



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CRIMINAL CASE NO. E005 OF 2020

REPUBLIC.....PROSECUTION

VERSUS

GRACE KENGA.....1ST ACCUSED

CHARLES KENGA.....2ND ACCUSED

LINET SALAMA.....3RD ACCUSED

ALFRED MRAMBA ROBERT.....4TH ACCUSED

FARAJ HAMISI.....5TH ACCUSED

Coram: Hon. Justice R. Nyakundi

Mr. Alenga for the state

Bamomin advocate for the accused persons

RULING

The accused persons through their counsel **Ms. Bamomin** moved this Court by way of notice of motion dated 19.10.2020 expressed in terms of Article 49 (1) (h) of the Constitution seeking to be released on bail pending trial. In support of the application are affidavits sworn by the accused persons and proposed sentences ready to enter cognizance with the Court.

The sureties have covenanted that they are ready to deposit their certificates of title with the Court as a condition precedent to and the accused persons be released from remand custody. The respondent did not seem to have any major challenge to have accused persons released on bail. The question is whether accused persons have satisfied the criteria to be released as such under Article 49 (1) (h) of the Constitution.

The Law

In considering the application, it must not be forgotten that its based on the Articles of the Constitution. As I understand the Law under Article 49 (1) (h) of the Constitution 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. In Article 50 (2) (a) of the same Constitution an accused person is presumed to be innocent until the contrary is proved what that means therefore he should not be deprived of his or her liberty until he or she has gone through a criminal process which secures a conviction with respect to the charge filed by the state.

It is a fundamental principle for the accused persons to be released on bail unless the state demonstrates existence of compelling reasons to keep them in custody pending trial. The grounds set out in the case of **Alhaj Majahid Dukubo v Federal Republic of Nigeria S. C. 20A/2020** forms the basis upon which an accused person may be denied bail. The Court stated as follows:

“when it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial Court, the Law has set out some criteria which the trial Court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this Court. Such criteria include among others, the following:

(1). The nature of the charge.

- (2). *The strength of the evidence which supports the charge.*
- (3). *The gravity of the punishment in the event of a conviction.*
- (4). *The previous criminal record of the accused if any*
- (5). *The probability that the accused may not surrender himself for trial.*
- (6). *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him*
- (7). *The likelihood of further charges being brought against the accused.*
- (8). *The probability of guilty.*
- (9). *Detention for the protection of the accused.*
- (10). *The necessity to procure medical or social report pending final disposal of the case.*

In another persuasive authority **Hangwe J** said in **S v Chiyangwa {2005} 2LRCH 168G – 169A** as follows:

“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 destruction and he is forced to rely on state support for livelihood whilst in custody. The consequences are just too of lastly to contemplate for the rich and the poor Magistrate and Judges are therefore to take the greatest care when approaching the question whether to deny or grant bail.”

The aim of the right is thus to ensure an accused person is released on bail with reasonable conditions before the state commences the trial. It should be pointed out that many accused persons find themselves in a state of shock or distress at their time of their arrest, with the result that they might not know of existence of a right to be released on bail pending trial. Therefore, the Court being an independent arbiter between the state with massive financial resources at its disposal against an accused person may attempt to furnish the Court with so called compelling reasons just to be given a chance to detain an accused person in custody.

“It follows, therefore that a Magistrate or Judge saddled with the responsibility of exercising a discretion is required to arrive at the decision in every case or situation based on the facts placed before him in the very case and apply the applicable Law. His decision is therefore likely to vary from case to case since the circumstances in each case may vary. The question of stereotype or strict application of the rule of judicial precedent would not be of importance.” (See **Eyu v The state {1988} 2 NWLR 607**)

I hold the view that there exists a striking disparity between an accused person and a convicted person at the end of the trial. Considering all factors the Court has to recognize the need to interpret Article 49 (1) (h) of the Constitution in a manner which upholds the rights of the accused person to be released on bail until a charge against him or her is established beyond reasonable doubt.

From the facts of this case the inescapable conclusion is that there are no compelling reasons for denying the accused persons bail pending trial. It follows that each of the accused person herein be released on bail of Kshs.500,000/= with a surety of identical amount to be approved by the Deputy Registrar of the High Court.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF NOVEMBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Alenga for the state

2. Bamomin advocate for the accused persons