REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL MURDER NO 7 OF 2014

PETER MAKAU NDILI……..……..APPLICANT

-VERSUS-

REPUBLIC…….....……..…….....RESPONDENT

RULING

1. The accused **Peter Makau Ndile**was charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. He pleaded not guilty to the offence on 8th May, 2014 and has been in custody ever since. The matter has already proceeded with hearing of three prosecution witnesses before the accused filed the application dated 15th February, 2017 seeking for bail pending trial.

2. The accused states that he has a right enshrined under the **Constitution** to secure bail of bond pending hearing and determination of his case. That he has a permanent home within the jurisdiction and he shall ensure he attends each time he is required. In addition, he shall not interfere with the investigations in this case and will abide by any conditions given by the court.

3. The prosecution filed their response and stated that he was briefed before taking over the matter that the accused escaped from Kirinyaga immediately after committing the offence and was arrested at Machakos Town therefore he is a flight risk. That there are only three prosecution witnesses remaining.

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. This issue has been addressed in various persuasive decisions of the High Court.In the case of **Republic v Stephen Robi Marwa & another [2014] eKLR**the Court in dismissing the application for bail pending trial in a murder case 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."***
>
> ***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."

In the case of **Republic v Dominic Muhangani [2015] eKLR**the Court in allowing the application for bail pending trial stated:

"It is the duty of the prosecution to offer such compelling reasons. Where no such reasons are given the court ought to exercise its discretion in favour of granting the accused bond……."

Further inthe case of **Sayanka Pariken Kanto v Republic [2016] eKLR** on the issue of compelling reason, the court held:

As noted elsewhere, compelling reasons have not been defined in our Constitution of the Republic. However this has been left to court interpretation to come up with some kind of threshold. In the case of REPUBLIC v DORINE AOKOheld atNakuru by Emukule JinCriminal Case No. 36 of 2010the court stated as follows:

"To my mind again, those compelling reasons are the very same ones spelt out in Section 72 (5) of the Repealed Constitution, and elaborated in Section 323 of the Criminal Procedure Code, namely that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence which are not only punishable by death, but are by reason of their gravity (taking away another person's life, disloyalty to the state of one's nationality or grievous assault and injury to another person or his property) are offences which are by their reprehensiveness not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim to see a perpetrator of murder, treason or violence robbery (committed or attempted) walk to the street on bond or bail pending trial. A charge of murder or treason or robbery with violence (committed or attempted) would thus be a compelling reason for not granting accused person bond or bail."

In the case ofREPUBLIC VS. JORRAM MAYENDE & 3 OTHERS HCCRC NO. 55 of 2009the court considered the scope of Article 49(1) (h) of the Constitution on what constitutes compelling reasons.

The court stated thus:

"The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution."

4. It is well established that the onus is on the prosecution to prove that there are compelling reasons not to grant the accused bail. Where this burden is discharged, the Court will hesitate to release the accused on bail. In this case the reason given is that accused is a flight risk.

5. The accused has indicated that he has a permanent home within the jurisdiction which has not been refuted by the prosecution. We have no information whether he has a family or not. However, the burden is upon the prosecution to prove compelling reasons why the accused should not be released on bail, their reason is that he is a flight risk since he escaped immediately after the offence and was arrested three days later in Machakos.

6. In view of the fact that the accused already escaped after allegedly committing the offence despite the fact that he had a permanent house within the jurisdiction then there is a high possibility that he might flee again. He is therefore a flight risk and should not be granted bail. As held by Makhandia J., as he then was, in the case of **R -V- Stephene Robi Marwa & another** one of the cardinal considerations when granting bail is whether the accused will turn up for his trial. The interest of justice demands that a trial should be heard and determined. This would not be achieved if the accused is granted bail and he absconds. The applicant absconded from the jurisdiction of this Court after the offence was committed and yet he depones that he resides within the jurisdiction of this Court. There is reasonable apprehension that he moved to Machakos from where he was arrested in an attempt to escape from being prosecuted for this offence. He is a flight risk as submitted by the State. Three witnesses have testified and the case can be fast tracked for the remaining witnesses to testify. I find that the prosecution has adduced a compelling reason not to grant the accused bail. I find that the application has no merits and so I dismiss it.

Dated and delivered at Kerugoya this 8th day of March, 2018.

L. W. GITARI

JUDGE