REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. 5 OF 2019

REPUBLIC..... PROSECUTOR

VERSUS

PATRICK TABU KAZUNGU CHONDA alias

PATRICK MUMBO.....1ST ACCUSED

SUMBUKO RAI alias

NG'ENG'E alias **NG'ANG'A ..... 2ND ACCUSED**

EZEKIEL KAINGU alias **KIMWARIO ..... 3RD ACCUSED**

SAMSON CHARO alias **RASTA ..... 4TH ACCUSED**

JAMES KIMERA MWALIMU ..... 5TH ACCUSED

CORAM: Hon. Justice R. Nyakundi

Ms. Sombo for the State

Mr. Otara for the accused persons

RULING

The accused persons currently facing a charge of murder contrary to Section 203 of the Penal Code as read with Section 204 of the Penal Code seeks an interim relief of being released on bond under Article 49 (1) (h) of the Constitution, and Section 123 of the Criminal Procedure Code.

The case for the applicants

The affidavit filed by **Patrick Mumbo** indicates that he is a resident of Marereni where he runs a business on sale and distribution of cashew nuts. That in the course of September 2019 he was allegedly arrested for the offence of murder in which he pleaded not guilty.

He proceeded to state that under the Constitution if granted bail he will make himself available at subsequent proceedings.

On the part of the prosecution an important assertion was made in the replying affidavits of **Adam Mohamed Dokota** and **Abdi Galogolo Sango** raising the following objections.

(a). That the 1st accused is a prime suspect to the murder and if released on bail he will interfere with witnesses.

(b). That due to the prevailing tension, the family members may unleash terror against the accused thereby compromising his personal security.

(c). That there is a great possibility that the accused persons in general would not attend Court as they do not have permanent residence at Marereni.

The investigating officer **PC Mawazo** also weighed in to the matter by deposing to the facts in the Replying Affidavit dated 30.1.2020. His main contention of objecting to the release of the accused persons was based on their own safety, interference with witnesses and the public interest claim.

Indeed, when one reads the three affidavits by the respondents one gets the impression that the accused persons application to be released on bail should be denied even for their own safety and security. However, it should be pointed out that the pre-bail report reported by **Mr. Masinde** endorses the view that the accused persons may be released on bail in so far as they are capable of meeting the conditions to be set by the Court. In the probation officer's reports, it is clear that the assertions by both the victims and the investigating officer remain contradictory.

The first major import of the view taken by the deponents to persuade this Court to decline the application is essentially on threats to their own safety. On this it is but a decent act by the state to provide security to the accused persons by taking necessary measures to prevent crimes contemplated by the victims or any other person stipulated in the affidavits.

Therefore, in my humble view the test of the application to release or not to release the accused persons on bail is clearly demonstrated under Article 49 (1) (h) of the Constitution.

The Law

The relevant provisions of the Constitution in Article 49 (1) (h) reads as follows:

> ***"That an accused 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."***

Further Article 29 provides:

> ***"that every person has the right to freedom and security of the person which includes the right not to be (a) deprived of freedom arbitrary or without just cause."***

In Article 50 (2) (a) of the same Constitution:

> ***"Every accused person has the right to be presumed innocent until the contrary is proved."***

The significance of the provisions is for the state to sufficiently convince the Court, that compelling reasons exist with certainty not to release the accused persons on bail. What is meant by compelling reasons, as I understand it, in the language of the Constitution include the exceptions provided for in terms of Section 123A of the Criminal Procedure Code:

> ***(1). The nature or seriousness of the offence.***
>
> ***(2). The character, antecedents, association and community ties of the accused persons.***
>
> ***(3). The defendants record in respect of the fulfillment of obligations under previous grants of bail.***
>
> ***(4). The strength of the evidence of his having committed the offence.***
>
> ***(5). That he is likely to abscond from the jurisdiction of the Court.***
>
> ***(6). That he should be kept in custody for his own protection.***
>
> ***(7). In addition, at the same time bond or bail may be denied on consideration that the accused is likely set to interfere with the prosecution witnesses.***

More often than not the provisions of the Constitution and in particular those dealing with fundamental rights and freedoms as enshrined in the Bill of rights are to be given a generous and purposive interpretation. This is to ensure that those rights are guaranteed and given effect to avoid potential prejudice to the accused and the broader interest of justice. The instant case involves a trial of the accused persons facing a very serious charge of murder contrary to Section 203 of the Penal Code. This Court wishes to cite the Judgment of the **Privy Council in Devendranath Hurnam v The State Appeal No. 53 of 2004 {2005} UKPC 49**, in which the Court succinctly stated as follows:

> ***"The Courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interest of the individual is of course to remain at liberty unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried will inevitably prejudice him and in many cases his livelihood and his family. But the community has a counter vailing interest in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence and that he does not take advantage of the inevitable delay before trial to convict further offences. It is obvious that a person charged with a serious offence facing a severe penalty if convicted may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him. Where***

there are reasonable grounds to infer that the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions they will afford good grounds for refusing bail."

