political power and influence in his county compared to the appellants herein. If peace and order have continued to prevail in the said county since the release of the Governor on bail, we do not see why the same would be disturbed by the release of the appellants herein on bail pending their trial. And if upon their release on bail there is evidence that they are adversely interfering with public order, peace and security, the prosecution can move the Court to reconsider any order made in their favour.

38. All in all, we allow this appeal and order that the appellants herein be and are hereby granted bail on the following terms:

(a) Each appellant may be released upon depositing into court cash bail in the sum of Kshs.1,000,000/- or on their own bond of Kshs.2,000,000/- with two sureties of Kshs.2,000,000/- each.

(b) The appellants shall deposit in court all their travel documents.

Dated and delivered at Nairobi this 28th day of February, 2019.

M. WARSAME

JUDGE OF APPEAL

D.K. MUSINGA

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR