



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

MURDER NO. 16 OF 2018

JOHN WARAGA NJUKI.....APPLICANT

-VERSUS-

REPUBLIC.....RESPONDENT

RULING

1. The application pending before court is dated 27/12/2018 seeking bail pending trial for the accused person who was charged with murder contrary to **Section 203 as read with Section 204 of the Penal Code.**

2. The application is based on the following grounds. That he has a constitutional right to bail pending hearing. That he is a farmer at Kabonge within Kirinyaga County. That the law presumes that an accused person is innocent unless or until proven guilty. That he shall abide to any conditions put by the Honorable Court and there are no compelling reasons that may render him unsuitable for bail.

3. His pre-bail report indicated that the applicant is a casual labourer at Mununga Tea factory. That members of the community are not opposed to his release on bond s they had not known him to be a violent person or to engage in activities bordering on criminality. That initially when the matter was fresh, there was outcry from the community due to gravity of the issue but due to lapse of time, tempers have cooled down. That the family of the deceased appeared highly traumatized by what transpired and would like the judicial process to determine the issue.

4. The applicant has a supportive family willing to stand surety for him. He has a fixed abode and strong community ties therefore not viewed as flight risk.

Prosecution

In response, the investigating officer stated that he has conducted background checks and gathered information from his neighbours who are bitter with him and are likely to hurt him in the event he is granted bail. That the applicant is likely to interfere with one of the key witnesses who happens to be his neighbour. That the application should be postponed to allow the neighbours to cool down.

5. I have considered the application.

Bail pending trial

Under **Article 49 (1) (h) of the Constitution** bail pending trial is a constitutional right which should not be denied unless there are compelling reasons not to be released.

In **Republic v Stephen Robi Marwa & another [2014] Eklr** where an application for bail was considered it was stated:-

In the case of Republic –vs- David Nyasora Nyamongo – Criminal Case No.90 of 2010 (unreported) in the High Court sitting at Kisii, Makhandia J (as he then was) stated:-

“At the end of the day however whether or not an accused should be admitted to bail, is largely a matter of discretion of the court to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again, the court must bear in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to

be released on bail.”

6. There are various matter which the court has to consider as stated in the case which are the seriousness of the charge, risk of absconding, interference with witnesses and whether the accused person will turn up for trial. The granting of bail is not an absolute right as the right may be denied if there are compelling reasons.

7. The matters I have listed constitute compelling which when proved the court will deny the accused. They are however not limited to what I have stated, the main consideration is whether the accused will turn up for his trial.

The issue in this application then is whether there are compelling reasons why the applicants should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons.

In the case of *Republic –vs- Danson Ngunya & another [2010] eKLR*, the Court adopting the reasoning in the *M. Lunguzi –vs- Republic CMSCA Appeal NO.4 of 1995* the learned judge stated:-

“... In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. That is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order”

I entirely agree with the above propositions and hold that it is the duty of the state to satisfy me as to the compelling reasons why the applicants herein should not be released on bail/bond pending trial.

8. I am in agreement with the persuasive decision. It is the state who will normally oppose bail in a criminal case. It is trite that he who alleges bears the burden of proof.

In **Republic v John Kahindi Karisa & 2 others [2010] eKLR**

The Court stated while considering an application for bail pending trial.

The primary consideration is whether the accused person shall attend court and be available at the trial. All factors and circumstances for the release will be centered on this question. Any other factor will be secondary.....

I also reject the idea that the accused should be remanded and not granted bail for their own safety, security and good. Any accused person released on bail has his Constitutional rights secured and protected. No member of the public or any other person can try him or punish him.....As a result, it would amount to a judicial aiding and abetting of this Criminal trend of public murders or so called “mob justice” for the court to purport to deny bail to the accused so as to protect them from being lynched by members of the public.....

Balancing and considering all the facts and circumstances of this case and bearing in mind the Applicant’s Constitutional right to bail and their respective presumption of innocence I am still not convinced that the two accused here have given the court sufficient comfort and assurance that they will be available and attend court from time to time and for the trial. I think that an accused person should have made some effort and show or give court some reasons to dispel the apprehension that he would abscond. The present accused persons have not told the court the following:-

- What they do for a living i.e. occupation**
- Marital status**
- Whether they have children**
- Whether they are Kenya citizens or not**
- Any references from their Church, Mosque, Temple or Synagogue**
- Any leadership or other in society which makes them dependable.**

9. The prosecution has not proven that there is the risk of the applicant absconding, the risk of influencing witnesses and whether he will turn up for the hearing of his case once granted bail. There are therefore no compelling reasons to deny the applicant bail pending trial.

10. The allegation that the neighbours are bitter and might harm him is not a compelling reason. The applicant has a right to liberty protected under the constitution. Due process has been put in place and I doubt that the neighbours will take the law into their own hands. The applicant has a right to be presumed innocent. The State has enough machinery to protect the applicant and to take action on anybody who may harm him. The social inquiry by the Probation Officer has given a positive report from the members of the community around the village. In the case cited **R –v- Richard David Alden (2016) eKLR** it was stated that the State has to place enough material before court in order to persuade the court that the accused should not be released. The neighbours have not filed affidavits and the fears by the State have

been disapproved by the pre-bail report. The State has failed to place enough material to compel the court to deny the accused bail.

11. I Make an order that he be released on a bond of Kshs 1,000,000/- plus one like surety to appear for the trial until it is heard and finalized.

12. The surety be approved by the Deputy Registrar.

Dated at Kerugoya this 20th day of June 2019.

L. W. GITARI

JUDGE