



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL CASE NO. 7 OF 2016

REPUBLIC.....PROSECUTOR

-VERSUS-

1. ESAU WEKESA MAKHOHA

2. ROBERT WAROBI MAKHOHA

3. FRANCIS KUREMA KARIUKI

4. FREDRICK KIOI NJENGA

5. WESLEY KIPKORIR CHEBET.....ACCUSED

RULING

Before me is a bail application by the five accused persons named herein above pursuant to Article 49 (1) of the Constitution and Sections 123, 123A, 124 and 125 of the Criminal Procedure Code Cap 75 of the Laws of Kenya.

The five accused persons have been indicted with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the charge as pertains to the murder are that on the night of 4th May 2016 and wee hours of the morning of 5th May 2016 at unknown time jointly with others not before court at Mbirika area in Namanga township at Kajiado County murdered **PETER KIMANI MUNGAI**.

During the hearing of the application all the accused persons were duly represented by counsel who canvassed arguments in favour of each of the accused to be released on bail pending trial.

Ms Mageto for the third accused had earlier filed a notice of motion setting out the grounds that the accused be released on bail as envisaged under Article 49 (h) of the Constitution and Section 123, 123A and 124 of the Criminal Procedure Code.

Ms Mageto submitted prior to accused's arrest he was a law binding citizen working with Kenya Forest Service at Namanga station. It was Ms Mageto contention that the accused will abide with any of the conditions the court may attach in releasing him to bail awaiting trial.

Ms Mageto further submitted that the pretrial report sought by the court from the Probation Office was favourable to the accused and the same should be taken into account in exercising discretion to release

accused person on bond.

Ms Mageto further submitted that the disposition in the affidavit by accused in support of the application to be released on bond has not been controverted by the state. According to Ms Mageto the reasons advanced in the affidavit by the investigating officer objecting to bond provides no cogent evidence why the right to bail against the accused persons should be withheld.

In furtherance to urge this court to release accused persons on bond. Ms Mageto submitted that under Article 50 (2) (a) of the Constitution accused persons are presumed innocent until the case against them is proved. In her argument the fact that accused persons are charged with the offence of murder should not be used as an excuse for the court to decline granting bail pending hearing and determination of their case.

As such according to Ms Mageto no compelling reasons have been advanced to deny accused persons right to bail under Article 49 (h) of the Constitution.

In support of the legal principles to be considered in an application for bond Ms Mageto for the accused relied on the following cases;

REPUBLIC v GILBERT MAKORI *alias* & 2 OTHERS HCC eKLR No. 26 of 2015, REPUBLIC v AHMED & 6 OTHERS HIGH COURT CRIMINAL APPEAL NO. 14 OF 2010 at NAIROBI, REPUBLIC v PATRICK KYALO MUNYUA & ANOTHER HIGH COURT at MACHAKOS CRIMINAL CASE NO. 52 OF 2013 eKLR.

Mr. Githuka counsel for the 1st and 2nd accused in his submissions associated himself with the arguments and the law advanced by his colleague Ms Mageto for the third accused. The main criticism by Mr. Githuka was the affidavit by the investigating officer and prebail report by the Probation Officer. Mr. Githuka submitted that the 1st and 2nd accused persons' right to bail under Article 49 of the Constitution should not be denied on the basis of the affidavit and probation officer's report.

Mr. Githuka argued that the statements in the affidavit and prebail reports that accused reside in a village at Moi's Bridge which was hostile to the police bearing no weight to deny bail to the accused persons. Mr. Githuka contended that accused persons are Kenyan citizens with recognizable family ties. He further submitted that no compelling reasons have been shown by the prosecution why 1st and 2nd accused persons should not be released on bail.

The other legal counsels for the 4th and 5th accused persons urged the court to be guided by the submissions made by Mr. Githuka and Ms Mageto in having the accuseds be released on bail.

Mr. Akula counsel for the respondent vehemently opposed the application by the accused persons to be released on bail. Mr. Akula made reference to the affidavit sworn by PC Makori the investigating officer as the basis of not granting bail under Article 49 (h) of the Constitution.

According to Mr. Akula under Article 49 (h) there are compelling reasons why accuseds right to bail should be curtailed. In his contention Mr. Akula submitted that the 1st, 2nd, 4th and 5th accused persons do not have fixed abode or permanent employment.

Mr. Akula further argued that accused persons be are charged with a serious offence of murder which on conviction the penalty is death sentence. That alone can occasion the accused persons to abscond from the jurisdiction of this court a factor which will impede administration of justice.

Mr. Akula urged the court to weigh and balance the interest of the victim family who in this case are looking up to the court for justice to be done to the perpetrators of the crime. Furthermore Mr. Akula made reference to the prebail reports by the Probation Officer in respect of the 1st, 2nd, 4th and 5th accused and a diverse comment of unsuitability to be released on bail.

