



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

HIGH COURT CRIMINAL CASE NO. 47 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

KIZITO INDECHE.....1ST ACCUSED

FRANCIS NDUNGU.....2ND ACCUSED

RULING

1. Kizito Indече (the “1st Accused Person”) and Francis Ndung’u (the “2nd Accused Person”) are charged with murder contrary to section 203 as read together with section 204 of the Penal Code. They are accused of jointly and unlawfully killing Peter Kibathi on the 15th day of September, 2019 at California Area in Gilgil Subcounty within Nakuru county.. At their arraignment, both Accused Persons pleaded not guilty to the charge.

2. The Prosecution has opposed the pre-trial release of the Accused Persons on bail or bond on the argument that the Accused Persons are a flight risk. Inspector Moses Onyapidi filed an affidavit in opposition to pre-trial release. He deponed that the alleged offence occurred, the two Accused Persons absconded from their duties at work and that “both of them were at large and we took time to try and locate them.” IP Onyapidi further depones that both Accused Persons are casual workers in Nakuru and that they have no fixed abodes. Based on this, the Prosecution argues that the two Accused Persons are a flight risk.

3. The 2nd Accused Person filed a Replying Affidavit disputing the factual allegations by the Prosecution. He admits that he was a casual worker at a construction site in Pipeline where the Deceased was the foreman. He further depones that he resides in Pipeline together with his wife and one young child. Additionally, he says that his mother lives in the Kikapu area of Njoro together with the 2nd Accused Person’s siblings. Finally, the 2nd Accused Person denies that he absconded and states that on 15th September, 2019, he attended a church service at Gorofa Pentecostal Assemblies Church of God Church and thereafter went home.

4. The 1st Accused Person did not put in an affidavit but his advocate, Ms. Mwangi pointed out that it was uncontroverted that the 1st Accused Person went to the Police Station on the 14th September, 2019 (the same day the incident happened) and was arrested there. It was therefore untrue that he had absconded; or that he was a flight risk.

5. The Court called for bail reports on the two Accused Persons. The Bail Report for the 1st Accused Person establishes that he hails from Waitaru location in the larger Transzoia County. His parents and some siblings still live there. He left his family home and settled at Kiminini with his wife and children. He moved to Nakuru to look for casual jobs. The family is willing to host him at their Kakamega home if released on bail.

6. The Bail Report for the 2nd Accused Person largely corroborates the 2nd Accused Person's affidavit about his family home and his unclear family.

7. Bail is a constitutional right enshrined in Article 49(1)(h) of the Constitution. An Accused Person can only be denied bail if there are compelling reasons. The Constitutional standard for denying bail is "compelling reasons" test. The burden is on the Prosecution to establish the existence of the "compelling reasons" that would justify denial of bail. Finally, our emerging jurisprudence is clear as to the kind of evidence needed to establish the "compelling reasons": the evidence presented must be "cogent, very strong and specific evidence" and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. See, for example, *R v Muneer Harron Ismail & 4 Others [2010] eKLR*. However, it is also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons beyond reasonable doubt. Indeed, such a standard would be impossible to meet at this point in the trial. See, *Bail and Bond Policy Guidelines* at p. 19.

8. Using the Compelling Standard Test, I have formed the opinion that the Prosecution's fears that the Accused Persons are a flight risk is unwarranted. It has not been established that the Accused Persons disappeared after the incident as claimed by the Investigating Officer. Indeed, the 1st Accused Person presented himself to the Police while the 2nd Accused Person has explained his whereabouts and how the Police came to arrest him. It is, by any standards, a stretch to claim that either of them absconded after the incident.

9. The only valid concern has been raised by the Bail Report about the 1st Accused Person's minimal ties to his community and the fact that he has no ties to Nakuru and will live in Kakamega if released on bail. However, this concern can be optimally mitigated by properly calibrated bond terms.

10. I would, therefore, hold that the circumstances here do not objectively warrant a denial of bail seen against the constitutional crucible. However, the circumstances go towards the setting of appropriate conditions for admission to bail.

11. Consequently, the orders of the Court shall be as follows:

- a. The 2nd Accused Person is admitted to bail on bond in the sum of Kshs. 300,000/- and one surety of a similar sum**
- b. The 1st Accused Person is admitted to bail on bond in the sum of Kshs. 300,000 and two sureties of a similar sum.**
- c. In addition, each of the Accused Persons shall each report to the Deputy Registrar every last Friday of the month.**

Orders accordingly

Dated and delivered at Nakuru this 30th day of January, 2020.

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JOEL M. NGUGI

JUDGE