



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO. 4 OF 2020

(CORAM: F.M. GIKONYO J.)

REPUBLIC

VERSUS

KESUUNTU OLE NTIMAMA.....ACCUSED

RULING

Bail Application

[1] In the ruling delivered on 19th April 2021 three pertinent matters are in plain eyesight. The court (1) declined to grant the accused bail; (2) directed that the evidence of the widow shall be taken as soon as possible; and (3) noted that, upon the taking of evidence in (2), any renewed application for bail may be considered.

[2] On the 29th July 2021, the accused through his defence counsel Mr. Kamwaro orally applied for bail as the evidence of the widow has been taken.

[3] The opposition as well as the victim family opposed the renewed bail application. The major ground for the objection to bail was a likelihood of interference with witnesses by the accused. According to the prosecution, there are witnesses who were at the scene who have not testified. That there is no assurance that the accused will not visit the home of the deceased. Mr. Karanja, however stated that if this court grants bond there should be a stern warning to the accused not go near the victims.

[4] Mr. Kamwaro for the accused urged the court to release the accused Article 49 (1) (a) of the Constitution. He stated that the accused enjoys presumption of innocence until proven guilty, thus, detaining him is an infringement of his liberty and could amount to punishment, yet he has not been convicted.

[5] Mr. Kamwaro further submitted that the accused confided in him that his stool is red and he is therefore suffering given that the next hearing date is 4 months away.

[6] Mr. Kamwaro continued to submit that **PW1** confirmed that the accused does not reside near her anymore.

[7] On a rejoinder Mr. Kamwaro stated that Article 23 and 65 (3) of the Constitution gives court jurisdiction to redress a denial of a right, in this case, right to bail is being threatened. He urged the court to adopt interpretation of rights that most favours the enforcement of a right.

[8] Mr. Kamwaro submitted that the DPP has not given the names of the other vulnerable witnesses. According to him, the motorcycle rider appeared after the incident.

[9] Mr. Kamwaro further submitted that the accused undertakes to comply with all terms and conditions the court may grant.

ANALYSIS AND DETERMINATION

Call of duty for legal counsels

[10] On 29/7/2021 this court made the following observations and orders: -

“I note Masikonde was said to be present during this hearing when the matter was called on virtual platform. I do note however, with concern, that Masikonde chose to appear before DR in Nairobi rather than this court. The explanation by Karanja that he is taking his oath of commissioner for oaths is not supported by evidence. However, I order Masikonde to file his submissions on the bond application within 14 days. He is hereby allowed to peruse the court file to enable him comply with this order. Time is of the essence as liberty is the issue. Ruling on 16/9/2021.”

[11] Mr. Masikonde did not file submissions on the bond application within the 14 days ordered. However, he joined the official link on 16th September, 2021, albeit late-the day the ruling was scheduled for delivery. Nevertheless, the court allowed him to make his submissions orally. He submitted that that the widow categorically stated that the accused had been seen around the area where the deceased lived and so he is likely to interfere with the other witnesses. He also submitted that the land dispute is still pending which is quite emotive matter. He urged the court that should it find it fit to release him on bond, it should be made a condition that he should never set foot on that area during the pendency of the case.

Bail; a constitutional right

[12] Bail is a constitutional right provided in Article 49 (I) of the Constitution. The right, may, however, be limited or denied where there are compelling reasons: reason that justifies limitation of right in an open and democratic society in accordance with Article 24 of the Constitution:

1. A right or fundamental freedom in Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

a) The nature of the right or fundamental freedom,

b) The importance of the purpose of the limitation,

c) The nature and extent of the limitation,

d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

[13] Article 24 of the Constitution embodies, *inter alia*, the principle of proportionality as a guide in limitation of rights. Liberty of a person is invaluable and should not be denied upon whims or flimsy grounds. See *Republic Vs. Danson Mgunya & Another* Ibrahim J (as he then was) stated that the liberty of accused should only be limited where there are compelling reasons not to be released and it is the duty of the state to demonstrate the same, and even then each case must be decided on its own circumstances

touch and context.

[14] I should however quickly add that, whilst the court considers the rights of the accused, it should also consider the rights of the victims, and the circumstances of the case so as to strike a balance thereof within the wider context of serving justice to all in the case. See *R. V. Richard David Alden (2016) eKLR*, where Lesiit J (s she then was) succinctly summarized the objective of the Bail and Bond Police Guidelines as follows: -

“Under the guidelines the general principles which apply to questions of granting or denying bail or bond are also set out and these include the right of the accused to be presumed innocent; accused right to liberty; accused obligation to attend court; right to reasonable bail and bond terms; bail determination must balance the rights of the accused persons and the interest of justice and considerations of the rights of the victims.”

