**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO.4 OF 2017**

**REPUBLIC……………………………………………………..…….PROSECUTOR**

**VERSUS**

**ELIJAH ROBERT KISHAPUI MAPENA……………….……….………. ………..ACCUSED**

**RULING**

In the case before me one Elijah Robert kishapui Mapena, hereinafter referred as the accused is facing a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The brief particulars constituting the offence are that between the night of 5th February 2017 and the wee hours of the morning of 7th February 2017 at Masaani Trading Centre in Mashuru Township within Kajiado County the accused murdered Albanus Nzomo.

During his initial appearance the accused denied the charge through his learned counsel Mr. Koin, a notice of motion dated 22/9/2017 was filed seeking that he be admitted to bail pending trial. The application is brought pursuant to Article 49 (1) (h) of the Constitution and section 124 of the Criminal Procedure Code. According to the grounds on the fact of the application, bail is a constitutional right. The accused person is a citizen of the Republic hailing from Sultan Hamud where he stays with his family and children. The accused filed an affidavit in support of the application dated 22/9/2017 and a supplementary one dated 18/10/2017.

The gist of the two affidavits was to demonstrate to this court that he understands the purpose of bail and will be ready and willing to abide with any conditions imposed by the court. The accused further deposes that he is a family man with fixed abide in Sultan Hamud where he stays with the proposed surety. It was also deposed by proposed surety Soimoire Ledinko that he is the absolute owner of LR/KAJIADO/KAPUTIEI-SOUTH/1927. In this affidavit he deposes his commitment to stand surety for the accused which includes surrendering his title as security to meet the conditions of bond.

On the part of the state IP Erick Macharia swore an affidavit filed in court on 12/10/2017 in which he opposed the release of the accused to bail. The concerns raised in the replying affidavit include the facts that the accused is charged with a serious offence. Secondly, the investigating officer deposed that the witnesses are well known to the accused which pauses a danger of interference. Thirdly, the accused has no permanent employment or home hence making him a possible candidate and a threat of being a flight risk.

In his submissions Mr. Koin, learned counsel for the accused urged this court to abide by the constitution and have the accused released on bail. He further contended that the grounds raised by the state to oppose bail flight risk, lack of permanent fixed abode and employment have not been supported by any cogent evidence. Learned counsel further contended that the applicant and the proposed surety have sworn

affidavits that they are willing to abide with any of the conditions in order to have accused be released on bail.

In essence learned counsel argued that the state has not discharged the burden of proving that there are compelling reasons that exist not to allow the accused enjoy the right to liberty pending trial. Learned counsel opined that the critical question begging for an answer is whether the affidavit by IP Macharia satisfies the threshold set by the constitution under Article 49 (1) (h). According to the materials before court he felt that the affidavit fell short of establishing compelling reasons. He cited the cases of: ***Republic v Richard David Alden Cr. Case No. 48 of 2016, Republic v Job Kenyanya Musoni Cr. Application No. 399 of 2012 and Godfrey Madegwa alias Godi & 6 Others Cr. Case No. 6 of 2016*** for the legal preposition on the essentials required in the circumstances of what constitutes compelling reasons. He therefore urged this court to find in favour of the accused by granting the order for him to be released on bail.

Mr. Alex Akula, the senior prosecution counsel on his part vehemently opposed the applicant by the accused. He reiterated the averments in the replying affidavit. Learned counsel observed that it is not in dispute that the accused is charged with a serious offence in the event of conviction carries a mandatory death sentence. He further submitted that the state has already identified the witnesses by supplying the committal bundles to the accused. Some of them are well known to the accused which pauses a real danger of interference before they could testify. Learned counsel further submitted that the accused flight risk as deponed in the affidavit of the investigating officer is supported by evidence that he has no permanent home or gainful employment. According to learned counsel these two aspects tends to show that the person charged is seen to be having strong family ties and also economic gain to dissuade him from taking flight. Learned counsel for the state felt that this application has not met both the factual and legal threshold to have him released on bail.

This application has been properly addressed by both counsels as evidenced from the highlights in their respective oral submissions.

The issue is whether the application for bail by the accused has met both the constitutional and statutory prescripts in accordance to Article 49 (1) (h) and section 123 and 124 of the Criminal Procedure Code.

**Relevant constitutional and statutory provisions:**

The right to bail is provided for under Article 49 (1) (h) which reads as follows:

> ***"An arrested person has a 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."***

The right to bail is therefore embodied in the constitution. This was a departure from the old constitutional order in which capital offences like murder, robbery with violence and treason were not bailable. The exceptions under section 123 (1) of the Criminal Procedure Code was therefore taken away by the enactment of Article 49 and more specifically 49 (1) (h) of the Constitution. The principles relating to bail and conditions to be met by both the accused and surety are provided for under section 123, 123A, 124 of the Criminal Procedure Code.

