



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 21 OF 2016**

**SIMON NGIGE NJOROGE.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

**RULING**

**SIMON NGIGE NJOROGE**, hereinafter referred as the applicant/accused has been indicted 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). The accused pleaded not guilty to the charge. He is represented at the trial by learned counsel Mr. Itaya while the prosecution is conducted by Mr. Akula, the senior prosecution counsel.

The accused has filed a notice of motion dated 20/3/2017 seeking orders that he be admitted to bail pending the hearing and determination of this case. The accused application is premised on the grounds that the offence is bailable.

- That he has a surety to stand surety for him.
- That the accused is innocent until proven guilty.
- That the prosecution will not be prejudiced at all. That he will abide by all the conditions placed by this court.

The accused in his supporting affidavit reiterated the grounds in the body of the application.

The respondent opposed the application in a replying affidavit sworn by IP Edgar Nyale the investigating officer. It is deposed in the affidavit that the accused is facing a serious offence which attracts mandatory death sentence and therefore likely to persuade him to abscond. That the accused accomplices are at large and in the event being released he will interfere with witnesses. The respondent further stated that the accused does not have a fixed abode nor permanent employment within the jurisdiction of this court.

The application was canvassed before me by both counsels Mr. Itaya for the accused and Mr. Akula, for the state.

I have read and perused the notice of motion accompanied with the supporting affidavit, the respondent's replying affidavit and submissions by both counsels. The issue to be determined is whether the state has demonstrated that there exist compelling reasons not to release the accused person to bail pending trial.

**The applicable law commentary:**

I will start with the constitutional provisions under Article 49(h) it provides:

**“The accused person has a right to be released on bond or bail, on a reasonable condition pending a charge or trial unless there are compelling reasons not to be released.”**

Article 50 (2) (a):

**“Every accused person has the right to a fair trial that includes the right to be presumed innocent until the contrary is proved.”**

The general statutory power of the court is articulated under section 123 as read with section 123A of the Criminal Procedure Code (Cap 75 of the Laws of Kenya). Under section 123A of the code it is required of the court to consider a multitude of factors in determining bail and conditions surrounding it and provides:

**(a) The nature or seriousness of the offence.**

**(b) The character, antecedents, associations and community ties of the accused persons.**

**(c) The defendants record in respect of the fulfillment of obligations under previous grants of bail; and**

**(d) The strength of the evidence of his having committed the offence.**

**2(g) should be kept in custody for his own protection.**

The bail provision in our Criminal Procedure Code sets out the conditions to be fulfilled by the defendant in a criminal case before an order of release is granted by the court. In the same provisions under section 124, 125, 126 and 127 of our code:

**“Bail is the process by which a person is released from custody either on the undertaking of a surety or his or her own recognizance. The nature of the security provided for may take the form of title to land, logbook of motor vehicle; some other property or cash deposit or as the case may be depending on the terms set by the bail court.”**

The Constitution 2010 provides that all the accused persons have a right to bond except in offences where the state must demonstrate that compelling reasons exist for that right not be availed to the accused. The right to bail is therefore not absolute under all circumstances. The presumption that accused persons should be released on bail pending trial became the norm throughout the administration of our criminal justice system. The jurisprudence being modelled by the superior courts on the provisions of Article 49(h) is that all offences shall be bailable on reasonable sureties unless where prove is evident that compelling reasons exist.

The question of what constitutes compelling reasons has been widely considered by our courts in various cases. In *Mohammed Khamisi Mazrui & Others v Republic HCCR Misc. Application No. 81 of 1985* the court held:

**“It must be borne in mind that the fundamental rights of liberty are subject to respect for the rights and freedoms of other and for public interest. Public interest cannot be considered in isolation from public peace, tranquility and security. Public interest does include these and must more. It includes maintenance of law and order without which the rule of law which is the fountain-head of the constitution of any country would not subsist or sustain.”**

As judge Ibrahim SCJ stated in the case of *Republic v John Kahindi Karisa & Ano. HCCR Case No. 23 of 2010* and did observe the power of the court to determine which accused get released on bail and factors to bear in mind in the following passage:

**“Murder is a serious offence and attracts the death penalty. Self preservation is a natural**

reaction or response of any human being. Whatever the court will decide, the fear and anxiety exerting on an accused's mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing capital offence is real and cannot be wished away."