Applying the test

[15] Has the prosecution established compelling reasons not to release the accused on bond" The main ground of opposition to bail is likelihood of interference with witnesses.

Interference with witnesses

[16] Of likelihood of interference with prosecution witnesses, the court stated in *R. V. Jaktan Mayende & 3 others*, that:

“- In all civilized systems of court, interference with witnesses is a highly potent ground on which the accused may be refused bail. It is a reasonable and justifiable limitation of right to liberty in law in an open and democratic society as a way of safeguarding administration of justice; undoubtedly a cardinal tenet in criminal justice, social justice and the rule of law in general as envisioned by the people of Kenya in the Preamble to the Constitution of Kenya 2010.....Threats or improper approaches to witnesses although not visibly manifest, as long as they are aimed at influencing or compromising or terrifying a witness either not to give evidence, or to give schewed evidence, amount to interference with witnesses; an impediment to or perversion of the course of justice...if the interference is aimed at impeding or perverting the course of justice, and if it is so found, it is a justifiable reason to limit the right to liberty of the accused.”

[17] See also *R. V. Patius Gichobi* where the court held that proven interference with witnesses was an affront to the administration of justice and therefore a compelling reason contemplated by Article 49 (1) (h) of the Constitution.

[18] More jurisprudence on the point is found in *R. V. Dwight Sagaray & 4 others, 2013 eKLR*, where the court stated that: -

“For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect, incriminating communication between the accused and witnesses; close familiar relationship between the accused and witnesses among others.”

[19] Accordingly, the specific instances of or likelihood of interference with witnesses must be laid before the court with such detail or evidence as to persuade the court to deny the accused bond.

[20] In the present case the prosecuting counsel and counsel for the victims merely stated that the accused is likely to interfere with witness. Other than stating that the accused had visited his shamba which adjoins that of the deceased, there was no any specific instance of attempt to interfere or likelihood of interference with witnesses which was cited by the learned counsels. The vulnerable witness- the widow- has however testified. No details of the other witnesses and their positions or vulnerabilities was provided by the prosecution or victims' counsel. Accordingly, the allegations by the prosecution and counsel of victims on interference with witnesses were left at very high level of generalization and devoid of any details on the likelihood of interference. The prosecution should paint a vivid picturesque of the specific circumstances or threats, whether direct or indirect, which point towards likelihood of interference with witnesses by the accused or his cronies. Such context, and nexus is absolutely necessary if the court is to make a finding that there is a possibility of interference with witnesses. Consequently, the prosecution has not proved any threats to or possibility of interference with witnesses. It bears repeating that, the specific circumstances or threats should *inter alia*, be of a nature that put the witness in a vulnerable position, or depict the accused in a position of influence over the witness or

capable of instilling fear in or preventing the witnesses from testifying freely or at all.

[21] Careful analysis of the opposing views on likelihood of interference with witnesses leads to inescapable conclusion, that, no cogent material has been laid before the court to demonstrate actual or perceived interference with witnesses by the accused if released. I so find and hold. The stringent standard set by the Constitution has not been met to justify limitation of fundamental freedom or liberty of the accused.

[22] Nonetheless, I should not leave any room for mischief in the future which may compromise the trial herein. I will, therefore, impose appropriate conditions to the release.

[23] In the upshot, I order: -

i) That the accused shall be released on a personal bond of Kshs. 1,000,000/= with one surety of similar amount. The circumstances of this case do not support cash bail as an option.

ii) That he shall not move near the place where the deceased lived and witnesses are ordinarily residing, establish or attempt any contact with the witnesses. Accordingly, it will be a violation of this condition for the accused to visit the area where the deceased lived in the pretext of visiting his land that adjoins the land of the deceased.

iii) That any single breach of these conditions will lead to cancellation of the bond by the court. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 27TH DAY OF SEPTEMBER 2021

F. GIKONYO M.

JUDGE

IN THE PRESENCE OF:

1. MR. KARANJA FOR DPP

2. THE ACCUSED PERSON

3. MR. KAMWARO FOR THE ACCUSED PERSON

4. MR. KASASO CA

F. GIKONYO M.

JUDGE



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