



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**CRIMINAL MURDER NO. 8 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS-**

**JAMES CHESIKAKI JOHN NATO**

**alias JOSEE/JOSPHAT.....ACCUSED**

**RULING**

1. The accused person **James Chesikaki John Nato alias Josee/Josphat** is charged with murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. He pleaded not guilty to the charge on 30<sup>th</sup> May, 2016 and has been in custody ever since. The accused has filed a Notice of Motion under **Article 49 (1) (h)** and **Article 2** of the **Constitution** seeking orders that he be released on bond with surety pending the hearing and determination of this case.

2. The application is based on the following grounds:

- (a) That the accused person/Applicant has a constitutional right to bail pending the hearing of this case.*
- (b) That the law presumes that the accused person is innocent unless or until proven guilty.*
- (c) That the accused person/Applicant did not commit the offence and therefore intend to plead not guilty.*
- (d) That the accused person/applicant shall abide to any conditions put by the honourable Court.*
- (e) That there are no compelling reasons that may render the accused person unsuitable for bail.*

3. The application is supported by the affidavit of the applicant sworn on 20<sup>th</sup> February, 2017. The appellant reiterates the above grounds and further states that he is ready to abide by any conditions which the Court may set and further that he is a shamba boy at Kangaru village in Kirinyaga County but comes from Bungoma. That he has been living with the deceased since 2015 and took parental responsibility of her two children one of whom she claimed was his.

4. The State opposed the application and filed a replying affidavit sworn by Cpl. Joshua Mwongela who is the investigating officer in the matter. He depones that the accused is alleged to have killed the deceased Rose Wambui alias Margaret Wambui who was his live in girlfriend and went into hiding. That the accused has no known place of abode as he used to live in a rented room at Kagio township where he is no longer a tenant. That it will be impossible to trace him in the event that he absconds. That the Appellant's true identity and home location are unknown as he does not possess a national identification card and this will make it impossible to trace him in case he absconds. That these are compelling reasons to warrant the Court to deny the applicant bail.

5. I have considered the application. Bail pending trial is a constitutional right which should not be denied to an accused unless there are compelling reasons to deny him bail. **Article 49 (1) (h)** of the **Constitution** provides:

***“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.”***

6. The principle consideration in granting bail is that the accused will turn up for trial. Where there are no compelling reasons the accused person will not be denied bail. This is based on the Constitutional principle that an accused person is presumed innocent until proved guilty.

A compelling reason must be one which is convincing and must be valid and well founded reason. My view is that the prosecution has given a compelling reason to deny the accused bail. This is because:

- 1) The accused is alleged by the prosecution not have a known or a fixed abode. The accused in his affidavit states that he comes from Bungoma but has not given his home particulars. Bungoma is a big County and failure to give his home particulars like village, location or local chief raises doubts as to whether that is where he comes from.
- 2) The accused has no national identity card to confirm his identity and where he comes from. His identity is not known. I note that he is James Chesikaki John Nato alias Josee/Josphat, which casts doubts as to his true identity. His identity cannot be ascertained. Though Bungoma is in the Republic of Kenya I take judicial notice that it is near Uganda border and without identification documents the identity of the accused cannot be ascertained. If released and he absconds, it will be difficult to trace him.
- 3) The accused is a flight risk. It is sworn that he went into hiding after he allegedly committed the offense. There is nothing deponed to show that if he is released he will not go into hiding again. Bail terms will not stop him from absconding when he has not given his particulars.
- 4) The accused is charged with a very serious offence.

7. There is nothing to guide this Court when considering bail terms if the Court were to grant him bail as no social enquiry was done. There was no probation officer's report which was availed. Under the Bail and Bond Policy Guidelines, a bail report is defined as "A social inquiry report based on information generated about the background and community ties of an accused person, and its purpose is to verify information provided to the court by the accused person, to assess the likelihood that the accused person will appear for trial, and enable the Court to impose reasonable bail terms and conditions." **Chapter 4 (26)** states:

***"The Court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision, including the following instances:***

- a) Where there is doubt on the information on the accused person relating to the grant of bail; or***
- b) Where the prosecution objects to bail, with plausible reasons; or***
- c) Where the accused person has been granted bail but fails to meet bail terms and seeks review of those terms; or***
- d) Where the victim of the crime contests the grant of bail or applies for review of bail conditions; or.***
- e) On the Court's own motion where it deems necessary."***

The report enables the Court to give an informed decision when granting bail and more so considering that justice must be done to all irrespective of status as provided under Article 159(2)(a) Constitution. The Court must give due consideration to all parties involved when exercising discretion as to whether to grant the accused person bail. In a persuasive decision in the case of **Republic -V- Stephen Robu Marwa & another (2014) eKLR** the Court in dismissing an 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.”*

8. It is my view that the prosecution has discharged the burden to prove that there are compelling reasons not to release the accused. In **Sayanka-Pariken Kanto -V- Republic (2016) eKLR** the Court stated on the issue of compelling reason:-

*“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 AOKO held at Nakuru by Emukule J in Criminal Case No. 36 of 2010 the 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 violent 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.”*

I have said as much that justice is two ways – must be done to call, the offender and the victim and hence the need for the Court to ensure that the granting of bail may not be seen as doing an injustice to the victim where bail is granted and the offender absconds due to failure to give due consideration to compelling reasons which the Constitution reserves at the discretion of the Court.

*“In the case of REPUBLIC VS JORRAM MAYENDE & 3 OTHERS HCCR NO. 55 OF 2009 the 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.”*

9. I have pointed out the compelling reasons proved by the prosecution which were not rebutted. The accused is clearly a flight risk. The uncertainty of his abode and his true identity are no doubt convincing and valid reasons and therefore compelling reasons to deny the accused bail. There are no indications that there are children out there suffering due to the incarceration of the accused. In any case he claims to be the father of one of them whose name he has not even given. Furthermore, since the accused is alleged to have killed the mother of those alleged children for reasons which this Court is yet to establish, it is not in the best interest of those children to be under his care or custody.

10. In conclusion I find that the prosecution has established to the required standards that there are compelling reasons to deny the accused bail. I find that the application is without merits and is dismissed.

**Dated and delivered at Kerugoya this 13<sup>th</sup> day of April, 2018.**

**L. W. GITARI**

**JUDGE**

The ruling read out in open court, accused present, Mr. D. Sitati for the State, M/s Kimotho holding brief for Abubakar for the Accused, C/A Kinyua

**L. W. GITARI**

**JUDGE**