REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.216 OF 2015

HILLARY OKEYO……APPLICANT

VERSUS

REPUBLIC……RESPONDENT

RULING

By Notice of Motion dated 5th November, 2015, brought under Articles 49, 50 and 65 of the Constitution, the Applicant prays that the court reviews its own ruling of 2nd November, 2015 disallowing him to be released on bond/bail pending trial. The Application is basically premised on the grounds that since the delivery of the ruling on 2nd November, 2015, the circumstance of the case had changed in that there was no longer any compelling reason why the Applicant should not be released on bond. The application was supported by the affidavit of Julius Juma, an advocate of the High Court of Kenya, having the conduct of the application on behalf of the Applicant.

In opposing the application, the Respondent filed a Replying Affidavit sworn by Stella Kanyiri, a Prosecution Counsel in the Office of the Director of Public Prosecutions sworn on 4th December, 2015. The crux of the Replying Affidavit is that although the Applicant has since been interdicted, there was overwhelming evidence against him which would compel him to abscond from the court proceedings. Furthermore, there was evidence that the teaching staff of Highridge Secondary School where the complainant was a student continued to intimidate the prosecution witnesses. It was alluded that five of the key prosecution witnesses were students from the school and owing to the intimidation, may decline to testify.

The application was canvassed before me on 8th December, 2015 and I have considered the respective submissions by both learned counsel Mr. Juma for the Applicant and learned State Counsel Mr. Ondimu for the Respondent. From the facts presented before me, it was clear that as at the time of the hearing of the application, the complainant had been withdrawn as a student of Highridge Secondary School. She also testified on 24th November, 2015. The trial court had also allocated three days to take the evidence of the six minors from the school who were the key prosecution witnesses. The 8th November, 2015, was the second day of the hearing and as at the 9th of December, 2015, it was expected that all the minors would have testified. Thereafter, the only remaining prosecution witnesses would be the doctors, the Principal of the school and the Investigating Officer.

In its ruling of 2nd November, 2015, the court declined to admit the Applicant to bail majorly based on the

ground that there was overwhelming chance of interference with the witnesses. That was vindicated by the obvious fact that the complainant and the majority of witnesses were students at Highridge Secondary School. But those circumstances have since changed since the Applicant has withdrawn from the school. More importantly, the trial court gave the other minor witnesses a chance to testify on priority basis and, as at now, it is expected that all of them have testified. Be that as it may, it is now trite that the Applicant is no longer a teacher at the school. As such, his likelihood of interfering with witnesses is not foreseeable. For those reasons, and having regard to Article 49(1)(h), which provides that an accused person has a right to be released on reasonable bail terms pending trial unless there are compelling reasons not to be released, I find no reason that would compel this court to continued holding the Applicant in custody.

The assertion by the Respondent that there is overwhelming evidence against the Applicant is unsubstantiated. It was also an assertion heavily contested by the Respondent's counsel. As at the time of hearing of the application, this court was not seized with the evidence of the witnesses who had already testified. It was agreed and the court so directed that the Respondent's counsel furnishes the court with proceedings of the witnesses who had testified within 7 days with effect from 8th December, 2015. As at date, the Respondent did not comply with the court's directives. Effectively, I have no evidence or material before me that demonstrates that the evidence so far adduced is overwhelming against the Applicant. I therefore have no reason to order that the Applicant continues to remain in custody. The ruling of the High Court in **Republic Vs Ahmad Abolafathi Mohamed & another [2013] eKLR, Criminal Revision No. 373 of 2012 at Nairobi**, in which learned Achode, J observed that bail may be denied when the evidence against an Applicant is overwhelming cannot bail out the Applicant under the circumstances of this case.

On the whole, I find the application merited and the same is allowed. I order that the Applicant be released on a cash bail of Kshs. 300,000/= or on a bond of Kshs. 1,000,000/= with one surety of a similar amount. The surety will be assessed by the trial magistrate.

DATED and **DELIVERED** this **23rd** day of **DECEMBER,** 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Mr. Juma for the Applicant*
2. *Muriithi for the Respondent.*