



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT CHUKA

HCCR NO. E020 OF 2020

REPUBLIC.....PROSECUTOR

VERSUS

ERICK KIRIMI.....ACCUSED

R U L I N G

1. The accused person is charged with Murder contrary to **Section 203 as read with Section 204 of the Penal Code**. Upon being charged in court the charge was read and explained to him and he pleaded not guilty.

2. The application pending before me is for bail pending trial. It is based on the ground that bail pending trial is a constitutional right which should not be denied unless there are compelling reasons not to grant bail. That it is based on the constitutional principle that a person charged with a criminal offence is presumed innocent until proved guilty and should not be made to suffer. The applicant submits that he has been in remand for over one year since the time of his arrest. This he claims was due to covid-19 pandemic. He relied on **Article 49(1) (b)** of the **Constitution** on the right of an accused person to be released on bail and **Article 50(2) (a)** of the **Constitution** on the presumption of innocent. The accused asserts that he is a family person and undertakes to attend court whenever he is required if he is released on bail.

3. The respondent opposed the application and relies on the affidavit sworn by the investigating officer No.86139 P.C Samuel Wanjora sworn on 27th January 2021. He deposes that the accused is violent, unruly drunkard who is a flight risk as he has no obligations or personal possessions which will hold him back if he is released on bond. He further avers that the accused had been charged with assault and had threatened the witnesses with dire consequences if they dared testify against him. He contends that the accused will intimidate witnesses and prevent them to come to court and testify.

4. The prosecution submits that right to bail is not absolute and urged the court to find that there are compelling reasons to deny the accused person bail pending trial as he is a flight risk and is likely to interfere with prosecution witnesses. It is also submitted that the situation on the ground is hostile and the accused risks being harmed by angry members of the public.

5. The court called for a social inquiry report and it was filed by Ntwiga Mugambi, Probation Officer Chuka dated 26th October 2020. The report states that the accused is a well known trouble shooter at the market place and his indulgence in local brews is legendary. He is a heavy drinker and is known for substance abuse. The accused has no known personal possessions. The report recommends that that accused remains in custody pending the conclusion of the trial.

ANALYSIS AND DETERMINATION

The right to bail or bond is a fundamental right enshrined in the Bill of Rights. **Article 49 (1) (h)** of the **Constitution of Kenya 2010** provides that an arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

Article 49 of the constitution stipulates that: An arrested person has the right to

“ a)

“ 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.”

It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the

Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation.

In **Republic vs Joseph Thomas Olang** Muchemi J. citing decided cases had this to say:-

“On the other hand, it is also important that the court should not impose such easy conditions that the accused person would not have any difficulty in meeting the same. If the conditions were very lenient, an accused person may be tempted to abscond, because he would not feel the pain of abandoning the bail or security in court. It is therefore important that the court determining an application for bail pending trial should conduct a delicate balancing act, so as to get the reasonable conditions for the particular case at hand”

It is therefore my view that the discretion to grant bail and determine the amount rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court should thus lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced.

Further, **section 123 A(1)** of the **Criminal Procedure Code** which is to be read with **section 123** thereof provides as follows:

“123A(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 and 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 fulfillment of obligations under previous grants of bail; and;**
- (d) the strength of the evidence of having committed the offence.”**

Subsection (2) thereof stipulates that 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.”

Each case presented before a court is unique and the compelling reasons given may differ with each case. However, there are certain principles that may guide the court in determining whether to grant bail. In the case of **REPUBLIC V LUCY NJERI WAWERU & 3 OTHERS, Nairobi Criminal Case No. 6 of 2013**, the court listed some of the factors that a court needs to consider in an application for bail as being:

“(a) Whether the accused persons were likely to turn up for trial should they be granted bail;

(b) Whether the accused persons were likely to interfere with witnesses;

(c) The nature of the charges;

(d) The severity of the sentence;

(e) The security of the accused if released on bond;

(f) Whether the accused person has a fixed abode within the jurisdiction of the court.”

The above list is not exhaustive. Other considerations include the accused’s previous criminal record; detention of the accused person for his or her own protection; the probability of the accused person tampering with evidence; and the strength of the evidence.

In this instant case, the prosecution contended that the accused person was likely to interfere with witnesses. In support of this assertion, the prosecution further observed that in the assault case previously before the lower court, it was reported that the accused person had gone threatening the victim’s family against testifying against him.

Section 123 of the Criminal Procedure Code also makes provisions for bail. However, this right is not unlimited. The courts are called upon to weigh an accused person’s right to bail against the opposition to bail by the State. In the case of **Republic v Danford Kabage Mwangi [2016] eKLR Mativo J** discussed the need to weigh an accused person’s right to bail vis-à-vis the interests of the public and the reasons given in opposition to grant bail. He observed as follows:

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the constitution and courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.

Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive...”

Gravity of the offence as a consideration was appreciated by *Mboghli Msagha, J*

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH DAY OF FEBRUARY, 2021

L. W. GITARI

JUDGE

25/2/2021

Ruling read out in open court.

L.W GITARI

JUDGE

25/2/2021