



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CRIMINAL CASE NO.5 OF 2018

(CONSOLIDATED WITH HCCR NO. 33 OF 2017)

REPUBLIC.....PROSECUTOR

VERSUS

SHADRACK NG'ENO.....1ST ACCUSED

CHARLES KIPLANGAT BOSUBEN.....2ND ACCUSED

RULING

1. The two accused persons in this matter are charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 23rd day of November 2017, they murdered Willy Kipkemoi Kigen. They pleaded not guilty to the offence and their case is set for hearing. They have now applied to be released on bail pending their trial. The applications are dated 6th March 2018 and 20th April 2018 respectively, and are supported by affidavits sworn by the accused persons. The accused persons are represented by their Learned Counsel, Mr. Sang and Mr. Terer.

2. The applications are opposed by the state on the basis that there are compelling reasons why the accused persons should not be admitted to bail or bond.

3. In his submissions on behalf of both the accused persons, Mr. Sang referred the court to Article 49 (1) (h) section 123 of the Criminal Procedure Code and the Bail and Bond Guidelines. He noted that in the affidavit in opposition to the application, the deponent, Anthony Ndegwa from the DCI, Bureti, had argued that the accused were a threat to the family of the deceased. He observed, however, that the pre-bail report had stated that the accused are eligible for release on bond.

4. It was his submission that in determining whether to grant bail or bond, the court is bound by the law in section 123 of the Criminal Procedure code and Article 49. That the only caveat is that there should be compelling reasons not to grant bail. It was his submission that as the DPP had objected to the release of the accused on bail, he had the burden of satisfying the court that there are compelling reasons why the accused should not be released.

5. According to Mr. Sang, the reasons advanced in the affidavit of Anthony Ndegwa - that the accused are a threat to the family of the deceased, fall short of saying that the accused will interfere with witnesses. There was, however, no evidence before the court to support the allegation that there would be such interference. Counsel relied on the decision in **Andrew vs Republic (1973) EA 282** to submit that allegations of interfering with witnesses should be proved, and the court should not act on fears or allegations. Further, that threats are codified in the Penal Code, are offences that require trial, and do not amount to compelling reasons. He urged the court to allow the applications and release the two accused persons on bail pending trial.

6. In submissions on behalf of the State, Mr. Ayodo, Learned Senior Prosecution Counsel, relied on the affidavit of PC Anthony Ndegwa sworn on 11th June 2018. PC Ndegwa deposes that prior to and immediately after the murder of the deceased, the accused persons issued threats and made good the threats to kill the deceased, the husband of one Janet Chelangat, who is a witness for the prosecution. He further deposes that the prosecution witnesses have been receiving persistent threats from the accused.

7. At paragraph 7 (e), PC Ndegwa deposes that to prove that the threats of the accused are real, both the accused are accomplices in CM CC 3020 of 2017 in Kericho in which the complainant, Alex Maloro, who is a neighbour to both the accused and the deceased, had been assaulted as he tried to assist and was assaulted during and after the murder incident.

8. Mr. Ayodo submitted that the witnesses are apprehensive and fear that if the accused are released on bond, they will be a threat to the witnesses as they are all neighbours, and they will interfere with witnesses. While conceding that the state was alive to the provisions of Article 49 (i) (h), it was Mr. Ayodo's submission that the rights under Article 49 are not absolute. In his view, the reasons advanced by the

state are compelling, and he urged the court not to grant the accused bail or bond, at least not yet.

9. Mr. Sang submitted in response that the pending criminal case cited by the prosecution cannot be relied on as the accused are not charged in those case and are not out on bond. Further, that the complainant in the case is not a witness in this case nor is he a member of the family of the deceased.

10. Article 49 (1) (h) provides that 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.”** The state is under an obligation to satisfy the court that there are compelling reasons why the accused should not be released on bail. Should it fail to do so, then the court is under a constitutional obligation to safeguard the accused’s right to be released on bail pending their trial. The question is whether the reasons placed before the court suffice to justify the denial of bail.

11. I have considered various decisions in which the court was called upon to decide whether or not a case has been made out for denial of bail to an accused person. I have also considered what courts have defined ‘compelling reasons’ to mean in reaching such decisions. In **R vs Mohammed Hagar Abdirahiman & Another [2012] eKLR, the court defined** a “compelling reason” as **“such a reason that is forcefully convincing to persuade this court to believe that something is true”**. In **R. vs Joktan Muyenda & 3 others Bungoma High Court Criminal Case No 55 of 2009**, the court stated as follows:

“...the phrase ‘compelling reasons’ would denote reasons that are forceful and convincing as to make the court feel very 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.”

12. In **Ng’ang’a vs Republic (1985) KLR 451** the court set out the principles to guide the court in considering whether to grant bail. These are whether the accused person will turn up for trial, the seriousness of the charge, the character and antecedents of the accused, and whether the security of the accused will be guaranteed if released.

13. In **Meru Criminal Case No. 55 of 2011-Republic vs Moses Mbaabu & Others** the court considered the pre-bail report and noted, among other things, that the likelihood of the applicants re-offending while on bail were high, that they were involved in questionable activities of a criminal character, and that even their own families did not recommend their release on bail and had made it clear that they would not avail themselves to stand surety for the accused. Similarly, in **Eldoret Criminal Case No. 43 of 2015-Alex Kipchirchir vs Republic**, the High Court declined to release the applicant on bail for his own safety. The applicant in that case had been charged with the murder of his stepbrother, the community was hostile and his safety was not guaranteed.

14. In the present case, the accused are charged with murder. The affidavit sworn on behalf of the state indicates that the deceased was a relative of the accused. The state alleges that there had been threats made to the deceased before his murder. These allegations have been made by the widow of the deceased, who the prosecution says is one of its witnesses. There is also an allegation made that the accused are accomplices in an assault case being **Kericho CMCC No. 3020 of 2017**. The complainant, one Alex Maloro, is a neighbour of the deceased and the accused, and he was assaulted when he attempted to assist the deceased.

15. I have considered the pre-bail report filed in this court on 22nd May 2018. It indicates that Charles Kiplangat Bosuben, the 1st accused, is a maternal cousin of the deceased. The relationship with the 2nd accused is not indicated. It appears that there was a dispute over land with the deceased, and this is what may have triggered the events that led to the death of the deceased. The report indicates that the accused are not known to have been involved in any criminal conduct. I note from the report also that the 2nd accused, Shadrack Ngeno Kibet, a student at Rongo University is alleged to be on medication as he is sickly.

16. Nonetheless, I note that the deceased and the accused are from the same family, and they appear to have been living either on the same parcel of land or in close proximity to each other. There is apprehension on the part of the family of the deceased, which in the circumstances I am satisfied is well founded, that the accused pose danger to them. Consequently, I am satisfied that the release of the accused on bail, at least before the family of the deceased has testified, is not in the interests of justice as the witnesses may be threatened or otherwise interfered with.

17. I accordingly decline to grant the accused bail pending trial at this stage. The prosecution shall proceed with the evidence of the widow of the deceased and any other family member first. Thereafter, the accused may renew their application for release on bail pending completion of their trial.

Dated Delivered and Signed at Kericho this 26th day of September 2018.

MUMBI NGUGI

JUDGE