



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. E027 OF 2020

DIRECTOR OF PUBLIC PROSECUTIONS.....REPUBLIC

VERSUS

BENJAMIN KARITHI MENJA.....ACCUSED

RULING

By application dated 2.10.2020, the applicant (accused), **BENJAMIN KARITHI MENJA** has pleaded that he be placed on bond pending determination of his case. In the submissions before court on 6.11.2020, Mr. Mureithi Kimathi, appearing for the applicant, submitted that the alleged clinic has since been closed and the applicant's landlord has taken possession of the same. He denied that the applicant is a flight risk, nor that he will interfere with prosecution witnesses.

Ms. Kimani, appearing for the state opposed this application. The first reason given was that the application would continue committing similar offences, since he is the proprietor of the clinic where the deceased died while in the process of procuring an abortion, secondly, it was submitted that the applicant is a flight risk. That during the investigations, the applicant had given wrong details of his name, identify card number and phone numbers, all of which belonged to different persons.

Finally, it was submitted that the applicant has no known place of abode. That he was arrested at Kenyatta National Hospital and the investigating officers failed to establish his place of abode. It was further submitted that if released on bond, the applicant is likely to interfere or intimidate the prosecution witnesses. The prosecution pleaded that the applicant be remanded in custody till his case is determined.

I have considered that submissions of both the defence and prosecution sides. Under Article 49(1)(h) of the constitution, all arrested persons are entitled to the determination of their cases. The constitution accords this right to all accuseds irrespective of the charges that they are facing. The constitution however gives a proviso in this section that should there be any compelling reasons, then that right to bail may be denied. In effect therefore, the right to bail is not an absolute right. Same may be denied should there be proof of reasons that are good enough to justify the denial.

The bail and bond policy guidelines developed by the Judiciary of Kenya, gives guidelines as to what would constitute compelling reasons that could make the courts deny an accused person the right to bail. At paragraph 4.9 of the guidelines, some of the circumstances that could be considered in the granting or not of the right to bail are:

- **Seriousness of the charge and the seriousness of the punishment in case of conviction.**
- **Strength of the prosecutions case**
- **Character and antecedents of the accused.**
- **Whether the accused is likely to abscond if released on bail**
- **Whether the accused is likely of interference with prosecution witnesses or investigations.**
- **Accused's own safety.**
- **Public order, peace and security.**

In our instant case, the prosecution has submitted on a number of factors as amounting to compelling reasons. Some were as follows: -

i) Likelihood to committing similar offences:

On this ground, it was submitted that if released on bond, the applicant is likely to go back to his clinic and engage in committing similar crimes. This allegation was not supported by any actual evidence. It also flies in the face of the age old doctrines of innocence. Denying accused bond on this ground without any cogent proof of the same would be tantamount to concluding that the accused is already guilty of the charges herein. The accused person stands innocent till his guilt is proved. I therefore find that this ground alone cannot amount to a compelling reason as envisaged in the constitution.

ii) That he has no known place of abode

It was submitted that the accused was arrested at Kenyatta National Hospital and the investigating officer did not determine his place of abode. The prosecution, however, did not show if at all any attempts were made at knowing the place of abode of the accused. On the other hand, the father of the accused has sworn an affidavit in support of his application for bail, confirming that the accused is one with a known family background.

The submissions by the prosecution on this ground were therefore unproven in any way. I am not convinced that the same amounted to a compelling reason.

iii) Likelihood of interference

For this ground to stand as a compelling reason, the prosecution must show the direct or indirect interference or the intention to do so. In the absence of such proof this ground cannot stand.

iv) Likelihood of absconding

This was probably the most serious of the objections raised. That upon being arrested, the accused on being interrogated, gave wrong information to the police. He gave false names, false identity card number and false mobile phone number, all of which belonged to different persons. That this showed an intention on the part of the accused to conceal his identity and disappear without trace. The accused has not responded to the allegations, leaving the court with only 1 conclusion to deduce from it. That the actions of the accused of giving the wrong set of information was in fact meant to misdirect the course of the investigations and in the process enable him disappear without trace

The question is however, whether this alone would be a sufficient reason to enable the court deny him the right to bail. His true identity has not been established. And by way of the affidavit of his father, his family bond has also been established. Yes, he may have acted in a rather awkward manner. But I am of the view that with proper conditions, the attendance of the accused would be secured.

In all, I am convinced that it would be fair and just in the circumstances to grant the accused his right to bail. I accordingly allow the accused's application dated 7.10.2020 and order that he may be released on bail on the following terms.

a) He may be released on a bond of Ksh.2 million with 1 surety of a similar amount

b) He is ordered never to interfere with any of the prosecution witnesses either directly or through proxy till this case is determined.

c) He is ordered, upon release, to attend court at all times as may be ordered by the court till this case is determined.

d) The surety shall deposit copy of his identity card and specifically confirm where the accused shall be residing upon his release on bond.

HON. JUSTICE D. OGEMBO OGOLA

27th November 2020

Court:

Ruling read out in open court (on-line) in the presence of the accused, his advocate Mr. Kimathi and Ms. Kimani for the state

HON. JUSTICE D. OGEMBO OGOLA

27th November 2020