Republic v Omayi alias Magogo & 2 others (Criminal Case E002 of 2024) [2024] KEHC 206 (KLR) (22 January 2024) (Ruling)

Neutral citation: [2024] KEHC 206 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL CASE E002 OF 2024

AC MRIMA, J

JANUARY 22, 2024

BETWEEN

REPUBLIC ..... STATE

AND

PATRICK JUMA OMAYI ALIAS MAGOGO ..... 1ST ACCUSED

ARNOLD NYONGESA IMBIAKHA ALIAS MWALIMU ..... 2ND ACCUSED

FRED WANJALA BARASA ALIAS FREDDY ..... 3RD ACCUSED

RULING

Introduction and Background:

1. This ruling relates to the Accused's oral applications for bail pending trial. The applications were presented by Learned Counsel Mr. H. P. Wamalwa for the 2nd Accused and Learned Counsel Miss Auta for the 1st and 3rd Accused respectively.

2. The accused submitted that they were constitutionally-entitled to bail pending trial since they were presumed innocent until proved otherwise. They recalled that the averments made by the investigating officer were not proved and amounted to heresay. They, in particular, contended that they had fixed abodes and that they were not flight risks and undertook to comply with all the conditions given by this Court.

3. The applications were vehemently opposed by the State through the Affidavit of No. 88268 Cpl. Faith Kishoin sworn on 15th January 2024.

4. In the disposition, the investigator deposed that the Accused were actively involved in the commission of the offence with other who are still at large. That, once released they will jeopardize efforts to arrest the rest.

5. It was also deposed that there had been incidents of witness interference and that the police were in the course of investigating the issue. The police pointed out that some of the witnesses and the accused were neighbours, hence, the interference is so real. It was also alleged that there was still grave animosity on the ground, hence, it was unsafe to release the accused.

6. Citing the *Constitution*, Learned Prosecutor Miss. Kiptoo argued that the right to bail pending trial was not absolute. She urged this Court to really consider the rights of all parties and to strike a balance by disallowing the application.

7. It is on the basis of the foregoing that this Court is called upon to determine the bail and bond application.

Analysis:

8. The foundation of bail or bond in Kenya is the *Constitution* and the *Criminal Procedure Code*, Cap. 75 of the Laws of Kenya (hereinafter referred to as 'the CPC').

9. Article 49(1)(h) of the *Constitution* states as follows: -

> An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or a trial, unless there are compelling reasons not to be released.

10. Section 123(A) of the *CPC* sets out exceptions to the right to bail or bond. The provision was brought on board with a view to align the *CPC* with the *Constitution*. It provides that: -

(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 relevant circumstances and in particular -

a) the nature of 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 fulfilment of obligations under previous grants of bail; and

d) the strength of the evidence of his having committed the office.

(2) 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 as 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.

11. The rationale behind bail or bond in Kenya is premised on the constitutional imperative under Article 50(2)(a) of the *Constitution* that an accused is presumed innocent until the contrary is proved.

12. In bail or bond applications, therefore, the primary consideration must always be the ability of the accused to attend trial. The only exception remains where compelling reasons are demonstrated.

Ibrahim, J (as he then was) in *Republic v Danson Mgunya & Another* [2010] eKLR described the right to bail as an "inalienable right" by holding that;

> The result of the foregoing is that a murder suspect has a constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.

13. Therefore, in granting bail or bond, the trial Court is called upon to exercise its discretion and, if there are no compelling reasons to deny an accused bail or bond, the trial Court should exercise its discretion in favour of the accused.

14. Both the *Constitution* and the *CPC* do not define what 'compelling reasons' are.

15. But what does the term 'compelling reasons' mean?

16. The term has been used in other jurisdictions to mean 'exceptional circumstances' or 'unusual' and 'extraordinary circumstances'. Having gone through various statutes, scholarly writings and decisions within and outside our jurisdiction, it appears that the term 'compelling reasons' (or as the case may be) is not settled and may include a rubric of circumstances.

17. The 10th Edition, *Black's Law Dictionary* defines 'extraordinary' as "beyond what is usual, customary, regular or common". It also defines 'a circumstance' as "an accompanying or accessory fact, event or condition such as a piece of evidence that indicates the probability of an event". The dictionary goes ahead to define "extraordinary circumstance" as "a highly unusual set of facts that are not commonly associated with a particular thing or event."

