



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 9 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

RICHARD ITWEKA WAHITI.....ACCUSED

RULING

1. Richard Itweka Wahiti (the “Accused Person”) is charged with murder contrary to section 203 as read together with section 204 of the Penal Code. He was first arraigned at the High Court in Milimani on 19/11/2014. He pleaded not guilty to the charge. The case was later on transferred to this Court since the alleged murder happened in Kiambu county.

2. At a regularly scheduled mention of the case on 23/06/2016, Mr. Saenyi, holding brief for Mr. Wachira for the Accused Person, indicated that the Defence had intention to apply for bail. I requested for a bail report and set a date for a bail hearing. The bail hearing was eventually held on 28/07/2016. By that time, the Bail Report had been filed in Court.

3. Mr. Wachira urged me to grant bail on terms the Accused Person could afford. He argued that the Accused Person was a casual labourer employed by the Deceased prior to his arrest. His father is a caddie at Kiambu Golf Club where he only gets to work no more than two weekends in a month. Mr. Wachira further argued that the Accused Person is not a flight risk as he does not even own a passport. If released on bail, the Accused Person will abide by the terms of his release including a pledge not to interfere with witnesses.

4. Ms. Maari, for the State, opposed bail. She relied on the findings in the Bail Report. She argued that the Bail Report had established that the Accused Person is a habitual law breaker: he has been previously convicted of being in possession of bhang. Additionally, the bail report contained other instances of violating law – including an occasion where he is alleged to have smashed the windscreen of a friend of the Deceased and smoking bhang. Finally, Ms. Maari argued that the community was still restive over the killing of the Deceased and the Accused Person’s release on bail may lead to violence against him.

5. In reply, Mr. Wachira argued that the grounds proffered by the Prosecution do not constitute “compelling reasons” to deny bail as required by the Constitution. The Accused Person, argued Mr. Wachira, had been punished for his previous offence over which he was charged. As for the other instances of violating the law, these were mere allegations as he had not been convicted. Finally, Mr. Wachira argued that the Accused Person has not attempted to threaten anyone and that, therefore, there was no risk of interference with witnesses.

6. Turning to analysis of the arguments presented by the parties, I begin with first principles: 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**. However, it is also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons beyond reasonable doubt. Indeed, such a standard would be impossible to meet at this point in the trial. See, **Bail and Bond Policy Guidelines** at p. 19.

7. The question presented here, then, is whether the Prosecution has, on a balance of probabilities, raised compelling reasons to deny bail. The Prosecution has made three arguments which, in its mind, cumulatively constitute compelling reasons:

- a. First, the Prosecution argues that the Accused Person is a habitual law-breaker; and
- b. Second, the Prosecution maintains that the release of the Accused Person might lead to a disruption of peace in the community and violence against the Accused Person because the community is still upset about the death of the Deceased.

8. Both reasons proffered by the Prosecution could, in an appropriate case, constitute compelling reasons to deny bail. The question here is whether there is such a case. The Bail Report, whose content was not seriously disputed by the Defence, paints the Accused Person as a troubled man who has had problems with the law. He has at least one conviction for being in possession of bhang, a prohibited drug. The Report also says that the Accused is a habitual user of the drugs. The area local administrator, Chief Kimani, spoke of the Accused Person’s use of the drug and association with other people known to be abusers of the drug. He allegedly smokes bhang openly. The Report credibly links the Accused Person to violence when he smashed the windscreen of a friend of the Deceased in a fit of anger. Though he was not charged for the offence, the area Chief was aware of the offence.

9. Finally, the area Chief is also apprehensive about the possibility of violence against the Accused Person if he is released on bail. He fears that the death is still fresh in the minds of the members of the community and that some members might misunderstand the release on bail to mean acquittal and attack the Accused Person.

10. Although Mr. Wachira argues that the allegations about the Accused Person’s past conduct are either not proved or relate to past conduct for which the Accused Person has already been punished for, it is my finding that the Bail Report has, on a balance of probabilities, established both aspects of the Accused Person’s conduct.

11. Unless there are good reasons to impugn the objectivity of a Bail Report, a Court is perfectly entitled to rely on its contents to reach an appropriate decision on bail. Of course the Court has to carefully consider what weight to give to the contents of the Bail Report. Additionally, the antecedents of an Accused Person are a legitimate concern for a Court considering bail where they are coupled with other adverse factors (see **Bail and Bond Policy Guidelines** at p. 10).

12. The Defence has not offered any reason to credibly question the accuracy or objectivity of the Bail Report. The history of violating the law through possession and use of prohibited drugs coupled with violent proclivities unrelated to the charges the Accused Person is facing provide powerful reasons militating against the admission to bail at this point. These grounds are further compounded by the fact that the Accused Person is facing a very serious charge and he has, at present, no known fixed abode. Finally, the daughter of the Deceased reports that she is afraid for her safety – a fear that cannot be taken lightly given that she has had to move houses as a safety precaution and given the violent past of the Accused Person. I, therefore find that there is credible evidence, on balance, to constitute compelling reasons to deny bail in this case.

13. However, the case shall be listed for hearing on a priority basis on account of this denial of bail as well as the relative youth of the Accused Person. The Accused Person shall continue to be held in custody during the pendency of the case or until the Court reconsiders this bail decision.

Orders accordingly.

Dated and delivered at Kiambu this 30th day of August, 2016.

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JOEL NGUGI

JUDGE