



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 65 OF 2019

REPUBLIC.....DPP

VERSUS

PETER NJOROGE KARANJA ALIAS PK ACCUSED

RULING

This matter was coming up today for mention for the court to confirm if the probation officer's pre-bail report on the accused Peter Njoroge Karanja had been prepared and filed as ordered by the court on 22.10.2019. Indeed the probation officer, Mr. Kanyota has confirmed that the said report has dully been prepared and filed as ordered. I confirm the same. However, during the morning appearance, Mr. George Kimani, Advocate, stood and addressed the court as representing one Hon. Martha Wangari, Honorable Member of Parliament, Gilgil constituency, an interested party in these proceedings.

In his address, Mr. Kimani submitted that the interested party had learnt of these proceedings yesterday from the probation officer on the issue of whether the accused has a fixed abode in Gilgil as explained in the accused's application for bail. And that the interested party had filed an Affidavit on the same which was yet to be served on the other parties herein. Counsel submitted that it is the position of the interested party that she is not a wife of the accused and that the mentioned house in Gilgil does not belong to the accused. Counsel urged that they be allowed to serve the said documents and that they also be served with the statements accused wrote to the investigating officer of this case and the pre-bail report.

On his part, Mr. Mbatia for the accused maintained that the interested party is a stranger to these proceedings who must first be enjoined. No such application for enjoinder had been filed and she could therefore not seek to be supplied with documents relating to this case. It was further submitted that the matter of the Gilgil house is subject to a court case at Naivasha, being CMCC 69/2018. And that since accused has 2 homes, this cannot be a good ground for denial of bail. He pleaded that this affidavit be struck out.

On her part, Ms. Kimani, for the state, also opposed the application raised by the interested party. First, that it is not clear what part the interested party intends to play since there is already counsel for the family. Second, that under Article 50, statements can only be supplied to the defence of the accused, not strangers. Also, that this is not a matrimonial cause.

Mr. Kimani submitted in further reply the interested party has disclosed her interest and that it is the duty of counsel to bring to court all useful material and that Article 35 allows any person to seek any Public document or information.

I have considered the submissions of the learned counsel for the various parties herein. There is no doubt that this is a criminal case (of murder contrary to section 203 as read with 204 of the Penal Code). It is a case of the Republic versus the accused Peter Njoroge Karanja. Both the state and accused also represented by learned counsel. Indeed these are the 2 primary parties in a criminal trial. The only other party allowed to participate in this trial and who have been involved herein from commencement of the trial are the family of the victim, also represented by counsel.

This being a criminal case, I am persuaded by the arguments of the defence counsel and supported by both the state and the counsel for the family, that any other party interested in being enjoined in the proceedings must first seek leave of the court before being so enjoined. The (Intended) interested party herein has not sought for and obtained such leave. To this extent therefore, the said interested party, not being enjoined in these proceedings cannot participate in these proceedings at this stage. Consequently, no orders may issue in favour of or against the said party.

This court has also noted that the probation officer managed to contact the named interested party before the said officer prepared the pre-bail report already filed in court. Clearly therefore, the probation officer, in making the said report must have considered such positions as held by the interested party.

The issue of the house in Gilgil, i.e Gilgil Teachers project – plot No. 063 has featured in the submissions of learned counsel for the interested party, and the fact that there is at least a pending case over the same at a court(s) in Naivasha. It would be improper for this court to

consider these submissions in this issue of bail especially in view of the fact that the interested party has not been enjoined in these proceedings. It would similarly be improper for this court to make any substantive orders prayed for by the interested party including prayers for supply of witness statements or even the pre-bail report.

In all, therefore I not convinced that the pleas by the interested party have any merit. I accordingly dismiss the same and struck out the Affidavit of Martha Wangari Wanjiru (Interested party) sworn on 24.10.2019 and filed herein today 25.10.2019. Orders accordingly.

OGEMBO D. O.

JUDGE

25.10.2019

COURT:

Ruling read out in open court in the presence of Mr. Mbatia for accused, Ms. Kimani for the state, Mr. George Kimani for interested party and Mr. Holi for the family of the victims.

OGEMBO D. O.

