

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO.67 OF 2016

PAPAYEI SUMUNGEN NANGUNYE.....ACCUSED

Versus

REPUBLIC.....RESPONDENT

RULING

[1] I am called upon to decide whether the accused person should be released on bail. On 10th May 2017, the court directed that a pre-bail report be filed within 14 days and further directed the matter be treated with priority as the accused person had applied to be escorted to Isiolo to make some cash withdrawals for his children. When the matter came up for hearing again on 30th May 2017, Mr. Mungai Learned State Counsel for the state opposed the release of the accused person on bail contending inter alia that the investigation officer did not know where the accused person resided and was therefore a flight risk. Consequently, he urged the court to deny the accused person bail.

[2] According to un dated pre-bail report filed in court, members of the family of the accused person were categorical that the accused person should not be granted bail at this stage as the family is yet to approach the deceased family and “console” them in accordance with their tradition. It states that there were rituals to be performed before the accused was accepted back. And that if this was not done, the accused person would not be accepted back if he was released. That is not all; the report stated that the matter was still very fresh in people’s minds hence the need to keep the accused person in safe custody until the home environment became less hostile. These sentiments were echoed by the family of the deceased; here the village elder intimated to the probation officer that the relationship between the two families was hostile since the family of the accused had not yet performed the required rituals which accompany such an occurrence (murder) as per their traditions. Similarly, the area chief was of the opinion that the accused person should not be granted bail at this stage until the “temperature” on the ground has cooled.

DETERMINATION

[3] Upon careful consideration of this application, submissions by counsels and the pre bail report, I am of the following persuasion. Unlike in the old constitutional dispensation, under Article 49 (1) (h) of the Constitution a person charged with a criminal offence including a capital offence will be released on bond upon reasonable terms except, where there are compelling not to be released. Courts have now embarked upon defining this term “compelling reasons” and towards that effort I am content to cite decisions by Odero & Nzioka JJ, and Majanja J in separate decisions in **MSA HC CR APPL NO 66A & 66B OF 2011 MOHAMED ABDULRAHMAN SAID & ANOTHER V REPUBLIC [2012] e KLR**, and **NBIHC JR MISC APP NO 271 OF 2011 WILSON THIRIMBA V DPP [2012] e KLR** respectively, where it was observed;

Once again we will turn to the Concise Oxford Dictionary 9th Edition where the ordinary English meaning of the term compelling is given as “rousing, strong, interest attention, conviction or admiration”.

[4] I will apply this test to the facts of this case. The pre-bail report indicated that the family of the deceased, and of the accused is opposed to the release of the accused at this stage. Their major reasons are threefold. The first, essential and specific rituals that must be performed following such an occurrence (murder) are yet to be performed by the family of accused person. Two, the incident is too recent and

fresh in the minds of the victim family and the community. And, three, the foregoing two factors have generated a lot of hostilities against the accused and his family from the family of the deceased and the community. The area chief was of a similar view that the accused person should not be released on bail until the temperature on the ground have cooled down. Are these matters compelling reasons not to release the accused on bond?

[5] Although the nature of the rites to be performed was not given in the report, it is apparent that it entails the family of the perpetrator approaching the family of the victim to “console” them. I am not an expert in this tradition, but it sounds to me like a pacification of the family of the victim and the society. It also seems that the tradition is regarded highly in that community. Thus, based on this tradition, the parties interviewed including the family of the accused expressed fear that releasing the accused before the rituals are done would portend danger to the accused from the family of the victim as well as the community. As I have stated in past decisions, real danger to the accused, would amount to compelling reason not to release the accused person. In this case, the fear is not unfounded; there is high possibility of real danger to the accused person. Accordingly, taking into consideration all the circumstances in this case and the reasons alluded to above; I find that there are compelling reasons not to release the accused person on bail. The application for bail is therefore denied for now. However, should circumstances change before this case is concluded, I will revisit the possibility of releasing him on bond. Meanwhile, the accused shall remain in custody as this case is being heard. It is so ordered.

Dated, signed and delivered in open court at Meru this 26th July 2017

F. GIKONYO

JUDGE