



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO. 29 OF 2016
REPUBLIC.....PROSECUTOR
VERSUS
KENNETH WATHUGI KARUME.....ACCUSED

RULING

Kenneth Wathugi Karume, the accused, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 24th March 2016 at Gracia Apartment in Kiambu within Kiambu County he murdered Victoria Wairimu Kamanja alias Mumbi Kilungya. The accused had denied committing this offence.

By an application by way of Notice of Motion dated 22nd April 2016, the accused has approached this court seeking to be admitted to bail pending the hearing and determination of this case. The grounds in support of the application are found on the face of the application and in the supporting affidavit sworn by the accused. The accused states that he is a Kenyan citizen with fixed abode; that the offence of murder is bailable; that he has the right to be released on bond on reasonable grounds; that he is innocent until the contrary is proved and that he will not interfere with prosecution witnesses. He further states that the prosecution has not provided compelling reasons to persuade the court to deny him bond and that he is not a flight risk. He has attached to his application a letter dated 21st April 2016 from the Chairman and Trustee of the Njenga Karume Trust informing the court that the accused is a beneficiary of the Trust and assuring the court that the accused person will not flee from this court's jurisdiction. Mr. Solonka, advocate for the accused, presented in court a list of the following authorities in support of the application:

- i. In the matter of the Application by Abdula Bin Mohamed ALR 1913 – 14 Vol. 166
- ii. Jaffer v. Republic (1973) EA. 39
- iii. Republic v. Joktan Mayende & 3 others [2012] eKLR
- iv. Republic v. Lawrence Sebastian Lorunyei & 6 others [2012] eKLR
- v. Sylvester Mwinga Tsuma v. Republic Misc. Criminal Application No. 619 of 2003

Counsel further submitted that the affidavit in opposition to the application does not disclose any compelling reasons and that the allegations contained in that affidavit are hypothetical and cannot amount to compelling reasons. He submitted that there is no evidence to support the allegation that the accused attempted to escape arrest and that the statement by CPL Abdi Diriye that the accused attempted to abscond cannot be believed without the officer being subjected to cross examination. Mr. Solonka further submitted that the witnesses have recorded statements and that the accused has undertaken not to interfere with them.

The application is opposed by the prosecution. In support of the opposition, the prosecution is relying on the affidavit of Senior Sergeant Gabriel Rotich who says he is one of the investigating officers. The grounds advanced in opposition are that the accused is in danger of attack by members of public if released on bail; he is a flight risk and may abscond; that the accused knows the key witnesses and may intimidate them; that the prosecution is in possession of strong evidence against the accused.

Ms Mwaniki prosecution counsel submitted that the offence is serious with a heavy penalty; that the accused attempted to run away and would have absconded had police not arrested him; that he possesses a passport and flying license for commercial flights and therefore a flight risk; that the accused may interfere with witnesses. Ms Mwaniki distinguished the authorities cited by the defence and urged the court to decline the application.

In response to the submissions by the prosecution counsel, Mr. Solonka reiterated his earlier submissions and told the court that the State is in possession of the accused's flying license and passport and therefore he cannot abscond.

I have read and analysed all that has been stated in support of the application and in opposition to the application. The accused has a right to be released on bail/bond. This right is not absolute and can be denied where there exists compelling reasons. The prosecution bears the duty of presenting compelling reasons to court and in discharging that duty the prosecution must present evidence on a balance of probabilities to persuade this court that the accused should not be admitted to bail.

A murder charge is a serious offence with death sentence as the penalty. However, if this court were to find that because of the seriousness of the offence and stiff sentence it cannot admit an applicant charged with murder to bail, then no applicant would qualify. There must therefore be other cogent and forceful reasons to deny bail.

On the issue of strong evidence, the law presumes an accused person innocent until the contrary is proved. This is done by presentation of evidence in court, which evidence must be tested through cross examination to determine its veracity. At this stage of the trial, there is no evidence before me. Again this reason given taken in isolation is not persuasive.

On the issue of absconding, this court was told that the State has in its possession the accused's passport and flying license. This statement was not rebutted by the prosecution and therefore this court has no reason to find that this is the true state of affairs. Further this court has powers to impose certain conditions to ensure the accused will not leave the country.

On interference with witnesses, I note that no witness has been disclosed in the affidavit and that the prosecution has not tendered any evidence to support the allegation of interference. Without such evidence this court is of the view that the prosecution is only fearful that this may happen and finds that without evidence these fears are unjustified.

On the issue of attempting to escape, I note from the statement of CPL Abdi Diriye that he went to the scene after the OCS Kiambu Police Station called him and instructed him to go there. He found the door open and the accused at the balcony. Had the accused intended to flee he would have done it before the police arrived. In other words the reason given by the prosecution on this issue is not persuasive.

This court is alive to the rights of both the accused person and the victim and her family. However, it does not mean that by denying the accused bond this court is not protecting the rights of the victim and her family. The court must have compelling reasons in support of the opposition in order to decline the application and I find this lacking in this application.

On a balance of probabilities, this court has not been persuaded that the accused will not turn up in court when required so to do until this case is fully heard and determined or that the accused will interfere with prosecution witnesses. I am inclined to grant this application which I hereby do on the following terms and conditions:

- a. That the accused shall execute a bond of Kenya shillings two million (Kshs 2,000,000) with one surety of similar amount.
- b. In the alternative he shall deposit cash bail of Kenya shillings one million (Kshs 1,000,000) with the Registrar of this court.
- c. The accused shall deposit all his travel documents (passports) to court, if he holds more than one, as well his flying license to be held by the court until this case is finalized or until further orders of this court.
- d. The accused shall not interfere, intimidate or in any manner deal with the prosecution witnesses in a way that may amount to subversion of justice.
- e. The accused is cautioned that breach of any one of these conditions shall amount to automatic cancellation of bond and his remand in custody until this case is heard and determined.

Orders shall issue accordingly.

Dated, signed and delivered in open court this 30th May 2016.

S. N. MUTUKU

JUDGE

In the presence of:

Ms Mwaniki, prosecution counsel

Mr. Solonka, defence counsel

Mr. Kenneth Wathugi Karume, the accused

Mr. Daniel Ngumbi, court clerk