JUDGE

25.10.2019

Court:

Ruling to be given to the pending application for bail. Ruling 29.10.2019.

OGEMBO D. O.

JUDGE

25.10.2019

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CRIMINAL CASE NO. 65 OF 2019

REPUBLICDPP

VERSUS

PETER NJOROGE KARANJA ALIAS PKACCUSED

RULING

This matter now comes up for the ruling of the application of the accused, Peter Njoroge Karanja, dated 9.10.2019 and filed herein on 11.10.2019. The same brought under Articles 25, 28, 29, 49(i) (h) and 50 of the constitution and section 123 of the Criminal Procedure Code, basically seeks that the accused be admitted to reasonable bail/bond pending trial of his case. The accused has sworn an affidavit in support of this application. The application has otherwise been opposed by the state and the counsel appearing for the family of the victims.

In arguing this application, learned counsel for the applicant (Mr. Lagat) submitted that the issue for determination herein is whether there are compelling reasons as to justify denial of bail to the accused. That the accused had been in custody for 43 days and co-operated fully with the investigators. He is a family man with houses both in Gilgil and Nakuru. He is also diabetic. Further, that an intended co-accused had already been granted bail in HCCR No. 60/2019.

Counsel further submitted that the accused was not known to the witnesses and so could not interfere with any of them and that in any case, the investigators had collected all the material they need for the investigations. Counsel relied on several decided cases:

- (i) Republic VS Richard David Alden (2018) eKLR, that the prosecution must place before the court material which demonstrates actual or perceived interference.
- (ii) Jeyendra Khimji Malde & 2 others VS R.(2011)eKLR, that all offences are bialable, while citing Cholmondeley Vs- R, Cr. Appeal 116/2007.

(iii) R. Vs. William Kipkorir Chirchir & Ano. (2018) eKLR on the same issue of interference with witnesses.

(iv) R. Vs. Mohamed Hagar Abdirahman & Ano. (2012) eKLR, in which the court disregarded the objection based on the ground of denial of bail for the sake of the safety of the accused.

(v) R. Vs. Godfrey Madegwa & 6 others, (2016) eKLR, that the primary consideration is whether the accused if released on bail would attend trial.

Counsel summed up that the accused would be willing to abide by any conditions that the court could set.

Ms. Gichohi, for the state, opposed the application basing her submissions on both the Affidavit filed by the investigating officer and the bail-bond policy guidelines. First that the right to bail is not absolute and the court must consider the nature of the offence, and seriousness of the charge and sentence upon conviction. That accused has a questionable character as shown by him being advised by the intended co-accused to change his phone. On interference with witnesses, it was submitted that the accused is well known to the witnesses since he was a frequent visitor to the home. Accused had also not shown any proof of his employment and there is need to have him in custody for his own protection. Neither has he shown any place of abode. Counsel otherwise confirmed that accused has health issues but that he would still access health attention even in custody. She pleaded that accused be denied bail.

On further reply, Mr. Mburu only stressed that grant of bail is the rule while denial is the exception, and that actual interference of witnesses must be shown. He urged the court to be persuaded by the findings in the related case being HCCR 60/2019 in which bail was granted.

I have considered the submissions of both sides regarding this matter of bail. I have also carefully considered the Affidavit and documents filed by the respective parties and the authorities relied on. This application is basically brought under Article 49(1) (h) which states:

“An arrested person has the 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.”

The above constitutional provisions clearly declares that bail or bond pending trial is a right of any person arrested on facing trial in court. However, the same provision at the same time declares that the right to bail is not an absolute right and that the same may be denied should compelling reasons be shown as to exist sufficient enough to justify such denial. In our case, the accused before the court has applied to be placed on bail. It is therefore incumbent upon the prosecution to prove to court, on a balance of probabilities, that there in fact exists such compelling reasons as to justify denial of this right to the accused.

As to what constitutes compelling reasons, this court is guided by the bail and bond policy guidelines of the judiciary which at clause 4.9 lists some of the factors that may be considered as follows:-

- The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.
- The strength of the prosecution's case.
- Character and antecedents of the accused.
- The failure of the accused person to observe terms of bail in previous cases.
- Likelihood of interference with witnesses.
- Need to protect the victims of the crime.
- Relationship between the accused person and potential witnesses.
- Whether accused is a flight risk.
- Whether accused is gainfully employed.
- Public order peace and security.
- Protection of the accused.

