

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KIAMBU HIGH COURT
CRIMINAL CASE NO. 41 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

JOHN GATAMBIA GATHONI.....ACCUSED

RULING

1. John Gatambia Gathoni (the “Accused Person”) is charged with murder contrary to section 203 as read together with section 204 of the Penal Code. He is accused of unlawfully killing John Gatambia Njoki on 27th August, 2017. He pleaded not guilty to the charge.

2. The Prosecution has opposed the pre-trial release of the Accused on bail or bond. The Prosecution has predicated its opposition on three grounds: First, that the Accused Person is a flight risk. Second, the Prosecution argues that the Accused Person is likely to face security risks by the community and family if released given that the Deceased was a family member. Third, the Prosecution has argued that the Accused Person is likely to interfere with witnesses.

3. The Prosecution filed an Affidavit by PC Olili Atulo in a bid to substantiate these claims. The Affidavit details that the incident which led to the murder of the Deceased happened on 27/08/2017 in the Uplands area of Kiambu County. The Affidavit narrates that the Accused Person disappeared immediately after the incident. He was, the affidavit depones, only arrested two days later at Duka Moja in Narok County. According to the affidavit by PC Olili, which has not been contested by the Defence, the Accused Person was only arrested because a relative happened to be driving along the Narok-Mai Mahiu Road and happened to see the Accused Person. That relative, then, facilitated the arrest of the Accused Person at Suswa Police Station. Were it not for this serendipity, the Prosecution insists, the Accused Person would never have been arrested.

4. The Prosecution also argues that the Bail Report which was filed at Court’s request clearly shows that the Accused Person is likely to interfere with witnesses the Deceased having been a family member – a close first family. Secondly, the Prosecution argues, alternately, that the Bail Report shows that the Accused Person’s security cannot be guaranteed given the animosity of the family towards his release on bail.

5. Counsel for the Accused Person, Mr. Harris, on the other hand, had the following submissions to make. On the issue of the Accused Person having run away after the incident, he submitted that the Accused Person was simply so shocked at what happened that he, in the heat of the moment, formed the opinion that the only way to settle the situation was to run away for a while. So while the Accused Person does not contest that he ran away after the incident, he contends that the implication for his flight is not that he is a flight risk – but that he was rendered temporarily unstable by the shock of the event.

6. The Defence also contests that the Accused Person is insecure or that he will interfere with witnesses. It argues that the Accused Person will not reside at his usual home where the incident happened during the pendency of the trial but with a cousin who lives far away from there if he is granted bail.

7. Bail is a constitutional right enshrined in Article 49(1)(h). An Accused Person can only be denied bail if there are compelling reasons. Hence, the Constitutional standard for denying bail is “compelling

reasons” test. The burden is on the Prosecution to establish the existence of the “compelling reasons” that would justify denial of bail. Finally, our emerging jurisprudence is clear as to the kind of evidence needed to establish the “compelling reasons”: the evidence presented must be “cogent, very strong and specific evidence” and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. See, for example, ***R v Muneer Harron Ismail & 4 Others [2010] eKLR***.

8. Using the Compelling Standard Test, I agree that the Prosecution has not placed before the Court sufficient material to warrant the conclusion that the Accused Person will interfere with witnesses. The fact that the Deceased was a family member does not definitionally lead to the presumption that the Accused Person will interfere with witnesses.

9. I would also have been able to blunt the security fears expressed by the Prosecution and in the Bail Report by placing residency requirements on the Accused Person as conditions for his release on bail.

10. However, the Prosecution’s fears that the Accused Person is a flight risk is not just flippant. The Accused Person has given the Prosecution reason to be apprehensive that he may not ultimately show up for his trial. He did this by running away after the incident. He was arrested more than 150 Kms away in Narok County – and even then, only because a relative happened to be in the area. The Accused Person’s explanation that he ran away due to the shock of the incident and needed to calm the tensions in the family is implausible.

11. This well-founded apprehension that the Accused Person might not turn up for trial coupled with the seriousness of the charge the Accused Person is facing is sufficient to give us pause that there is a real likelihood that the Accused Person might abscond. That is the single most important factor in determining whether to grant bail or not. On that score, bail is denied. However, the case shall be listed for hearing on a priority basis on account of this denial of bail. The Accused Person shall continue to be held in custody during the pendency of the case or until the Court reconsiders this bail decision.

Dated and delivered at Kiambu this 23rd day of November, 2017.

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JOEL M. NGUGI

JUDGE