



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

HIGH COURT CRIMINAL CASE NO 46 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

DAVID MUCHIRI MWANGI.....ACCUSED

RULING

1. The applicant **DAVID MUCHIRI MWANGI** 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 11th July, 2017 at about 7.50 hours at Fig Tree Medical Centre Ngara Area in Starehe Sub County within Nairobi County murdered **JARED RATEMO MOKUA**.

2. He pleaded not guilty to the said charges and by a Notice of Motion dated 3rd November, 2017 under Article 23, 24 and 49(i) (h) of the Constitution of Kenya 2010 and Section 123 of Criminal Procedure Code applied to be admitted to bond/bail pending the hearing and final determination of the cause which application was supported by an annexed affidavit sworn on 3rd November, 2017 in which he stated that he is a medical doctor by profession.

3. It was deponed that the accused was arrested on 2nd October, 2017 during which period he cooperated with the police and provided all information needed within his knowledge. He stated that he was married with four children the older being seven (7) years and the younger four (4) months old all who depended upon him as the sole bread winner his wife being a house wife. It was stated further that his wife's parents and his single mother who are relatively aged depended upon him for their day to day survival. He deponed that he shall not while on bond interfere with, intimidate, coerce or otherwise with any prosecution witnesses.

4. It was the accused contention that he was not a flight risk and would abide by all the terms and conditions set by the court including attending court at all material times.

5. In opposition to the said application the Law Society of Kenya to which the deceased was a member filed a replying affidavit sworn by **MERCY WAMBUA** its secretary and Chief Executive officer wherein she swore that whereas the applicant is presumed innocent until the contrary is proved and eligible to bail/bond, this case was about a medical doctor facing a serious charge whose mandatory death sentence is so profound that the temptation to abscond court and take flight was very high and real.

6. She deponed further that she had reasons to believe that investigations were incomplete with critical unanswered questions and the applicant being a man of means was able to influence and potentially interfere with investigations.

7. The prosecution did not file any affidavit in response to the said application and on 14/12/2017 this court ordered the probation office to prepare and submit to court pre-bail report which was filed on 24/1/2018 in which it was stated that the accused is married with children including one born out of wedlock and runs two medical clinics within Nairobi which offers general, Laboratory and Pharmaceutical services. The accused had community ties as confirmed by the Senior Assistant Chief of Ngara East sub-location to Nicholas Rono. It was stated therein that the accused had another pending matter before court where he was granted bond of Kshs.150,000/- and had faithfully obeyed the bond terms.

8. On victim impact statement it was stated that the deceased was a lawyer with KRA based at Mombasa having graduated with a law degree at the University of Nairobi and was at the time of his death pursuing M/A in International Relations at Kenyatta University. He was married to one C.O with three children aged 14, 9 and 2 years respectively who were all traumatized by his sudden death. He was the main bread winner of his family including his parents and siblings who were strongly opposed to the applicant being released on bond since they believed that there were more people who participated in the untimely death of the deceased and if released on bond the accused could collude with them to shield them and defeat the trial and deny the family justice.

SUBMISSIONS

9. When the application came up for hearing before me on 24th January, 2018 Dr. Khaminwa (SC) Advocate for the applicant took objection to the participation of the Law society and the victim's family at this stage of proceedings which objection was dismissed vide a ruling dated 1st February, 2018.

10. Dr. Khaminwa (SC) submitted that the only legal principle applicable was whether the accused will appear in court as and when required and that the only limitation was whether the accused life was in danger which was not the case. He submitted that the court may impose any condition including ordering the accused to appear before a police station. In support the following cases were submitted but without any comments thereon:-

- a) MOHAMMED & ANOTHER v REPUBLIC [2011] 2 EA 265
- b) REPUBLIC v KIMUNYA [2011] 2EA
- c) ALI v REPUBLIC [2013] 1 EA
- d) REPUBLIC v MGUNYA & ANOTHER [2011] 2 EA 36

11. Further emphasis was placed on the legal writing by PLO Lumumba and Luis G. Francesch. The constitution of Kenya 2010 an Introductory Commentary Strathmore University press pages 223 – 227.

12. On behalf of the prosecution Mr. Meroka submitted that there was a part of investigation that was not complete and the accused being a medical doctor can interfere with the said report and may interfere with witnesses. It was submitted that since a hearing date had been set the prosecution can bring in all crucial witnesses on the said dates.

13. Mr. Litoro on behalf of the wife and children of the deceased submitted that the court ought to take into account whether the accused if released will interfere with witnesses or not while Mr. Ongaro for the Law society submitted that there was information that the accused did not act alone and that investigations were ongoing and therefore the accused being a man of means may interfere with the said investigations. Mr. Omari for the siblings and parents of the deceased did not attend court for hearing of the application.