In exercising discretion to grant or deny bail to an accused person the trial court is enjoined to consider the circumstances and principles provided for in section 123A of the Code. Generally, the code has listed six grounds upon which if established the accused may not be released from prison custody. They consist of the following grounds:

> **(a) The nature or seriousness of the offender.**
>
> **(b) The character, antecedents, associations and community ties of each accused person.**
>
> **(c) The defendant's record in respect of the fulfillment of obligations under previous grants of**

**bail.**

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

**(e) Has previously been granted bail and has failed to surrender to custody and that if released on bail, it is likely that he would fail to surrender to custody should be in custody for his own protection.**

These provisions under section 124A of withholding bail are regarded to be consistent with the constitutional rights of an accused person under Article 49 of the Constitution. The onus to establish that any of the circumstances exist to warrant an exception being made not to release an accused person on bail rests with the state. The exceptional circumstances are what the constitution prescribes as compelling reasons. That is what this court has to grapple with by weighing between the rights of an accused persons liberty with that which weigh on the interest of justice.

In our country one thing is clear both the constitutional and legislative scheme require of the court to release the accused on bail notwithstanding the gravity of the offence unless compelling reasons exist. This would be the primary consideration I will bear in mind in exercising discretion to allow or disallow the application.

When it comes to the issue of bail pending trial our superior courts have pronounced themselves in some of the cases as follows:

In the case of ***Republic v Jackton Mangelede & 3 Others Cr. Case No. 55 of 20***09 the court considered Article 49 (1) (h) on compelling reasons and held thus:

> ***"The phrase compelling reasons would denote 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. The high standard is more in accord with the stringent constitutional requirements in Article 24 of the Constitution on limitation of rights and fundamental freedoms. In light thereof, 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 are bailable completely 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 not to be released on bond. One of the key contention in this application as advanced by the state touches on interference of witnesses. This was done by way of a replying affidavit from one IP Fredrick who is the investigating officer.

What are the case commentaries on this issue?

In the case of ***Republic v Gerald Mutuku & Jackline Mwende Kithome Cr. Case No. 44 of 2015*** the court held as follows on what test to subject this ground on witnesses:

> ***"The prosecution must, in my view demonstrate a more than whimsical probability of interference (not a mere assertion) it must be shown that the accused persons are in such close. Family, filial or other relationship which creates an environment of control and influence of the witnesses by the accused person such as to interfere with the ability of the witnesses to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of the age or the mental acuity of the witness may be a factor to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses, as eye witness or circumstantial is also relevant."***

In yet another case of ***Republic v Dwight Sagaray & Others Cr. Case No. 61 of 2012*** the court stated as follows:

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

At the trial of this application the following facts are not in dispute:

From the prebail report the accused is married and blessed with two children. The accused is the first born son of Kishapul Semuile family who own over 200 acres of land within Elemukutani Location. The accused has no previous antecedents relevant to this application. He lives and stays within the family homestead. There is ample evidence of accused having strong family and community ties. There is accordingly no evidence placed before the court that the accused is likely to abandon his young family because of this trial. The burden is on the state to appraise all the information pertaining to the accused and reasons why he is thought to be a flight risk. There were no details provided by the investigating officer on circumstances that will make the accused not turn up for the trial of his case.

In addition the prosecutor did not consider introducing evidence or specifically identify who among the witnesses is likely to be interfered by the accused. I find it particularly disconcerting that the investigating officer made no effort to obtain and place before court cogent and credible evidence bearing on this application.

The right to bail is essential element of our reformed criminal justice system since the promulgation of the Constitution 2010. It entrenches the right on the presumption of innocence under Article 50 (2) (a) of the Constitution and safeguards the liberty of an accused person.

It therefore follows that an accused person can only be denied bail if there is a just cause what our constitution prescribes as compelling reasons which mirror on the following:

Firstly, if the set of circumstances are such that the pretrial release would in the process impact on administration of justice this may connote the accused failure to attend the trial when scheduled. Secondly, if the safety of the accused and the public is in issue in the event the accused is released on bail. Thirdly, recognition that the accused or surety would not meet the conditions precedent towards the release of the accused. Fourthly, the accused will most likely interfere with the proposed witnesses to be summoned by the state against his trial.

In the objection to the application for bail the investigating officer alluded in his affidavit to the seriousness of the charge and interference of witnesses as the reasons why this court should not exercise its discretion in favour of the accused. However on consideration of the affidavit he did not go a step further in setting out the strength of the state case nor the level of interference of the witnesses. In my view he was required to adduce convincing evidence to establish these grounds as compelling reasons to restrict the right to bail as provided for under Article 49 (1) (h) of the Constitution.

Having regard to the range of all factors in totality I am satisfied that the state has failed to demonstrate existence of compelling reasons to deny the accused bail. Accordingly the notice of motion dated 22/9/2017 succeeds in the following terms:

> **(1) That the accused be released on bond of Ksh.1,000,000 with a surety of identical amount. In the alternative the accused may deposit a cash bail of Ksh.500,000 with a surety of identical amount.**
>
> **(2) The case be set down for pretrial conference on a priority basis.**

**(3) Further mention on 13/11/2017 for further orders.**

**Dated, signed and delivered in open court at Kajiado on 31st day of October, 2017.**

**…………………………………..**

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Accused present

Mr. Koin for the accused - absent

Ms. Thyaka holding brief for Mr. Akula senior prosecution counsel - present

Catherine E.O holding for Mateli Court Assistant - present