



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL CASE NO. 9 OF 2018

REPUBLICRESPONDENT

– VS –

SIMON GITU GATUNA ACCUSED

RULING

INTRODUCTION

1. The application before the court is an *ex-parte* **Notice of Motion** dated and filed on the 5th of February 2020 by the Applicant praying for the orders that:

- a. **This application be certified as urgent and heard ex-parte in the first instance;**
- b. **The Court be pleased to grant the accused person bond pending the hearing and determination of the suit.**

2. The application is premised on the grounds that the accused person is not a flight risk and is entitled to his constitutional right to bond. The application is supported by the affidavit of the applicant Simon Gitu Gatuna.

THE APPLICATION

3. The application is brought under **Section 356 of the Criminal Procedure Code**. This is however erroneous as the Section deals with bail pending appeal and stay of execution of a sentence. The correct provision is **Article 49(1) (h) of the Constitution and Section 123 of the Criminal Procedure Code. Article 49(1)(h) of the Constitution** provides: -

(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.

4. On the other hand **Section 123 of the Criminal Procedure Code** provides:-

“(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail: Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.”

5. The accused was charged with the offence of murder contrary to **Section 203 as read with section 204** of the penal code. Upon being arraigned in court, a psychiatrist report confirmed that he was not fit to plead. He was committed Mathare mental Hospital for treatment under **Section 162 of the Criminal Procedure Code**.

6. The State opposed the application for bond and relies on the replying affidavit by Chief Inspector, Charles Lumatete. He contends the application on grounds that the accused person is a flight risk and that the state's case had reached an advanced stage near its conclusion with only two witnesses pending. He also averred that due to his mental health the accused was still under observation and could not be on his own.

7. The pre-bail report dated 9th March 2020 recommended that the accused person be granted bond. The victim impact assessment indicated apprehension by the victim's family for the accused to be released on bail.

ANALYSIS

8. The primary issue is whether there are compelling reasons to deny the accused person his right to bail. The reasonable bail and bond terms is a constitutional right provided in **Article 49 (1) (h)** that states the accused person has a Constitutional right that can only be qualified by 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 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.

In ***Nyeri High Court Criminal Case No. 8 of 2016 Republic vs Danford Kabage Mwangi*** the criteria or compelling reasons to consider in the exercise of judicial discretion in bail applications were set out to include:

- i. The nature of the charges.**
- ii. The strength of the evidence.**
- iii. The gravity of the punishment in the event of conviction.**
- iv. The previous criminal record of the accused, if any.**
- v. The probability that the accused may not surrender himself for trial.**
- vi. The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.**
- vii. The likelihood of further charges being brought against the accused.**
- viii. Detention for the protection of the accused.**

10. In ***Joseph Mutua Kimeu vs Republic Nairobi HC Criminal Revision No. 166(2017) eKLR*** it was held that the onus is on the prosecution to provide evidence of the compelling reasons to deny the accused person bail.

11. In the present application the investigating officer in his affidavit raised mere allegations that the accused is a flight risk and that the case had reached an advanced stage, therefore bail should not be granted. The accused cannot be considered a flight risk merely because of the fact that he studied abroad a while back. I note that the pre bail report indicates that he does not have a fixed dwelling, however his brothers Moses Gichuhi and James Mbirua are willing to accommodate him and ensure he attends court.

12. On the issue of advanced stage of the proceedings, I note that **Section 123 of the Criminal Procedure Code** states that bail may be granted at any point of the proceedings. Therefore, this cannot be a compelling reason to deny bail.

13. However, the unique circumstances of this case is that the accused has a history of suffering from mental health illness, and is presently in custody at a mental hospital. The issue arising is therefore a question of the health and safety of the accused person himself and the likelihood that he may pose a threat to society. In the pre-bail report his brothers state that they are willing to accommodate the accused and ensure he is on his medication so that he stabilizes fully.

14. This willingness is not a guarantee that the accused will be cared for medically as while under observation in hospital or that he may not pose a threat to society or himself. I am of the view that, coupled with the fact that he has no fixed abode and the nature of the charges brought against him, these are compelling reasons to deny the accused's right to bail. Thus for the foregoing reasons the accused application for bail is declined. The accused to remain in custody until the case is finalized.

Dated at Kerugoya this 13th day of August 2020.

L. W. GITARI

JUDGE