



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO.90 OF 2016

GEORGE MUGAMBI NGOLWA.....ACCUSED

-VS-

REPUBLIC.....RESPONDENT

RULING

[1] I am considering an application by the accused person to be released on bond. The accused is charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya. But he says that it is his constitutional right to be released on bond. Mr. Ojiambo, the legal counsel for the accused submitted that the reasons being advanced by the prosecution are not compelling reason as envisaged by the Constitution. He stated that the accused person presented himself to the police after the event and that he is ready to abide by all conditions which the court may set.

[2] On 27th March 2017, the court directed that a pre-bail report be filed in court within 14 days from the said date and further directed the prosecution to file an affidavit within 7 days if they honestly believed that there were compelling reasons not to release the accused person on bail. When the matter came up for hearing again on 31st May 2017, the prosecution had not filled any affidavit as directed by the court on 27th March 2017. Mr. Mungai Learned State Counsel however explained to court the reason of this failure to be that the Investigations Officer had not been available to do the affidavit. Nonetheless, Mr. Mungai was opposed to the release of the accused on bond and he gave his reasons, to wit; (1) that two the suspects and who are related to the accused person were still at large; and (2) that there was real possibility of interference with witnesses by the accused.

[3] The pre-bail report was filed in court on 30th March 2017. In the report, the accused person was said to be a first offender and that there were no previous records of criminal conduct on him. The local area administration confirmed this fact. The accused persons family members were positive of the accused person being released on bail, except as it would naturally be expected, the family of the deceased were said to be bitter with what happened and could not entertain the idea of the accused person being released on bail.

DETERMINATION

[4] I have considered this application, submissions by counsels and the pre bail report. Unlike the old constitutional order where persons charged with capital offences were not eligible to bail or bond, the new constitutional dispensation proclaimed that 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. See Article 49 (1) (h) of the Constitution. In this case, the prosecution says that there compelling reasons not to release the accused on bond. The defense says the reason given do not amount to compelling

reasons in the sense of the Constitution. My task therefore is to weigh the reasons advanced by the prosecution on the constitutional yardstick and determine whether they are compelling reasons to deny the accused person bail or bond. This phraseology "compelling reasons" has not been defined in the constitution. But of course, each case shall depend on its merits. However, much judicial and literary ink has been spilt in the attempt to give pragmatic meaning to the phrase "compelling reasons" as well as to create a catalogue of instances which would amount to compelling reasons.

[5] On this word "compelling" see the decision 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, that;

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".

Applying this test, the Learned State Counsel is making general assertions that two other suspects were at large and that there was a possibility of the accused person interfering with witnesses. The investigations officer did not swear an affidavit to give specific details on the possibility of interference with witnesses by the accused. The onus of showing there are compelling reasons rests with the prosecution and that burden cannot be discharged through generalized statements without details however serious those statements may seem to be. Again, the prosecution did not deny that the accused indeed presented himself to the police. I note also that the pre-bail report was positive of the accused person release on bail. Taking into consideration all the circumstances of this case and upon evaluation of the reasons adduced by the prosecution, I find that there are no compelling reasons not to release the accused person on bail. Accordingly, I order that the accused shall be released on cash bail of Kshs. 100,000 or bond of Kshs. 200,000 with one surety of the like amount. It is so ordered.

Dated, signed and delivered in open court at Meru this 24th day of July 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Mungai State Counsel for State

Mr. Ojiambo advocate for the accused.

F. GIKONYO

JUDGE