



**REPUBLIC OF KENYA REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL CASE NO. 12 OF 2020**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**AHMED ADAN GUHAT.....1<sup>ST</sup> ACCUSED/APPLICANT**

**AHMED ADAN MUHUMED.....2<sup>ND</sup> ACCUSED/APPLICANT**

**IBRAHIM ALI GUHAT.....3<sup>RD</sup> ACCUSED/APPLICANT**

**MOHAMED ALI GUHAT.....4<sup>TH</sup> ACCUSED/APPLICANT**

**ADAN ALI HASSAN.....5<sup>TH</sup> ACCUSED/APPLICANT**

**RULING**

**The Principle**

[1] This court has always considered that the right to bail is a constitutional protection on its own right, as well as a necessary appurtenance to the cardinal principle of constitutional and criminal law on fair trial and its basic foundation of the presumption of innocence. In Kenya, Article 49 (1) (h) of the Constitution of Kenya provides for bail pending trial under the rights of arrested persons in words that an arrested person is entitled to, among other rights, 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.’***

[2] The Statutory provisions of Section 123A (1) of the Criminal Procedure Code (CPC) gives effect to the constitutional right to bail as follows:

*“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 fulfillment of obligations under previous grants of bail; and*
- d) The strength of the evidence of having committed the offence.”*

[3] The Kenya Judiciary’s Bail and Bond Policy Guidelines, of March 2015 elaborates the judicial policy on bail and bond at page 25 thereof as follows:

*“The following procedures should apply to the bail hearing:*

- (a) The Prosecution shall satisfy the Court, on a balance of probabilities, of the existence of compelling reasons that justify the denial of bail. The Prosecution must, therefore, state the reasons that in its view should persuade the court to deny the accused*

person bail, including the following:

- a) That the accused person is likely to fail to attend court proceedings; or
- b) That the accused person is likely to commit, or abet the commission of, a serious offence; or
- c) That the exception to the right to bail stipulated under Section 123A of the Criminal Procedure Code is applicable in the circumstances; or
- d) That the accused person is likely to endanger the safety of victims, individuals or the public; or
- e) That the accused person is likely to interfere with witnesses or evidence; or
- f) That the accused person is likely to endanger national security; or
- g) That it is in the public interest to detain the accused person in custody.”

[4] The primary consideration in deciding whether or not to grant bail pending charge or trial is the question of whether or not the Accused person is likely to attend and/or abscond Court. The policy as set out above and the wording of Constitution indicates that such bail should be granted and only be denied if there are compelling reasons not to grant the same. The burden is clearly on the Prosecution to show that there are compelling reasons as to why bail should not be granted.

#### *The application*

[5] The Accused persons herein are all charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. In bringing their application for bail, they argue that the 2<sup>nd</sup> and 5<sup>th</sup> Applicants are minors aged 13 years and 14 years respectively and that they are required to report to Danyere Primary School in January 2021; That there have been very fruitful reconciliation efforts involving the community leaders, family members of the deceased and the families of the Applicants and that the conditions of hostilities between the families of the Applicants and the families of the deceased no longer exist; and that no party will suffer any prejudice if the orders sought are granted. Annexed to their supporting affidavit is a letter from the Senior Principal Chief of Danyere Location in Garissa County. Therein, the Chief communicates that as government officials, they have been working with community leaders and have held several meetings with the clans and families of both members to promote forgiveness and reconciliation. He indicated that they have made very good progress in that regard and that the tension has calmed down.

[6] The Prosecution, through CPL Geoffrey Mutua of DCI Garbatulla opposed the application. They aver that the Applicants have no permanent place of abode since they are pastoralists and keep moving from one place to another and that if they are released on bond, there is a chance that they will not appear in Court; That there is fear of retaliation attacks if the Respondents are released on bond; That he has confirmed from the area senior chief that, a Mr. Tawane Hussein Al of mobile phone number 0729019825 that the letter referenced DNY/ADM/VOL250 dated 4<sup>th</sup> December 2020 is genuine; That if the Respondents are to be released their sureties should make sure that they adhere to the conditions to be set by the Court.

#### **Determination**

[7] This Court observes that this is the second time the Applicants are making an application for bail pending trial. The first application was made on 4<sup>th</sup> May 2020 following which a pre-bail report was made and by a Ruling delivered on 30<sup>th</sup> July 2020, A. Mabeya, J. found that the pre-bail reports were negative for security reasons and he therefore denied the application for bail to the exception of one accused person owing to her health condition.

