



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL CASE NO. 25 OF 2019**

**REPUBLIC.....RESPONDENT**

**– VS –**

**ERNEST KAMU NJOROGE.....ACCUSED**

**RULING**

**INTRODUCTION**

1. The application before the court is an oral application made on 20.12.2019 by the Applicant/accused's advocate that accused be granted reasonable bail terms.
2. The prosecution opposed the application on the ground that the deceased was a senior police officer. That the accused is a flight risk as he has no fixed abode.

**THE APPLICATION**

3. The application is brought under section 356 of the Criminal Procedure Code. This is however in error as the section deals with bail pending appeal and my stay of sentence bail pending trial is under **Section 123A of the Criminal Procedure Code** and **Article 49(1)(h) of the Constitution**. They provide:-

**“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 or seriousness of the offence;**

**(b) the character, antecedents, associations and community ties Detention of property seized. Provisions applicable to search warrants. Bail in certain cases. 22 of 1959, s. 13, 6 of 1976, Sch., 13 of 1978, Sch., 19 of 1984, Sch., 19 of 1985, Sch., 14 of 1991, Sch., 7 of 1990, Sch., 5 of 2003, s. 71. Exception to right to bail. 18 of 2014, Sch. 48 CAP. 75 Criminal Procedure Code [Rev. 2015 Issue 1 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 his having committed the offence.**

**(2) 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.”**

**“(1) An arrested person has the right—**

**(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.”**

The accused was charged with the offence of murder contrary to **Section 203 as read with Section 204 of the Penal Code.**

4. The state responded to the application for bond though a replying affidavit dated 5.02.2020 by the detective Chief Inspector, Charles Lumatete, in which he opposed the application on grounds that the accused person has no fixed abode, he is a flight risk and if granted bail he would interfere with the prosecution witnesses. Since the witnesses were hesitant to give information after the arrest of the accused person because they belong to the unlawful gay society.

5. Counsel for the accused challenged the replying affidavit on the issue that the accused had no fixed abode. He claimed that the prosecution had conceded that the accused lived in Mururi Market and, there was no evidence presented that the accused had no fixed abode. As to the allegation that the accused will interfere with witnesses the applicant submitted that because the witnesses were unwilling to talk did not mean he was intimidating. He claimed the allegations are baseless.

6. The pre-bail report dated 11<sup>th</sup> March 2020 did not recommend the release of the accused person on bail on the ground that the accused was a threat to himself and, he was also likely to be attacked by the society because emotions are still high. His family was not willing to stand as surety on his behalf. The victim impact assessment indicated apprehension by the victim's family for the accused to be released on bail they vehemently opposed the application as they believe the accused could conceal information and the truth pertaining to the death of the victim.

### **ANALYSIS**

7. The primary issue for consideration is whether there are compelling reasons to deny the accused person his right to bail. The reasonable bail and bond terms is a constitution right provided in **Article 49 (1) (h) of the Constitution** which states that the accused person has a Constitutional right to bail that can only be denied if there be compelling reasons. The Bail and Bond policy sets out principles that courts take into consideration. They include:

- i. The Presumption of innocence Article 50 (2)**
- ii. Right of liberty unless compelling reasons exist**
- iii. Right to reasonable bail and bond terms**
- iv. Balance of right of accused persons and the interest of justice**
- v. Consideration of victims**

**Section 123 A (1) of the Criminal Procedure Code** provides for bail/bond and its exceptions It provides:-

**“(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 or 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 his having committed the offence.”**

8. It sets out factors that the court should consider which include:

- (a) the nature or 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;**
- (d) the strength of the evidence of his having committed the offence;**

9. The second subsection provides for compelling reasons such as likelihood to abscond and for the protection of the accused person.

10. In the present application the investigating officer in his affidavit raised allegations that the accused is a flight risk, will interfere with witnesses and has no fixed abode. The pre-bail report indicates that the accused is from Muranga County, he came to Kirinyaga to work in horticulture farms, he resided in Mururi Market, where he worked with High Chem Essentials. The accused person poses a threat to himself because of previous suicidal intentions and from society as per the pre-bail report. Bail is not recommended. Close relatives are not willing to commit themselves as sureties. The accused has no known fixed place of abode as he was living in a rented house at Mururi market. He is

therefore flight risk. The principal consideration is whether the accused will turn up for his trial. This is not guaranteed in the circumstances of this case.

11. Therefore, coupled with the fact that he has no fixed abode within the County and is originally from another County and the nature of the charges brought against him, there are compelling reasons to deny the accused's right to bail. I reject the application and order that he be remanded in custody until the case is finalized. The case may be fast tracked.

**Dated at Kerugoya this 13<sup>th</sup> Day of August 2020.**

**L. W. GITARI**

**JUDGE**