In **Sharman Rosemond v PC Charles and Ors SLU HCV {2003} Edwards J** affirmed the position where he had this to say:

"The discretion of the Court to grant bail in murder cases must be exercised responsibly. This is a very serious crime and it is in the public interest that a person alleged to have committed such a crime and whose guilt may be proved should be available to stand trial within a reasonable time."

On the question of whether in the context of the Constitution under Article 49 (1) (h), the state has sensibly discharged the evidential burden to satisfy the nature of compelling reasons sufficient to decline grant of bail has been emphasized in the following judicial precedents: **Ramadhan Iddi Ramadhan & 5 others v R {2019} eKLR, Republic v Milton Kabuilt & 60 others {2011} Eklr, Hassan Mahat Omar & another v R {Rev No. 31 of 2013}.**

All this is necessary to determine the question of what is the strength of evidence required on these kind of applications, with regard to bail. This Court on the other hand must accept that at the stage of pretrial bail it is not a trial of the ultimate issues. Taking the queue from the statement by the **International Icon Nelson Mandela (The former President of the Republic of South Africa),**

"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens but its lowest ones."

In addition to the above dictum, there is also the dicta in **Pugh v Rain water, 572 F 2d 1053 5th Circuit 1978:**

"The Court stated on the legal mix of the right to presumption of innocence and the important question of release from person custody pending trial "Here we deal with a right, the right to release of presumably innocent citizens. I cannot conceive that such release should not be made as widely available as it reasonably and rationally can be."

These grounds are essentially important given the fact that the Constitution itself explicitly lifted the bail clause of having all criminal offences bailable unless there are compelling reasons not to release an accused person on reasonable conditions.

I have considered the application and the objection advanced by the state and victims to that effect. At the very least, these views presented by the respondents are not identifiable content to fit the rubric of compelling reasons. All it does is a general drive towards depriving the accused their liberty pending trial. The concerns raised remain to be mere allegations and that burden of persuasion was disputed by the pre-bail reports which was at variance with the context set up in the replying affidavits.

A further consideration that arises is the failure by the state to highlight the very nature of the flight by the accused persons not to appear in future proceedings, committing further offences or interfering with witnesses. The state is legally bound to give the Court even an executive summary of the evidence which is admissible likely to act as a motivation to justify the need of restraining grant of bail. The holy grail of the Constitution is that every accused person is presumed innocent unless the contrary is shown that he committed the crime punishable under the Law. This presumption places the burden upon the Court to grant bail on reasonable conditions until the charge is determined.

The set of principles that augurs well with exercise of discretion under Article 49 (1) (h) of the Constitution is consistent with the dicta in the case of **S v Chiyangwa {2005} 1 2LR 163 at 168 – G – 169A** where the Court concluded that:

"Initial remand is an important step in a citizen's loss of liberty. After arrest without warrant, it is the first time, that his case is presented to a neutral body for arbitration of the issue whether or not, on the basis of mere suspicion, the citizen must lose his freedom. If he loses his freedom at that stage, before his guilt is proved, he may face total ruin. He may lose his job or other means of his livelihood. He could lose his home too if he is a lodger or a mortgagee as he falls into arrears. This could drive his family into distribution and he is forced to rely on state support for livelihood whilst in custody. The consequences are just too ghastly to contemplate for both the rich and the poor. The Court must therefore take the greatest care when approaching the question whether to deny or grant bail."

This clearly justifies the maintenance of a balance between the right to deprivation of an accused liberty and the case made up by the state to require longer pretrial incarceration which does not reflect the Constitutional entitlement of the rights under Article 27 and 29 of the said Constitution. The constitutional provisions relating to bail geared towards the protection of the Law on Freedom, pertinent liberties, human dignity and security of a person require judicial discretion which supports the right to afford an offender hope and prospect of certainty of release on bail.

In this case when considering the meaning of release on reasonable conditions, it's impossible to divorce the concept from the test of excessiveness as a contra substantive ground on the right to bail. Applying the principle in the case of **Stack v Boyle 342, US. 15 {1951}:**

"since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuming the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure at the time, the nature and circumstances of the offence, the weight of the evidence against the defendant, and the defendant financial situation and character are to be applied in each case to each defendant."

This Court is also guided by the decision in **Hazarilal v Rameshwar Prasad AIR 1972 SC 484** where it was restated and reiterated that:

> ***"the accused cannot be subjected to any condition which is pragmatic and is unfair. It is the duty of the Court to ensure that the condition imposed on the accused is in consonance with the intendment and provisions of the Sections and nor onerous. The Court may also impose, in the interest of justice, such other conditions as it considers necessary."***

One can therefore confidently conclude that the broad Constitutional considerations on bail in the context of Article 49 (1) (h) contemplate a policy against excessive bail.

For all these reasons, I answer this question on bail in conformity with Article 49 (1) (h) of the Constitution to grant bail to each of the accused persons subject to giving reasonable bail of Kshs.500,000/= with a security each of identical amount to be approved by the Deputy Registrar of the Court.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF JUNE 2020

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R. NYAKUNDI

JUDGE