



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

HIGH COURT CRIMINAL CASE NO. 36 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JUSTINE ELKANA KARUNGA.....ACCUSED

RULING

1. The Applicant is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which are that on the night of 24th/25th March 2017 at the Vineyard Bar Huruma Ngei II within Nairobi county jointly with another not before the court murdered **JOSEPH NYOIKE KANGETHE**.

2. He pleaded not guilty and by a Notice of Motion under **Article 49 (1) (g)** of the **Constitution of Kenya 2010** and **Section 123(3)** of the **Criminal Procedure Code** sought orders to be released on bond or bail on reasonable conditions pending the hearing and final determination of this cause supported by an affidavit in which it was deponed that he had been in custody for over a year since his arrest and being the sole breadwinner with a young family and children which are languishing in abject want as a result of his incarceration and the fact that one of his daughters needs to get married for which his presence is required, he should be released on bond.

3. The application is opposed by the prosecution through an affidavit sworn by **CPL. CHARLES LEPUCHIRIT** in which he deponed that upon the commission of the offence the Applicant and the other suspects not before the court relocated to unknown destinations and the Applicant was only arrested four (4) months later within Ngong area after concerted efforts of the police and the victim's family. It was stated further that the Applicant has no registration documents with the only information being that at the time of his employment he had indicated that he was of Tanzanian nationality.

4. It was deponed further that the Applicant has no fixed place of abode and is therefore a definite flight risk if released on bail. It was stated that other suspects are still at large and might never be found if the Applicant is released on bail.

SUBMISSIONS

5. Mr. Naulikha for the state submitted that through the affidavit and the Pre-bail report the prosecution had established compelling reasons to 5. enable the court deny the accused his constitutional right to bail being that he is a Tanzania citizen with no fixed abode making him a flight risk. Mr. Kariuki for the victim's family supported the prosecution's position and stated that the accused being a Tanzanian had come to the court's jurisdiction for the murder of a Kenyan and if released on bond there is no guarantee that he shall avail himself for trial when required.

6. Ms. Nyaga for the accused submitted that there was information that the accused was employed in Kenya and shall avail Kenya sureties. She stated that being a member of the East African Community should the same abscond there is in place East African Mutual Assistant Act which can be used.

7. The court called for Pre-bail report in which it was confirmed that the accused is a resident of Samunge area of Tanzania and that he came to Kenya and became a security guard at a place near Bomas of Kenya where he has been guarding a timber yard and other businesses upto the time of his arrest. His release was not recommended on the basis that he is a flight risk since he hails from Tanzania.

8. Bail is a constitutional right of every accused person under **Article 49 (1) (h)** of the **Constitution of Kenya 2010** which is only limited where there exists compelling reasons to be advanced by the prosecution as per the case law on a balance of probability.

9. Among the compelling reasons to be considered by the court are:-

- a) The likelihood of the accused fleeing from justice.*
- b) The likelihood of the accused repeating the offence.*
- c) The possibility of tempering with witnesses and obstructing court.*
- d) The criminal antecedents of the accused.*
- e) The gravity of the allegations.*
- f) Position and status of the accused.*
- g) The existence of prima facie case against the accused among others,*

as stated in the Bond and Bail Policy Guidelines issued by the Judiciary.

10. It is by now well settled that while considering an application for bail, the court ought not go deep into the merits of the matter but must consider whether there are compelling reasons advanced by the prosecution to enable the court limit the right of the accused person under **Article 24** as was stated in the Supreme court of India case of **MASROOR v STATE OF UTTAR PRADESH & ANOTHER [2009] 14 SCC 286**.

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the Courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”

11. In determining whether to grant bail or not **Section 123 (3)** of the **Criminal Procedure Code** is clear that the purpose of bail is to secure the attendance of the accused person at his/her trial and the basic rule should be bail and not jail.

12. In this cause, the prosecution has advanced the following grounds which I consider compelling reasons enough to enable me deny the accused his right to bail at this moment:-

- a) The fact that after the alleged commission of the offence he avoided arrest for a period of over four (4) months prima facie reveals that he is a person who can take the law into his hands and may even abscond in the future thereby delaying the process of justice.*
- b) The fact that he is not a Kenya citizen with known fixed abode makes him a possible candidate for flight risk.*
- c) The fact that there are still some suspects at large who have not been arrested portrays a possibility of the accused interfering with them and or their arrest.*

13. Whereas the accused has indicated that he has Kenya sureties, from the material placed before the court including pre-bail report I am satisfied that the prosecution has placed before me compelling reasons to enable me deny the accused bail at this stage of trial which I hereby do. The accused should remain in custody pending the final determination of this cause and it is so ordered.

Dated, Signed and Delivered at Nairobi this 20th day of February, 2019.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Ms. Nyaga for the accused

Mr. Kariuki for the victim's family

Accused present

