



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISC. APPLICATION NO. 2 OF 2015

SAYANKA PARIKEN KANTO.....ACCUSED/APPLICANT

Versus

REPUBLICPROSECUTOR/RESPONDENT

(Arising from Criminal Case No. 2 of 2015)

RULING

Before me is a notice of motion dated 19.1.2016 brought by the accused under Article 49 (1) (h) of the Constitution and Section 123 and 124 of the Criminal Procedure Code Cap 75 of the Laws of Kenya seeking an order to be released on bail pending trial.

The application filed by Mr. Nduva counsel for the accused is supported by an affidavit sworn by **SAYANKA KANTO** the accused herein. Mr. Akula Senior Prosecution Counsel represented the Director of Public Prosecutions.

Besides the affidavit in support, the applicant/accused relied on the grounds in the face of the notice of motion crafted in the following terms:

- 1. That the accused person has been in remand since 17.6.2015 when he was arraigned in court.**
- 2. The prosecution intends to call over seven (7) witnesses at the hearing who have recorded statements and the trial is likely to take long.**
- 3. Investigations have been completed and its prejudicial to the right of the accused person to remain in custody for such long time in the event of an acquittal.**
- 4. The accused person is ready and willing to abide to any terms and conditions as may be set by the honourable court in granting bail.**
- 5. There are no compelling reasons for the accused person not to be granted bond/bail.**

Mr. Nduva counsel for the accused submitted that under Article 49 (1) (h) of the Constitution, the accused has a right to bail. Learned counsel further contended that the accused person though charged with the offence of murder is presumed to be innocent until proven guilty by the court when prosecution adduces evidence at the trial. Counsel reiterated that there are no compelling reasons to limit the right of the

accused to be released on bail at this stage of the proceedings.

In reply Mr. Akula the Learned Senior Prosecution Counsel objected to the release of the accused to bail. In support of his objection he relied on the affidavit sworn by Chief Inspector Martin Sewe dated 11/5/2016. In the affidavit it is deponed that there are compelling reasons not to release the accused on bail under Article 49 (1) (h) of the Constitution.

It was averred that the accused faces a serious offence of murder which attracts a mandatory sentence of death upon conviction. That the accused committed the offence and soon thereafter escaped to an unknown place which caused the police to experience enormous resources and time in order to effect an arrest. That the accused has no fixed abode and hence if released on bond he is a flight risk and his attendance in court will not be guaranteed. That the accused is likely to interfere with the prosecution witnesses.

I have carefully considered the application, affidavit in support by the accused and replying affidavit by C.IP Sewe for the prosecution opposing the grant of bail to the accused. The court also in the course of the pretrial issues on this application called for a prebail report on the accused which was duly prepared and filed by the County Probation Officer Kajiado Mr. Mbui.

The issue before this court is whether the accused's application to be released on bail under Article 49 (1) (h) of the Constitution should be allowed or there are compelling reasons for that right to be limited.

I will start with the applicable law and case commentaries:

Article 50 (2) (a):

“Every accused person has a right to be presumed innocent until the contrary is proved.”

Article 49 (1) (h):

“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.”

As noted elsewhere, compelling reasons have not been defined in our Constitution of the Republic. However this has been left to court interpretation to come up with some kind of threshold. In the case of **REPUBLIC v DORINE AOKO** held at Nakuru by Emukule J in **Criminal Case No. 36 of 2010** the court stated as follows:

“To my mind again, those compelling reasons are the very same ones spelt out in Section 72 (5) of the Repealed Constitution, and elaborated in Section 323 of the Criminal Procedure Code, namely that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence which are not only punishable by death, but are by reason of their gravity (taking away another person's life, disloyalty to the state of one's nationality or grievous assault and injury to another person or his property) are offences which are by their reprehensiveness not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim to see a perpetrator of murder, treason or violence robbery (committed or attempted) walk to the street on bond or bail pending trial. A charge of murder or treason or robbery with violence (committed or attempted) would thus be a compelling reason for not granting accused person bond or bail.”

