



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. E026 OF 2020

REPUBLIC.....PROSECUTOR

=VERSUS=

MOHAMED ALI HUSSEIN.....ACCUSED

RULING

1. The DPP opposes the release on bail of the accused who is charged with murder c/s 203 s read with 204 of the Penal Code on the principal grounds that the accused has no fixed abode; that all prosecution witnesses reside in the same locality with the accused person and “there is a high possibility that, if released on bail, [he] is likely to interfere and or threaten them and or commit further offences” and that the accused’s “security is not guaranteed due to clan hostility and animosity occasioned by the murder of the deceased who was very popular especially with among the youth after graduating recently and securing a job with County Government of Isiolo.” See the Affidavit of the Investigating Officer, PC Geoffrey Kamau of 29/1/2021 in opposition to bail.

2. The accused responded to the Prosecution’s opposition to his release on bail by a formal application by way of Notice of Motion dated 15/4/2021 supported by his affidavit sworn on the same date in which he demonstrates ownership of a parcel of land Ngaremara/Gambela Adjudication/31748 to counter allegation of lack of fixed abode while pointing out that he had been in custody for five (5) months “and, therefore, whatever emotions that might have arisen out of the commission of the alleged offence have now cooled down.” The court denounces this cold and insensitive submission. The accused denied any intention to interfere with the witnesses and submitted that “in any event, if I were to interfere with the said witnesses, the prosecution would be able to apply for my bond to be cancelled.”

3. At the hearing of the bail application on 21/4/2021 counsel for accused Mr. Nkunja emphasized the primary consideration for grant of bail being that the accused will attend his trial and the burden of proof for compelling reason for refusal of bail being upon the prosecution, citing **R v. Rober Zippor Nzilu** (2018) eKLR.

4. The prosecution counsel, Ms. B. Namdwa, for the DPP relied primarily on what has come to be known as ‘volatility of the ground’ and urged that-

“[T]he situation on the ground is hostile, and for the accused’s own safety we pray that he continues to remain in custody upto the final determination of the matter. The Probation Officer’s Report at p.3 the local administration indicate that they are opposed to accused’s release on the ground of his safety, as the community attitude shows that the deceased’s family is still bitter.”

5. The Probation Officer’s Bail Assessment Report dated 18/3/2021 considered the matter and “recommends [that] the accused be granted bond on conditions that he promises not to go back to the community and accept to stay [elsewhere] at his brother’s home at Makutano Township since he (his brother) is willing to offer him accommodation” based on findings going by the Accused’s family attitude, Deceased’s family attitude, local administration and Community attitude.

Determination

6. It is trite, and it bears repeating, that bail is a constitutional right for all arrested (and as in this case) accused persons under Article 49 (1) (h) of the Constitution unless there are compelling reasons not to be released”; that the burden of proof of which lies with the prosecution who seek that the accused person be refused bail. The right to bail is a co-adjutant to the presumption of innocence, which is a cardinal principle of criminal justice.

7. It is correct as urged by counsel for the accused that the primary consideration for bail is whether the accused shall attend court for his trial if released on bail, and this is the subject of section 123A (2) (a) of the Criminal Procedure Code (CPC) which seeks to elaborate the right to bail under Article 49 (1) (h) of the Constitution.

8. The consideration for denial of bail under paragraph (b) of subsection 2 of section 123A of the CPC namely that the accused “(b) should be kept in custody for his own protection” being an obvious limitation to the right to bail must be applied only as a last option resort where in

the wording of Article 24 (1) (e) of the Constitution there are no less restrictive means to achieve the objective of protection of the accused. In this regard, I respectfully, agree with Odunga, J. in **R. v. Robert Zippor Nzilu**, supra, that “in cases where limitations to the right to bail contemplated above exist, the court must, as provided in Article 24(1) € of the Constitution be satisfied that there are no less restrictive means to achieve the purpose other than denial of bail.”

9. In this case, the Probation Officer’s Report indicated that the accused may be hosted by his brother at another place outside the allegedly hostile community, and he court may make orders restricting the accused’s visit to the area of the affected community and or contact with the witnesses. Needless to say, if the order is violated, the prosecution may apply for cancellation of the bail. Such is a less restrictive way of dealing with the issue of hostile ground and risk of interference with witnesses in the circumstances of this case.

10. The accused has demonstrated by evidence of ownership of land a fixed abode to rebut the prosecutions submission that the accused was a flight risk being of no fixed abode. However, the legal burden of proof to show that the accused is a flight risk who may not turn up for his trial is with the prosecution and, on a balance of probability, the court has not seen evidence of the accused’s likelihood to abscond given his local connexion with his community where he has landed property and family and from where, indeed, the prosecution seeks to keep him out.

Orders

11. Accordingly, for the reasons set out above, the court is not satisfied that there exist compelling reasons for he accused not to be released on bail, and therefore grants the accused bail upon the following terms:

1. The accuse shall execute a bond of Kenya Shillings Five Hundred Thousand (Ksh.500,000/-) with one surety for the same amount.
2. The accused shall not threaten or otherwise interfere with the witnesses or make any contact physical or by tele-, internet or other media of communication with the witnesses in the case.
3. The accused shall not visit any destination within Kisima Sub-location of Ngabera location in Tigania East Sub-county of Meru County where the offence subject of this trial was allegedly committed, without express authority and or further orders of the Court.
4. The accused shall attend court every thirty (30) days, or as he may be required by the court, for purposes of hearing or mention of his case, until the final determination of the trial.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S NKUNJA & Co. Advocates for the Accused.

Ms. B. Nandwa, Prosecution Counsel for the DPP.