Republic v Tonui (Criminal Case E006 of 2022)
[2022] KEHC 12239 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12239 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL CASE E006 OF 2022

RL KORIR, J

JUNE 29, 2022

BETWEEN

REPUBLIC ..... PROSECUTION

AND

BERNARD KIBET TONUI ..... ACCUSED

RULING

1. The Application before me was made by Counsel for the Accused person through an oral Application in Court on June 21, 2022. The Accused was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*, Cap 63 Laws of Kenya.

2. In his oral submissions, counsel for the Accused argued that though the Pre-bail Report dated June 15, 2022was unfavorable, the right to bail was a constitutional right. He submitted that the Accused would abide by the terms set out by the Court, that he had changed while in prison and that the presumption of innocence stood until he was proven guilty.

3. Prosecution Counsel opposed the bail Application on the premise that the Accused had murdered his brother, that none of his family members were willing to stand surety for him and they were yet to come to terms with the death of their brother. He further submitted that the Social Inquiry Report indicated that the safety of the Accused was not assured and that the Accused was also known as a violent person with many pending criminal cases and should therefore not be admitted to bail.

4. The right to bail is enshrined in the *Constitution* of Kenya 2010 under Article 49 (1) (h) which states as follows: -

> " 49. Rights of Arrested Persons
>
> (1) An arrested person has the right –

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released."

5. Thus, bail is a constitutional right as rightfully submitted by counsel for the Accused. It is afforded to every accused person regardless of the nature of the offence they may have been charged for. In *Republic v John Kahindi Karisa & 2 Others* [2010] eKLR it was held that: -

> "This Constitutional provision came into force after the promulgation of the New Constitution. As a result of this, the provisions of Section 123 of the *Criminal Procedure Code* which made the offences of murder, treason and robbery with violence non-bailable offences became obsolete and in effect repealed and inapplicable. In all these cases, the mandatory sentences provided by law is Death, and were referred to as Capital Offences. The said sentences are still applicable. It means now that in case a suspect is charged with any offence under the *Penal Code* including those that attract the death sentence e.g. murder, the same is bailable. 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."

6. Similarly, in the Bail and Bond Policy Guidelines, it is recommended at paragraph 3.1. (a) that: -

> "The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pre-trial detention should not constitute punishment, and the fact that accused persons are not convicts should be
>
> reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts."

7. However, it is not absolute since the Constitution gives a proviso to the effect that other compelling reasons may require the court's refusal to grant it. The court in exercising its discretion is therefore expected to review the circumstances of the case and make a determination as to whether the release of an Accused person on bail pending trial is necessary. Emukule J. in *Republic v Milton Kabulit & 60 Others* [2011] eKLR] stated that:

> "My understanding of Section (*sic*) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application....."

8. Similarly, the Supreme Court of Appeal in Malawi in the case of *M. Lunguzi v Republic*, MSCA Appeal No. 1 of 1995 (Unreported) stated thus:-

> "There are two points which must be made about the effect of Section 42 (2) (e) of the *Constitution*. In our view the right to bail which Section 42 (2) (e) now enshrines does not create an absolute right to bail. The Section still reserves the discretion to the courts and it makes the position absolutely clear that courts can refuse bail if they are satisfied that the interest of Justice so requires. The second point we would like to make it is that Section 42 (2) (e) does not create a new right. The right to bail has always been known to our law and all that section 42 (2) (e) does is to give it Constitutional force. We would like to emphasize

that S.42 (2) (e) does not give an absolute right to bail. The courts will continue to exercise their discretion depending on the circumstances obtaining in each particular case."

9. I am persuaded by the above precedents. The *Criminal Procedure Code*, Cap 75 outlines the considerations that a court of law should make in considering whether to grant bail. Section 123A stipulates as follows: -

(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 or 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 offence;

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 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.

10. It follows then that this Court must consider the circumstances of the case. The Accused was charged with the murder of his younger brother. According to the Pre-bail, report the Accused was known to be a violent man with previous criminal records. His family was opposed to his release on bail and the family land had no title to be issued as surety. Further, no family member was willing to stand surety for him and he was a likely flight risk. It was the recommendation of the Probation Officer Mr. Boiyon, that the Accused should not be granted bail because the environment was hostile and his family members who were the victims in this case warned of dire consequences should he be released on bail.

11. The circumstances outlined above present to this Court compelling reasons that warrant the denial of bail. The Bail and Bond Policy Guidelines at paragraph 4.9 provide that: -

> "4.9. In terms of substance, the primary factor considered by the courts in bail decision-making is whether the accused person will appear for trial if granted bail. A particular challenge the courts face since the promulgation of the Constitution of 2010 is determining the existence of compelling reasons for denying an accused person bail, particularly in serious offences...."

12. The Guidelines further outline non-exhaustive factors for consideration in bail applications as follows: -

(a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

(b) The strength of the prosecution case.

(c) The character and antecedents of the accused person.

(d) The failure of the accused person to observe bail or bond terms.

(e) The likelihood of interfering with witnesses.

(f) The need to protect the victim or victims of the crime.

(g) The relationship between the accused person and the potential witnesses.

(h) The best interest of child offenders.

(i) The accused person is a flight risk.

(j) Whether the accused person is gainfully employed.

(k) Public order, peace and security.

(l) Protection of the accused persons.

13. While I am cognizant of the presumption of innocence of the Accused person, the safety of the Accused person must be considered such that if it is not guaranteed, it will be a compelling reason for not granting bail. In *Republic vs. Pascal Ochieng Lawrence* [2014] eKLR, it was stated;

> " 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:-
>
> (i) The seriousness of the offence although this carried greater weight under the old constitutional dispensation;
>
> (ii) The weight of the evidence so far adduced if the case is partly heard;
>
> (iii) The possibility of the accused interfering with witnesses;
>
> (iv) The safety and protection of the accused once he/she is released on bail/bond;
>
> (v) Whether the accused will turn up for trial;
>
> (vi) Whether the release of the accused will jeopardize the security of the community."

14. I have also taken into consideration the subsequent effect this alleged offence by the Accused has had on the family. As evidenced in the Pre-bail Report, the hostility from the family members of the Accused is glaring and none of them is ready to associate with him as a result. The family members have even warned of dire consequences should he be released. It is obvious that it is not in the best interests of the Accused that he be released at this time on bail as his safety is not guaranteed.

15. Additionally, the Pre-bail Report indicated that the Accused has had previous criminal records and that he was likely to skip bail. In light of this, I am hesitant to grant him bail. I rely on the Supreme Court of Nigeria decision in the case of *Alhaji Mujahid Dukubo – Asari v Federal Republic of Nigeria* S.C. 20A/2006; where Justice Ibrahim Tanko Muhammad J.S.C. held that:-

> " ...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: - .... the nature of the charges, the previous criminal record of the accused if any, the probability that the accused may not surrender himself for trial, detention for the protection of the accused....."

16. Based on the foregoing, it is my finding that the Accused is at present underserving of bail. In the upshot the Application for Bail pending trial is hereby dismissed. The Accused is denied bail and will remain in custody during the pendency of the trial.

17. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JUNE, 2022.

R. LAGAT-KORIR

JUDGE

Ruling delivered in the presence of Mr. Murithi for the State, Ms. Chirchir for the Accused, Accused (Bernard Kibet Tonui) and Kiprotich (Court Assistant).