In the case of **REPUBLIC VS. JORRAM MAYENDE & 3 OTHERS HCCRC NO. 55 OF 2009** the court considered the scope of Article 49(1) (h) of the Constitution on what constitutes compelling reasons.

The court stated thus:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel 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 duty is on the state to demonstrate that there exist compelling reasons not to release the accused on bail.

In order to buttress the case law under Article 49 (1) (h) of the Constitution the Judiciary developed Bond and Bail Policy Guidelines 2015. The policy factors new principles to guide court in exercise of discretion have been set out to include interalia: **the nature of the charge, strength of the prosecution case, character and entire conduct of the accused person likelihood of interfering with witnesses, the view to protect the victim or victims of the crime, the failure of the accused person to observe bail or bond terms, accused safety, whether accused is a flight risk and would therefore not attend court.**

These grounds in the Bond and Bail Policy 2015 can be said to factor in the big picture of the interest of justice in administration of criminal justice in our country. This court has therefore to balance the rights of the accused under Article 49 (1) (h) of the Constitution with that of the victim and society at large.

The Supreme Court of Appeal at Malawi in the case of **FADWECK MVAHE v THE REPUBLIC CR. APPEAL NO. 25 OF 2005** held as follows on the same issue:

“In considering the issue of the interests of justice the paramount issues the court will consider include, the likelihood of the accused attending his trial, the risk that if he is released on bail the accused person may interfere with the prosecution witnesses or tamper with evidence, the likelihood of him committing another offence or other offences, and also the risk to the accused person, if granted bail and he returns to his village where the deceased’s relatives may harm him. In considering these issues the court may take into account, among other things such factors as the gravity of the offence, the punishment likely to be imposed and, indeed as was conceded by the court in the LUNGUZE CASE that the accused is a sickly person.”

I have considered the replying affidavit by Chief Inspector Martin Sewe and averments to this court why accused should not be released on bail. What the deponent failed to do was to adduce cogent evidence that accused has no permanent abode and that he will be a flight risk before the trial is concluded.

This court has had the advantage of the prebail report by the Probation Officer which was filed and served upon the prosecution will in advance before the bail application. The prebail report contrary to the affidavit by the prosecution indicates that the accused has strong ties with the family, duly married and blessed with two children. The community attitude when confronted with the issue of accepting accused back while awaiting the outcome of the criminal trial was positive. The confirmation from the social inquiry report dispels any fears of accused being a flight risk and absence of evidence that he will not turn up at his trial.

The question as to who has the burden to demonstrate existence of compelling reasons is always and will be cast upon the prosecution. That duty has not been discharged in the instant case.

DECISION

Applying the above factors, the constitutional provisions of Article 49 (1) (h) on right to bail to an accused person together with Section 123 (A) of the Criminal Procedure Code, I am satisfied no compelling reasons have been advanced by the prosecution to limit the right to bail in favour of the accused person. The application dated 29.1.2015 on bail pending trial is hereby allowed in the following terms:

(a) That the accused person be released on bond of Ksh. 3,000,000 with one surety of identical amount pending trial.

(b) That the accused person is hereby cautioned not to interfere with witnesses in anyway given the nature and circumstances of this case.

(c) That the accused would be required to appear for mentions before the Deputy Registrar at the end of 30 days of the month.

(d) That in any event each party is at liberty to apply.

(e) That the surety do endorse a restriction issued by the Deputy Registrar on the proposed title deposited as security.

It is so ordered.

Dated, delivered in open court at Kajjado on 16th day of June, 2016.

.....

R. NYAKUNDI

JUDGE

Representation:

Mr. Mutavi holding brief for Mr. Nduva for accused person

Mr. Akula for the Director of Public Prosecutions

Accused present

Mr. Mateli Court Assistant