In opposing this application, the prosecution basically relied on only some of these grounds as follows:-

(i) Nature of the charge and seriousness of possible punishment.

There is no doubt in my mind that the accused faces a serious charge. It is a charge of murder, which in case of a conviction could attract a death sentence. But can this alone be a compelling reason? I do not think so. This is in view of the express constitutional provision that all arrested persons are entitled to bail (Irrespective of the nature of the charge). I therefore do not find this to be a compelling reason for denial of bail if taken on its own.

(ii) Likelihood of interference with witnesses:-

It was the prosecution's case that the accused, having been a frequent visitor at the residence of the victim, is well known to the witnesses herein and therefore able to interfere with the said witnesses. The accused of course denies this and so this fact can only await the trial for a definite determination to be made on the same. This court however, gets guidance from the case cited by the defence counsel of R. Vs. Richard David Alden (2016)eKLR, at paragraph 15,

“For the prosecution to succeed in persuading of this criteria of interference, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses, direct or indirect incriminating communication between the accused and witnesses At least some facts must be placed before court otherwise it is asking the court to speculate”

As it is, the prosecution only maintained that there is likelihood of interference since the accused apparently knows the witnesses. No claim was made of any attempts at communication or contact between the accused and any of the intended witnesses. This fear of the prosecution therefore has not been backed by any evidence. It therefore remains just that. A fear. It this is so, then this court does not find this to be a compelling reason.

(iii) That accused has no fixed abode:-

It was again the position of the prosecution that the accused person has no fixed abode. The accused has on his part maintained that he has residences both at Gilgil town and his rural home. This court ordered for a social report on the accused and a probation officer's pre-bail report was duly filed in court. The said report mentions that accused has a house both at Game village, Nakuru county and Gilgil town. Whereas there is no issue raised about accused's residence at Game village, Nakuru County, from the submissions in court on 25.10.2019, it became apparent that there are ownership issues over the house at Gilgil town. Indeed the defence side confirmed that this house is subject of pending court case(s) at Naivasha courts. In all, based on the social inquiry made about the accused, this court is not convinced that accused has no place of abode.

The main objective of grant of bail or bond is in my view, to enable the accused conduct his trial while he is not held in custody. He must commit to attend court as and when required or ordered to do so. In the application before court, he has undertaken to do so, and the prosecution has not made any claim that he is likely to abscond if released on bail.

This court is further persuaded by the decision made by the Hon. Justice S. Mutuku in Criminal case No. 60 of 2019, Republic –Versus Sarah Cohen, a related case to this one. The court, in that case analysed the same or similar circumstances, but nonetheless placed the accused therein on bond.

This court is therefore not convinced by the prosecution's objection that there are compelling reasons that could justify the denial of bail to the accused herein. I accordingly dismiss the prosecution's objection and allow the application of the accused dated 9.10.2019 on the following terms:-

- (i) That accused may be released on a bond of Ksh.4 million with 2 sureties, each of Ksh.2 million.
- (i) In the alternative accused shall deposit cash bail of Ksh.2 million
- (ii) The accused is ordered not to go to or visit the scene of crime, being plot no. LR. 2951/449, Farasi Lane, Nairobi unless appropriate orders are issued by this court.
- (iii) The accused is ordered never to contact or interfere with any prosecution witnesses or family members of the victims, either directly or indirectly through his agents or proxies, pending determination of this case.
- (iv) The accused's passport to be held by the DCI (investigators).

Orders accordingly.

OGEMBO D. O.

JUDGE

29.10.2019

Court:

Ruling read out in open court in the presence of accused, Mr. Mbatia for accused, Ms. Kimani for Ms. Gichohi and Ms. Mwaniki for the state.

OGEMBO D. O.

JUDGE

29.10.2019

Ms. Mwangi:

We ask for mention of this matter on 12.11.2019 for possible consolidation.

Court:

Matter to be mentioned before the Hon. Mutuku J. for application for consolidation on 12.11.2019.

OGEMBO D. O.

JUDGE

29.10.2019