



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIM. CASE NO. 52 OF 2016

REPUBLIC.....PROSECUTOR

VERSUS

PETER MACHARIA CHEGE ALIAS MACHAACCUSED

RULING

1. Peter Macharia Chege Alias Macha (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 25/05/2015 and took plea on 16/06/2015. 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. Due to failure of the originally allocated counsel to show up in court, the matter was re-assigned to Mr. Tumu as Defence Counsel. He first appeared on 27/07/2016 and indicated that he would be interested in applying for the admission of the Accused Person to bail. I requested for a Bail Report and set the bail hearing for 31/08/2016. The Prosecutor filed an affidavit by the Investigating Officer, PC Shukri, opposing bail.

3. Mr. Tumu orally urged me to admit the Accused Person to bail. His submissions centred on four arguments. First, he sought to lay the constitutional principles governing the grant of bail. He reminded the court that the twin applicable principles are that the Accused is presumed innocent until proved guilty (Article 50(2)(a)) and the right to be released on bail or bond unless there are compelling reasons not to do so (Article 49(1)(h)). He submitted that in viewing the limitation in Article 49(1)(h), the Court should have in mind Articles 20 and 24 of the Constitution. I understood Mr. Tumu to be saying that any limitations on constitutionally enshrined rights must be read restrictively so as to enlarge the rights and liberties declared in the Constitution. He cited the Ugandan case, *Charles Onyango Obbo & Another v AG (Const. App. No. 2 of 2002)* for that proposition. That is an interpretive posture which this Court readily adopts. Indeed, we believe that the Supreme Court has given us matching orders to that effect in cases such as *In the Matter of the Kenya National Commission on Human Rights, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR*.

4. Turning to the facts, Mr. Tumu argued that the Bail Report filed in the case, has shown that there are no good grounds to deny bail based on the antecedents of the Accused Person. The Bail Report, Mr. Tumu argued, shows a peaceful man with good relations in the community. The Accused Person worked in the hospitality industry as a cook – with plenty of items around him which can be turned into dangerous offensive weapons upon a trigger of violent ire if one has such proclivities. The fact that no such known incidents have been reported against the Accused Person is testament to his good character. The only blot in the Report, Mr. Tumu truthfully told the Court, is the observation that the Accused Person tends to get

violent when drunk.

5. Lastly, Mr. Tumu attacked the assertion by the Prosecution that the Accused Person has a criminal record. He readily admitted that the Accused had been charged with a criminal offence, and was, indeed convicted by the Trial Court but that he successfully appealed against the conviction and he was released due to lack of evidence. This, therefore, cannot be a valid ground constituting compelling reasons to deny bail.

6. Ms. Maari, for the State, opposed bail. She relied on the Affidavit by PC Shukri and the Bail Report. She argued that both the Affidavit and the Bail Report had established that the Accused Person is a habitual law breaker: he has been previously convicted of defilement. Additionally, the two documents establish the Accused Person as a violent person who is likely to break the law if released on bail. Ms. Maari also argued that the Bail Report says that his family is not ready to stand surety for him which could be an indication of his character.

7. Mr. Tumu responded, correctly, that the general comments about the behaviour of the Accused Person, without more, do not constitute compelling grounds to deny bail. *John Chikamai v R* (Naivasha Crim. App. No. 54 of 2015) is in accord.

8. The whole application, then turns on whether the allegations of the general character of the Accused Person as a habitual law breaker is backed up by a conviction which might tilt the balance in favour of a finding that there are compelling reasons to deny bail. Unfortunately, here, the parties differ on what the position is: the Accused Person is clear that his conviction was overturned by the High Court while the State is unsure that there was such reversal of conviction.

9. Both Mr. Tumu and Ms. Maari promised to supply the Court with the High Court decision overturning the conviction. I rescheduled my ruling at least once to obtain that judgment. Mr. Tumu reported that he is trying to locate the judgment in the High Court archives but he has been unable to find it to date. I re-scheduled this ruling twice to be supplied with the judgment.

10. While both parties agree that a previous conviction coupled with the findings in the Bail Report and the seriousness of the current charges all seen together could cumulatively lead to a finding of the presence of compelling reasons to deny bail, we are left without the crucial piece of evidence needed to conclude the analysis: the judgment on appeal which would be the objective ascertainment of conviction or acquittal.

11. What then should the Court do? Turn to the law and 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.

12. 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 two arguments which, in its mind, cumulatively constitute compelling reasons:

- a. First, the Prosecution argues that the Accused Person is, generally, a violent person in the community and a habitual law-breaker; and
- b. Second, the Prosecution maintains that the Accused Person has a previous conviction for

defilement.

13. Both reasons proffered by the Prosecution could, in an appropriate case, constitute compelling reasons to deny bail: 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). Is this such a case? As pointed out above, the allegations in the Bail Report and the Affidavit on the Accused Person's character, alone, are not sufficient. A previous conviction on the charge of defilement could change that. It is the Prosecution's burden to prove that previous conviction. While both Mr. Tumu and Ms. Maari promised to avail copies of the judgment to the Court, it remains the Prosecution's obligation to prove compelling reasons and produce the required evidence leading to that finding. It has failed to do so here.

14. I would, therefore, hold that the circumstances here do not objectively warrant a denial of bail seen against the constitutional crucible. However, the circumstances go towards the setting of appropriate conditions for admission to bail. **Consequently, I hereby grant the Accused Person bond in the sum of Kshs. 500,000 and two sureties of a similar sum.**

15. In addition, the following conditions shall apply:

- a. Accused Person is ordered to refrain from contacting the Prosecution witnesses in any way whether electronically, in person, through agents or by phone; and
- b. The Accused Person shall report to the Deputy Registrar every alternate Thursday.

Orders accordingly.

Dated and delivered at Kiambu this 29th day of September, 2016.

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JOEL NGUGI

JUDGE