Driven by the same concerns the high court in Bungoma in the case of *Republic v Jakton Mayunde & 3 Others [2012] eKLR* held as follows:

**"The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strong that the accused should not be released on bond. Bail should not therefore be denied on fainsy grounds but on real cogent grounds that rule the high standard set by the constitution. This high standard is more in accord with the strongest constitutional requirements in Article 24 of the Constitution on limitation of rights and fundamental freedoms. In light therefore, the court must be convinced by the prosecution that it is proportionate and justified in the circumstances of the case to deny the accused bail.**

**The above test is the exemplar of the constitutional order ushered by the Constitution of Kenya 2010; when it pronounced that all offences areailable completing departing from the earlier position where capital offences did not qualify for bail, and this explains why the court must be convinced to the set standard that there are compelling reasons for the accused person not to be released on bond."**

The rationale of the courts considering interference of witnesses as a compelling reasons was illustrated in the case of *Republic v Dwight Sagaray & Others HCCR No. 61 of 2012* where the court held thus:

**"For the prosecution to succeed in persuading the court on this criteria (of interference) it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and the witnesses; close familial relationship between the accused and witnesses among others.....at least some facts must be placed before court otherwise it is the court to speculate."**

As regards the accused persons being a flight risk **Warsame J** as he then was in the case of *Republic v Muneer Harron Ismail & 4 Others HCCR No. 51 of 2009* held thus:

**"In deciding whether or not to grant bail, the basic factor or denominator is to secure the attendance of the accused person to answer the charges brought against him. The court has to take into consideration various factors and circumstances and one paramount consideration is whether the release of the individual will endanger public security, safety and the overall interest of the wider public."**

What I am trying to bring out is that the courts have recognized right to bail for an accused person pending trial unless compelling reasons exist to be demonstrated by the state. These legal principles are the ones to be applied in deciding the application before this court by the applicant. The right to bail is entrenched in our Republic constitution.

I consider grant to bail to be a discretionary matter given the provisions of Article 49(h) that the compelling reasons identified in our statute law (see section 123A of the CPC and case commentaries). In the exercise of discretion the court ought to act judiciously in order to give effect to the right to bail. The primary objective for the pretrial release of an accused person is the court entering into a kind of contract with the surety who will be entrusted the accused person to ensure his or her appearance in court from time to time.

The conditions precedent to be met before the release of the accused person are clearly provided for under section 124, 125, 126 and 127 of Criminal Procedure Code. These provisions outlines the steps to be undertaken by the court to admit a surety who applies to be considered to stand in favour of the accused

for his conditional release. My understanding of all these is that sometimes it is not easy to decide whether on the material before court the accused should be released on bail pending trial. This is more specifically where the seriousness of an offence is certainly a factor which in the event of conviction the penalty is to suffer death.

When applying the principles in the cases cited to the facts of this case, there is no dispute that the investigations in this case are complete. Secondly, the prosecution has supplied the information to the accused and his defence counsel. The affidavit by IP Nyale has not demonstrated that the accused if released on bail will most likely interfere with the identified witnesses. Thirdly, this court ordered for a prebail report. The report alludes to the accused close family ties both at his rural home at Muranga and Ongata Rongai. Fourthly, the investigating officer is the first person to have been in contact with the circumstances and history of how the accused came to be involved with the commission of the offence. She is the one who reviewed the evidence and recommended the indictment of the accused person. In her affidavit the investigating officer has not deposed to any fact that the accused has not co-operated with the agency prior to his arraignment in court.

In addition the investigating officer has not shown that the accused placed any behaviour to warrant this court to suspect that he will not turn up for trial. The affidavit evidence therefore fails to provide cogent and credible material to show that on a balance of probabilities compelling reasons exist for the accused not to be released on bail. It is important for the state to take judicial notice that pursuant to the provisions of Article 49(h) of the Constitution it is certainly not business as usual in the pretrial release of accused persons facing serious offences. The existence of compelling circumstances to warrant denial of bail is the onus of the state to place information before court.

In this case the burden falls short of the set guidelines both under the constitution and authorities cited. In the foregoing I am satisfied that the application for bail be allowed in favour of the accused in the following terms:

- 1. That the accused person be released on bond of Kshs.1,000,000 with two sureties of identical amount each.**
- 2. To be approved on oath by the deputy registrar.**
- 3. That the accused be reporting to the DCIO Kitengela police station once every month.**
- 4. That the accused is hereby cautioned not to interfere with any of the identified witnesses as per the information supplied by the state.**
- 5. The matter be expeditiously set down for hearing upon completion of pretrials and case conferences on interlocutory matters.**

**Dated, delivered and signed at Kajiado on 4/8/2017.**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

Accused

Mr. Akula for the Director of Public Prosecutions

Mr. Itaya for the accused absent

Mr. Mateli Court Assistant