18. In Kenya, Courts have, as well, dealt with the issue. In *Republic vs. Joktan Mayende & 3 Others* (2012) eKLR, *Mohamed Abdurrahman Said & Another vs. Republic* (2012) eKLR, *Wilson Thirimba vs. DPP* (2012) eKLR, among others, the Courts reverted to the meaning of the word 'compelling' as defined in the Concise Oxford Dictionary, 9th Edition which is defined as 'rousing, strong, interest, attention, conviction or admiration'.

19. Admitting the challenge in the term 'exceptional circumstances', the Constitutional Court of South Africa in Liesching and Others v S (CCT304/16) [2018] ZACC 25; 2018 (11) BCLR 1349 (CC); 2019 (1) SACR 178 (CC) (29 August 2018) quoted with approval the definition in S v Petersen 2008 (2) SACR 355 (C) and had this to say: -

> Meaning of "exceptional circumstances"
>
> (39) The phrase "exceptional circumstances" is not defined in the Superior Courts Act. Although guidance on the meaning of the term may be sought from case law, our courts have shown a reluctance to lay down a general rule. This is because the phrase is sufficiently flexible to be considered on a case-by-case basis, since circumstances that may be regarded as "ordinary" in one case may be treated as "exceptional" in another. For instance, in Petersen a Full Court of the High Court of South Africa, Western Cape Division, Cape Town (Western Cape High Court) observed in relation to an application for bail under section 60(11) (a) of the Criminal Procedure Act:
>
> > On the meaning and interpretation of 'exceptional circumstances' in this context there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something

> unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of section 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for certain flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all applicable criteria.

20. Defining the term further, the South African Court in S v Bruintjies 2003 (2) SACR 575 (SCA) had the following to say: -

> .... What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release. What is exceptional cannot be defined in isolation from the relevant fact.
>
> ... If upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exceptional have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail.

21. Still on the South Africa jurisprudence, in S v Rudolph 2010 (1) SACR 262 (SCA) at 266 g-h, the Court dealt with what exceptional circumstance are and reiterated that the Applicant in bail application must, on a balance of probability, demonstrate that "exceptional circumstances" in his or her case, indeed, do exist and that they "in the interests of justice permit his release". This, according to the Court, involves the balancing" between the liberty interests of the accused and the interests of which", society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstance" are shown by the accused to exist".

22. And, in Antonio Jacobie Snyders –vs- The State (A455/2015) 2015 ZAGPPHC 618, the High Court in South Africa dismissed an appeal against denial of bail on the basis of the fact that the community was up in arms as it found it necessary to voice its opinion regarding the conduct of the Appellant. The Appellant's concessions relating to his safety meant that it would not be wise to release the Appellant on bail. Indeed, the Appellant conceded that the community would not accept him back with open arms and that there existed some enmity between him and the community.

23. Given the amorphous nature of the term 'compelling reasons' or 'exceptional circumstances', a Court while exercising its discretion in dealing with a bail and bond application must 'consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify his or her release' and must also balance "between the liberty interests of the accused and the interests of which", society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstance" are shown....". In Kenya those 'compelling reasons' or 'exceptional circumstances' must be demonstrated by the prosecution.

24. In delineating the parameters of 'compelling reasons' and 'exceptional circumstances' and remaining alive to the provisions of Section 123(A) of the CPC, the High Court in Republic v Pascal Ochieng Lawrence [2014] eKLR stated as under: -

> .... It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the State. The Court in exercising its discretion as to whether or not to grant bond is, however, to be guided by the following parameters: -the seriousness of the offence although this carried greater weight under the old constitutional dispensation;the weight of the evidence so far adduced if the case is partly heard;the possibility of the accused interfering with witnesses;the safety and protection of the accused once he/she is released on bail/bond;whether the accused will turn up for trial;Whether the release of the accused will jeopardize the security of the community."

