



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HIGH COURT CRIMINAL CASE NO. 11 OF 2020

REPUBLIC.....PROSECUTOR/RESPONDENT

-VERSUS-

PHARES MUTEMBEI MIRITI.....1ST ACCUSED

BENJAMIN MURANGIRI MUTEMBEI.....2ND ACCUSED

R U L I N G

1. PHARES MUTEMBEI MIRITI, the 1st Accused person/Applicant, is charged jointly with the 2nd Accused person with the offence of murder Contrary to **Section 203 as read with Section 204 of the Penal Code**. He pleaded not guilty.

2. By an application dated 02/08/2020, the 1st Accused person sought to be released on reasonable bail or bond terms pending the hearing and determination of the trial. The application is supported by the affidavit of the 1st Accused and premised on the principal grounds that:

- a.** The Applicant is a resident of Kimuru Village, Muthambi location in Maara sub county of THaraka Nithi county and working for gain as a peasant farmer.
- b.** The Applicant has not previously been charged with any offence and is a law-abiding citizen.
- c.** The Applicant undertakes to avail himself for trial when called upon to.

3. After considering the rival arguments raised by the parties herein, the court directed that a social inquiry be conducted, and a pre-bail report be filed in this court. The court consequently received a Pre-bail Information Report dated 26/11/2020 and noted that it was not favourable.

Prosecution's submissions

4. The Learned Prosecution Counsel informed the court that a similar application was lodged before but the same was not allowed because counsel had requested that the 1st accused be detained by the state until all witnesses had testified. The learned counsel added that they did not see it safe for the 1st Accused to be released before the witnesses had testified because members of the public had burnt the house and vehicle of the 1st Accused after the offence was committed. The prosecution counsel noted that four witnesses have since testified in the matter and that the three more witnesses remaining are members of the public.

5. In opposing the release of the 1st Accused, the prosecution noted that the report by the probation office proved that the situation has not changed and stated that the administration was also apprehensive about the security of the 1st accused if released on bail/bond terms. He stated that the 1st accused might be tempted to go back to his home and he will be in danger. It was thus the prosecution's submission that the application for bond by 1st Accused person should be reviewed once all the prosecution witnesses had testified.

Defence's submissions

6. The learned counsel for the 1st Accused, Mr. Muthomi Gitari, submitted that the earlier application referred to by the prosecution was lodged by the 2nd Accused person and that there was no other application made by the 1st Accused in respect to the grant of bail/bond. He informed the court that the state and the defence had agreed that the application for bail by the 1st Accused person be made after all the civilian witnesses had testified and submitted that all have testified and only the testimonies of the doctor and the investigating officer are

remaining.

7. On the issue of the threats on the life of the 1st Accused, Mr. Muthomi submitted that it is the responsibility of the state to provide security and stated that the 1st Accused would not be seeking for his release if he was aware that he is likely to be harmed. He further submitted that it would be prejudicial to not release him on bond terms as he may be acquitted.

8. Noting that the report by the probation officer was not favourable, counsel for the 1st Accused informed the court that the 1st Accused has other places he can live and has a surety who is willing to stand for him.

Summary of the Pre-bail report

9. From the pre-bail information report dated 26/11/2020, it is clear that the 1st Accused home remains a shell after it was burnt down by an angry mob following the material incident. It is also clear that the community around the 1st Accused home is still irate and charged with rage. In conducting the interviews for purposes of the report, the probation officer found out that the 1st Accused separated from his first wife several years ago due to domestic violence and that his second wife deserted the home after it was burnt down.

10. The report also notes fact that of the 1st Accused's brother that the family has nothing to stand for surety for his bail. Notably, the piece of land where the brothers to the 1st accused live is still in the name of their father who is deceased, and the family has not initiated any succession process for the property.

11. Furthermore, the victim's family, that is the family of the deceased, are opposed to the granting of bail of the accused because they are of the view that **"the presence of the 1st Accused in the community could still ignite the villager's bitterness and this could jeopardize his life."**

Issue

12. The only issue for determination by this court is whether the 1st Accused person be released on bail/ bond.

Analysis

13. The present application is brought under the provisions of **Article 49 (1) (h)** of the Constitution which provides that an arrested person has the right to be released on bond or bail, on reasonable conditions pending charge or trial, unless there are compelling reasons.

14. In ***Michael Juma Oyamo & another v Republic [2019] eKLR***, the Court of Appeal pronounced itself as follows in respect to compelling reasons that can justify denial of bail/bond :

"Article 49(1) (h) of the Constitution states that an arrested person has the right "to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons". It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person. We wish to adopt the definition of what amounts to compelling reasons as defined by the High Court in R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009 as follows:

"..... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by the Constitution."

According to the recently launched publication, Criminal Procedure Bench Book at pages 48 – 51 paragraph 105, compelling reasons may include the likelihood that the accused will fail to attend court; commit or abet the commission of a serious offence; endanger the safety of victims, individuals or the public; interfere with witnesses or evidence; endanger national security or public safety; and where it is necessary for the protection of the accused."

15. After perusing the Probation Officer's report dated 26/11/2020, I am persuaded by the Probation Officer's report that the life of the 1st Accused would be at risk if released back to the community before the case is determined and finalized. It is my view that there is a string of compelling reason not to grant accused bail.

16. Although the counsel for the 1st Accused stated that there are other places where the 1st Accused can stay, such places were not identified with certainty for consideration by this court. In addition, the family of the 1st Accused has made it clear they are not in a position to avail themselves to stand surety for him. That, to me, is also a strong reason to tilt the court's mind towards declining to grant the bail/bond sought.

Conclusion

17. Taking into consideration the unfavourable probation report on the release of 1st accused on bails 1st Accused's, it is my view, that there are compelling reasons why the 1st Accused should not be released on bail/bond at this stage as his safety while out on bond cannot be guaranteed.

I decline to grant the application is dismissed.

Dated, signed and delivered at Chuka this 25th day of February 2021.

L.W GITARI

JUDGE

25/2/2021

The ruling has been read out in open court.

L. W. GITARI

JUDGE

25/2/2021