[8] While it is within the law to bring a similar application for bail, the repeat applicant must demonstrate changed circumstances, that is to say the circumstances prevailing at the time of making the earlier application must have changed to favour a grant of bail in the second application. I have dealt with the principle of changed circumstances in bail applications in *Kelly Kasses Bunjika v. R* KBT HC Misc. Criminal Application NO. 20 of 2017 where I held as follows:

**“The Court may make orders as to bail and review the same from time to time depending on changed or changing circumstances of the case. Moreover, if aggrieved by the denial of bail or the terms thereof, the accused could have moved the High Court for bail or review of terms thereof in terms of section 123 (3) of the Criminal Procedure Code, which provides as follows:**

**“(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”**

Indeed, in the case of KBT HCCRC NO 23 of 2017 *R. v. Wilberforce Kosgei Bett* this court declined a renewed application for bail and held that **“the renewed application for bail is rejected there being demonstrated no changed circumstances and there being a compelling reason of threat of interference and likelihood of confrontation with family members and the community”**.

[9] I would also respectfully agree with the court in *Republic vs Mohamed Hagar Abdirahman & Another* Garissa Criminal Case No. 1 of 2012 (2012) eKLR, where S. Mutuku, J. said **“i. That the law does not bar an applicant from bringing another similar application after the first one has been denied, however such an applicant coming to court the second time has to show that the circumstances have changed to warrant the court to consider such an application in his favour (see Misc. Criminal Application No. 679 of 2004: Omba**

***Gandu Magloire v. Republic).***”

[10] The key question is whether the circumstances that led to denial of bail previously have changed so as to make the Court have reason to grant bail. The basis for denial of bail was the fact that the pre-bail reports were negative. Significantly, the reports for all the Accused persons indicated that the grounds at the time were still very hostile and there were fears of retaliatory attacks against the accused persons and/or their families. The Applicants have argued that there have been very fruitful reconciliation efforts involving the community leaders, family members of the deceased and the families of the Applicants and that the conditions of hostilities between the families of the Applicants and the families of the deceased no longer exist. To support their averment, they have attached a letter from the Chief. Although the Prosecution confirms that the letter from the Chief is genuine, they argue that there is fear of retaliation attacks if the Respondents are released on bond. The Prosecution has however not stated how this conclusion, that there are fears of retaliatory attacks was arrived at. This Court has gone through the letter from the Chief. It is indicated that there have been ongoing talks between the families of the victim and those of the Accused. It is claimed that good progress has been made and the tension has calmed down.

[11] This Court is therefore alive to the fact that matter herein is one that involves the community as a whole and there appears to have been extensive talks in a bid to reconcile parties. While the State has a duty to ensure justice is administered, the free will of parties and their respective communities to engage in reconciliatory talks is also recognized. The one thing that barred previously the Court from denying the Applicants bail were the security concerns. It has however been shown by the letter from the Chief that the situation has since changed and tension has eased. The Prosecution has not challenged the authenticity of the said letter. To the contrary, at paragraph 8 of the replying affidavit of CPL Geoffrey Mutua that he has confirmed the genuineness of the said letter.

[12] The Prosecution has argued that the Applicants are pastoralists who have no permanent place of abode. On the other hand, the Applicants, especially the 2<sup>nd</sup> and 5<sup>th</sup> Applicants, argue that they are minors and school going children who are required to report to Danyere Primary School in January 2021. From the pre-bail reports on record which were filed in July of 2020, this Court observes that the 2<sup>nd</sup> and 5<sup>th</sup> Applicants are said to have never been to school. They both herd their fathers’ livestock for a living. The said Danyere Primary School is merely indicated as the nearest primary school close to where the said Applicants come from, but not the school they attend. Although there is doubt as to whether the 2<sup>nd</sup> and 5<sup>th</sup> Applicants are school going children, this Court finds that the Applicants indeed have a known place of abode. This is confirmed by the pre-bail reports and also by the letter from the Chief confirming that the Accused persons hail from his location.

[13] The upshot of the foregoing consideration is that there are in view of the changed circumstances in this case no compelling reasons to deny the Accused persons bail, and the court shall grant the application as prayed.

#### **Orders**

[14] Accordingly, for the reasons set out above, this Court makes the following orders:

- i) The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Applicants may be released on execution of a bond in the sum of Ksh.500,000/= each with a surety of similar amount.***
- ii) The bonds in respect of the 2<sup>nd</sup> and 5<sup>th</sup> Applicants who are minors shall be executed by their parents or guardians each with a surety of similar amount.***
- iii) The Accused persons shall attend Court when required for mentions and hearings unless otherwise ordered by the Court.***

*Order accordingly.*

**DATED AND DELIVERED THIS 25<sup>TH</sup> DAY OF FEBRUARY 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

#### **Appearances:**

M/S Chui Karera & Company Associates, Advocates for the Applicants.

Ms Nandwa, Prosecution Counsel for the Respondent.