ANALYSIS AND DETERMINATION

14. Bail is now a constitutional right of every accused person under Article 49 (1) (h), which can only be limited where there are compelling reasons which compelling reasons must be proved by the prosecution on a balance of probability. What constitutes compelling reasons are now well settled in the Kenya criminal jurisprudence which can be discerned through a ray of authorities one being **REPUBLIC v MGUNYA & ANOTHER (SUPRA)**

- (i) The nature of charge.*
- (ii) The strength of the evidence which supports the change.*
- (iii) The gravity of the punishment in the event of conviction.*
- (iv) The previous criminal record of the accused if any.*
- (v) The probability that the accused may not surrender himself for trial.*
- (vi) The likelihood of the accused interfering with witnesses or that he may suppress any evidence such as incriminating him.*
- (vii) Likelihood of further charges being brought against the accused.*
- (viii) The probability of a finding of guilt.*
- (ix) Detention for the protection of the accused.*
- (x) The necessity to procure a medical or social report pending the disposal of the case.*
- (xi) Accused persons own safety, security and protection – REPUBLIC V KIMUNYA.*
- (xii) If the accused person is likely to pose public danger by being released on bail.*
- (xiii) If by releasing the accused on bail public confidence in the administration of justice will be dismissed.*
- (xiv) The character antecedents, associations and community ties of the accused person.*

15. In this matter the prosecution only stated that there was a part of investigation which was not complete which submission was supported by Mr. Ongaro for the law society but note that no details were given to assist the court in making a determination thereon. The other fact submitted was that being a man of means the accused may interfere with the said investigations.

16. This court takes the view that the constitutional right granted to Kenyans under the Constitution of Kenya 2010 for which Kenya struggled for may not be denied without adequate compelling reasons and a person should not be denied his freedom until he is judged to be guilty or innocent of the crime for which he is charged. Good reason must exist for the denial of bail.

17. For the accused to had been charged the investigations must have been completed and even if there is still pending investigation that in itself is not compelling reason enough to deny the accused his constitutional right to bail. The fact that an accused person is a man of means in itself cannot be a ground for denial of bond unless it is proved to the satisfaction of the court that he is using the same means to defeat the course of justice which is not the case herein. Having taken into account the replying affidavit by the law society and the submissions, it is my finding that the prosecution has failed to provide compelling reasons to the required degree to enable the court deny the accused person his right to bail and noting as submitted by the applicant that the main purpose for bail is to secure the attendance of the accused person at the trial, no reason has been advanced to show that when released the accused will fail to appear for his trial at this stage and or to interfere with investigations.

18. Having found that there is no compelling reason aforesaid the next issue for consideration is as to what constitutes reasonable bail terms and conditions. The accused person is charged with an offence of murder for which he has pleaded not guilty and therefore in setting out the bond terms the court must take into account the nature of the offence the character and status of the accused and the bail amount that will make it attractive for the accused to attend his trial.

19. I am therefore of the considered opinion that a bond of Kenya Shillings two million (Kshs.2,000,000/-) with two surety of similar amount will be very reasonable in the circumstances herein, my finding herein is supported by the following high court decisions wherein the accused persons were also charged with the offence of murder:-

1) REPUBLIC v PETER OCHIENG

High Court at Kisumu Cr. Case No. 62/2012 [2012] eKLR – the accused was released on a bond of Kshs. One million five hundred thousand (Kshs.1,500,000/-)

2) REPUBLIC v RICHARD NYAENGA MOGAKA

High Court of Kenya at Kisii Cr. Murder No. 74/2013 wherein the accused was granted bond of Kenya shillings five million (5,000,000/-) with two sureties of like amount.

3) REPUBLIC v COLLETA KWAMBOKA ISENA

High court of Kenya at Kisii Cr. Case No. 31 of 2012 wherein the accused was released on a bond of Kenya Shillings three million (Kshs.3,000,000/-) with two sureties of similar amount.

b) in addition to posting the above bond the applicant shall during the course of his trial make no contact of whatsoever nature with the potential prosecution witnesses and in particular the wife of the deceased until she testifies in the trial herein and shall report to the officer commanding Ngara Police Station once after every 60 days until the final conclusion of this case and it is so ordered.

Dated, Signed and Delivered at Nairobi this 21st day of February, 2018

.....

J. WAKIAGA

JUDGE

In the presence of:-

..... for the State

.....for the accused

Accused present

Court clerk - Tabitha