25. Further, the High Court in *Republic v Joshua Mueke Mutunga & 3 others* [2020] eKLR in determining the criteria to be applied on whether to grant bail or bond relied on the decision by the Supreme Court of Nigeria in *Alhaji Muiahid Dukubo-Asari v Federal Republic of Nigeria*, SC 20AI /2006 which set out a similar criteria on the granting of bail by holding as follows: -

> ...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following: -
>
> i. The nature of the charges;
>
> ii. The strength of the evidence which supports the charge;
>
> iii. The gravity of the punishment in the event of conviction;
>
> iv. The previous criminal record of the accused, if any;
>
> v. The probability that the accused may not surrender himself for trial;
>
> vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him;
>
> vii. The likelihood of further charges being brought against the accused;
>
> viii. The probability of guilty;
>
> ix. Detention for the protection of the accused;
>
> x. The necessity to procure medical or social report pending final disposal of the case". [Emphasis added]

26. The prosecution's contention in this matter was fourfold. First, that there is overwhelming evidence against the Accused. Second, that some of the perpetrators of the offence are still at large whom others are closely related to the accused. Third, that the Accused will interfere with witnesses upon release, and fourth, that the community is still up in arms with the Accused and releasing them will be tantamount to endangering their lives.

27. In dealing with this matter, this Court should not lose sight of the fact that the right to bail or bond is one of those rights under the Bill of Rights whose enforcement is aimed at preserving the dignity of individuals and communities, the promotion of social justice and the realisation of the potential of all human beings. The Court still remains alive to the fact that granting bail and bond is discretionary based on the unique circumstances of each case.

28. Having said as much, this Court now turns to a consideration of the grounds tendered in opposition to the application.

29. On the ground that there is congent evidence against the Accused, this Court's position is that such evidence is yet to be availed to this Court. The evidence is also yet to be tested in examination.

30. The allegation that some of the perpetrators of the offence are still at large whom others are closely related to the accused cannot be ignored. However, it is not clear how the accused will frustrate the efforts by the police to arrest the rest.

31. On the interference with witnesses, this Court finds that the State deposed that the issue was still under investigations. The fact that the witnesses are neighbours to the accused cannot, ipso facto, be a measure of imputing interference. There has to be demonstrated real likelihood on the alleged interference. As such, the ground fails.

32. On the allegation of animosity in the community, this Court called for Pre-Bail Reports to ascertain the prevailing situation. The Reports were availed within a very short time. The Reports, however, did not support the assertion of animosity on the ground and recommended that all the Accused may be released on bond and bail.

33. Having carefully considered this matter and in light of the in-depth analysis of the *Constitution*, the law and various decisions, this Court finds in light of Article 49(1)(h) of the *Constitution* and Section 123A(2)(b) of the *CPC*, there are no compelling reasons in this case to decline to admit any of the accused to bail or bond at this point in time.

34. It is on the basis of the above that this Court finds that this is case where the Accused ought to be admitted to bond and bail on reasonable conditions.

35. As this Court comes to the end of this ruling, it remains profusely grateful to the Probation officers who availed the Pre- Bail Reports within a very short period.

36. And, on the basis of the above discussion, the following orders do hereby issue: -

    a. The application seeking that the accused be admitted to bond and bail pending trial is hereby allowed.

    b. Each of the Accused may be released on a bond and bail of Kshs. 1,000,000/= (Read: Kenya Shillings One Million Only) with one (1) surety of similar amount.

    c. The Accused shall not, in any way whatsoever whether directly or otherwise, interfere with any of the witnesses in this matter.

    d. The State shall immediately inform this Court of any breach of order (c) above.

    e. The hearing of the case will, however, be expedited.

    Those are the orders of this Court.

DELIVERED, DATED AND SIGNED AT KITALE THIS 22ND DAY OF JANUARY, 2024.

A. C. MRIMA

JUDGE

Ruling No. 1 delivered virtually and in the presence of: -

N/A for Mr. H. P. Wamalwa, Learned Counsel for the 2nd Accused.

N/A for Miss. Auta, Learned Counsel for the 1st and 3rd Accused.

Mr. Kiptoo, Learned Senior Assistant Director of Public Prosecutions instructed by the Office of the Director of Public Prosecutions for the Respondent.

CHEMOSOP/DUKE – COURT ASSISTANTS.