



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 13 OF 2018

REPUBLIC.....RESPONDENT

VERSUS

EDWIN MWENDA NJERU.....APPLICANT/ACCUSED

RULING

1. This is a ruling on an application dated 11/06/2018 seeking for orders for bail pending hearing and determination of this case.
2. The applicant states that he was arraigned in court and charged with the offence of murder in May 2018. He has been in custody since then and is convinced that he has a right to be released on bail.
3. He depones that he has a young family and that he is the only bread winner. He further states that his siblings who are in school depended on him for payment of school fees before his arrest. The entire family has now been left without financial and moral support after he was charged.
4. The applicant states that he will not interfere with witnesses if released on bond.
5. The respondent in its replying affidavit sworn by Richard Mathenge the investigating officer opposes this application.
6. It is deposed that it took the investigating team a period of one year to unearth the evidence in this case because the applicant had threatened to harm the witnesses should they give any information to the police. One the witnesses Diana Mukami Njeru was an eye witness to the offence and has continually been threatened with death. The witness is a student who has now sought refuge at the home of her school headmaster. The respondent is convinced that should the applicant be released on bond, he is likely to harm the said eye witness.
7. The applicant's counsel Ms. Mutege argued that bail is a constitutional right to the accused and the applicant is entitled to be released. She argued further that the respondent has not given any particular incident of threats complained of. The prosecution ought to have put the witness under witness protection programme if the threat is real.
8. The relevant law to this application is Article 49(1)(h) which provides that:-

(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

9. From the reading of Article 149, bail is one of the rights protected by the Constitution. It is based on the notion that the accused is presumed innocent until proven guilty.
10. The provision relating to bail gives the prosecution the window of presenting compelling reasons to the court on why the accused person ought not to be released. This invokes discretion of the court to interrogate the reasons given by the prosecution and reach a conclusion whether the same are compelling.
11. The word “compelling” is defended in Concise Oxford Dictionary as “force or obliging to do something; bring about by force or pressure”.

12. The court must therefore ensure that compelling reasons presented to it are powerfully evoking attention for its consideration.
13. The investigating officer states on oath that the applicant had threatened his sister who is a student with death should she give any information to the police. This was in the initial stages of the investigation. The investigation to unearth the truth continued to an extent that the witness who is a student has taken refuge in the home of her school principal.
14. These averments were not controverted by the applicant on oath and remain as such. It is in the submissions that the counsel raised the issue that no single incident of the threats was stated by the prosecution. In the supporting affidavit, the deponent states that the threats have been "continuous" which is self explanatory. It may not have been supported by attaching an Occurrence Book report but coming from the investigating officer, I have no reason to doubt it.
15. The defence raises the issue why the witness has not been taken into the witness protection programme. She is said to be a student which has not been denied.
16. I believe that the consideration to keep the young girl at the school in the custody of her school principal was meant to ensure that the witness continues with her studies. The witness protection program may be considered at a later stage if need be.
17. The applicant is charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. In the statement of the witnesses, he is alleged to have killed his girlfriend and her young child after the two disagreed. The offences are serious in nature and involves loss of two lives.
18. The only eye witness seems to have gotten so scared by the applicant who threatened to harm her to an extent that she can no longer live at her parents home. The prosecution have a reason to fear that the threats may develop in destruction of the evidence. The applicant is said to be a General Service Unit (GSU) officer which job status would send shivers in the life of the young student.
19. The applicant has been in custody for about two (2) months since he was arrested. The trial of the case is yet to begin.
20. It is my considered opinion that the threats on the witness are compelling reasons for the accused not to be released on bail at this stage. However, bail may be considered after the said witness has testified.
21. I find the application not merited and dismissed accordingly.

DELIVERED, DATED AND SIGNED AT EMBU THIS 23RD DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Mate for the State

Ms. Mutegi for Applicant/Accused

Applicant present