



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

HIGH COURT CRIMINAL CASE NO. 54 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

CHRISTOPHER MBUGUA MBURU.....ACCUSED

RULING

1. Christopher Mbugua Mburu (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 01/03/2016. He pleaded not guilty to the charge.
2. The Accused Person filed a formal application to be admitted to bail/bond on reasonable terms through his lawyers on 25/05/2016. The case was later on transferred to this Court since the alleged murder happened in Kiambu County.
3. On 18/07/2016, upon an application by the Prosecutor, Ms. Maari, I requested for a Pre-bail Report. This was eventually filed in Court on 28/07/2016.
4. Mr. Gacau, acting for the Accused Person appeared before me on 29/07/2016 to argue the bail application. His main argument was that the Accused Person is not a flight risk and will show up whenever required by the Court. The Accused Person, Mr. Gacau informed the Court, is a resident of Limuru and was engaged in the business of fruit vending there when he was arrested. The incident leading to the alleged murder happened in 2014 when the Accused Person was a High School student.
5. Mr. Gacau explained that the Accused Person did not run away after the incident but changed schools. He went to school in Nyandarua. He voluntarily returned to the Kikuyu/Limuru area post-2015 after he finished High School. This, Mr. Gacau insisted, was not consistent with the conduct of someone who intends to escape. He could easily have stayed away from the area but he chose to come back.
6. It was Mr. Gacau’s argument that the Prosecution had not demonstrated any compelling reasons to deny bail as required by the Constitution in Article 49(1)(h). Mr. Gacau argued that it is now “well settled that compelling reasons must be cogent data and information which will result from an investigation into the circumstances of an Accused Person which will lead an apprehension that the Accused Person will abscond.” In this case, Mr. Gacau argued, the only information available was in the Pre-bail Report which is not a product of investigations of the nature envisaged in the test and standards the courts have enunciated in determining if there are compelling reasons to deny bail. For the Prosecution to demonstrate such compelling reasons, it was Mr. Gacau’s view that an affidavit by the Investigating Officer needed to be filed deponing facts unearthed by investigations. Only such an Affidavit would provide the “cogent data” required by the applicable test.

7. On her part, Ms. Maari for the Prosecution opposed bail for the single reason that the Accused Person is, in her view, a flight risk and will likely abscond. She argued that the Accused Person is alleged to have committed the offence in July, 2014 when he was a student at Kinyongori High School. Immediately thereafter, the Accused Person withdrew from that school and disappeared from the area. The Accused Person did not report the incident anywhere but instead simply disappeared. He was only charged with the offence two years later when he re-appeared and was discovered by the Police. Ms. Maari was of the opinion that the information in the Pre-bail Report was sufficient to deny bail in these circumstances. She was of the opinion that there was no hard and fast rule that an affidavit by the Investigating Officer is needed to establish compelling reasons to deny bail.

8. Mr. Gacau is right that the Constitutional standard for denying bail is “compelling reasons” test. He is also right that the burden is on the Prosecution to establish the existence of the “compelling reasons” that would justify denial of bail. Finally, Mr. Gacau is also right that the 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*.

9. First, I do not accept Mr. Gacau’s position that the compelling reasons threshold can only be met with information contained in an affidavit by the Investigating Officer. In many cases where the Prosecution wishes to oppose bail, it is a salutary practice for such an affidavit to be filed. However, its mere absence will not automatically lead to the conclusion that there are no compelling reasons to deny bail. In some cases, such as here, the Court has, often at the Prosecution’s instigation, obtained independent, reliable and verified information from other government agencies on the case and circumstances. In such cases, subject to the usual factors to be considered in determining the weight to be given to such information, and reports the Court is permitted to rely on such information.

10. In the present case, the Court called for a probation Bail Report at the instance of the Prosecution. One was filed. It contains specific information about the circumstances of the alleged offence, the Accused Person’s antecedents and his conduct after the alleged offence. There is no reason to believe that the Bail Report is inaccurate or biased. Indeed, the Accused Person’s advocate does not impugn the independence or objectivity of the Bail Report. The only point the advocate makes is a technical one: that the bail report is not a product of investigation capable of producing the “cogent, very strong and specific evidence” needed to deny bail.

11. I do not agree with this characterization by Mr. Gacau. The Bail Report filed here is an example of independent information filed in Court which the Court is entitled to rely on in order to make a fair and appropriate bail decision. The Bail Report filed is perfectly capable of providing the “cogent data” that a Court needs to determine that there are compelling reasons to deny bail.

12. Here, the incident that led to the death of the deceased happened in July, 2014. There is credible evidence before the Court that the Accused Person disappeared from his usual place of residence two days after the incident. While he was a student at Kinyongori High School, the Head Teacher reported that he was last seen at the school in July, 2014. The Accused Person says he could not afford school fees so he transferred to a different school in Nyandarua. However, as Ms. Maari argues, the timing of his withdrawal from Kinyongori High School so soon after the incident raises credible questions about his motives. The Accused Person stayed away for two years and only returned at the end of 2015.

13. This history coupled with the seriousness of the charge the Accused 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 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.

Dated and delivered at Kiambu this 5th day of August, 2016.

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JOEL NGUGI

JUDGE