The respondent's counsel Mr. Akula placed reliance on the following authorities to buttress his submissions to oppose accused persons not to be released on bail; **REPUBLIC v CHARO 2014 eKLR, REPUBLIC v ALBERT NJIRU & 5 OTHERS [2013] eKLR and REPUBLIC v MAKORI eKLR [2015]**

Analysis and Resolution:

The right to bail is well entrenched in both the Constitution 2010 and the Criminal Procedure Code. Prior to the enactment of the current constitution the Kenya criminal justice process faced grave challenges in respect to incarceration of offenders charged with capital robbery, murder and treason. These categories of offences inevitably were not bailable.

The pretrial incarceration presented a special problem. The accused persons were being deprived of his/her liberty in circumstances where no court had found him/her guilty of the charge. This position has now slightly changed under the new constitution where under Article 49 (h) accused persons has a right to be released on bond pending a charge or trial; unless there are compelling reasons not to be released. The onus of proof on bail applications in respect of compelling reasons is borne by the state under Section 123A of the Criminal Procedure Code. The right for an accused person to be released on bail is not absolute.

In determining whether the interest of justice dictate exercise of discretion under Article 49 (h), the courts are to be guided by the provisions of Section 123A.

“In such a determination the courts are to factor the following exceptions to limit the right to bail;

(a) Nature or seriousness of the offence;

(b) The character, antecedents, associations and community of the accused person;

(c) The defendants record in respect of the fulfillment of obligations under previous grant of bail;

(d) The strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person;

(a) Has previously been granted bail and has failed to surrender to custody if released on bail. It is likely that he would fail to surrender to custody;

(b) Should be kept in custody for his own good.”

The constitution specifically requires under Article 49 (h) the terms of bail to be attached to an accused who is released on bail be reasonable. Besides the exceptions to limit right to bail under Section 123A of Criminal Procedure Code, Article 49 (h) of the Constitution places the burden of proof in the state to demonstrate compelling reasons.

The phrase compelling reasons is a requirement of the constitution which should be considered alongside the provisions of Section 123A of the Criminal Procedure Code.

The procedure of determining both requirements by the state may be by way of written submissions or oral evidence to the satisfaction of the court since the promulgation of the constitution. The High Court has developed jurisprudence around the bail question for guidance. The jurisprudence recognizes the right to bail for all accused persons arrested or charged before a court of law.

It is in this regard case law on what constitutes compelling reasons has emerged. In **REPUBLIC v DORINE AOKO NAKUMA HIGH COURT CRIMINAL APPEAL NO. 36 OF 2010 (UR)** the court defined what constitutes compelling reasons as follows:

“In 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, are offences 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 kin 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 his trial. A charge of murder, treason, robbery with violence committed or attempted would this be a compelling reason for not granting an accused person bond or bail.”

REPUBLIC v JOHN KAHINDI KARISA & 2 OTHERS MOMBASA HIGH COURT CRIMINAL NO. 23 OF 2010 (UR) the court observed;

“Murder is a serious offence and attracts a death penalty. Self preservation is a natural reaction or response of any human being. Whatever the court will decide, the fear and anxiety on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused facing a capital offence is real and cannot be wasted away.”

In **REPUBLIC v ALBERT NJIRU & 5 OTHERS HCCR NO. 79 OF 2012 Korir J** held thus in compelling reasons;

“It is however my considered view that the apprehension on the part of witnesses would not be limited to the applicant, access to guns. It would extend to a perceived position of influence and balance of power between a law enforcement officer vis viz a civilian. Such balance in the mind of any ordinary citizen tilts heavily in favour of the enforcement officer. I would therefore agree with the prosecution counsel that indeed the witnesses would fear to see the accused walking freely in public. They would feel intimidated. Such a state would not serve the interest of justice in the trial at hand. Indeed it is a compelling reason not to release the applicants.”

It is evident from case law that the definition of the phrase compelling reasons under Article 49 (h) is not closed. The content of bail jurisprudence in Kenya resonates well with the purpose of bail defined by **S NAGEL ED** (In his book *The Rights of the Accused in Law and Action* Safe Publications 1972).

“The basic purpose of bail from the society’s point of view, has always been and still is to ensure the accused’s reappearance for trial. But pretrial release serves other purposes as well, purposes recognized over the last decade as often dispositive of the fairness of the entire criminal proceedings. Pretrial release allows a man accused of crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence or probation. It spares the family the hardship and indignity of welfare and enforced separation. It permits the accused to take an active part in planning his defence with his counsel, locating witnesses, proving his capability of staying free in the community without getting into trouble.”

This is usually the basis right to bail is discussed and contextualized within the maximum of presumption of innocence under Article 50 (2) (a) of the Constitution.

In exercising discretion therefore I have get to take a holistic approach and decide each case on merit and

circumstances. The starting point is therefore to evaluate the evidence and material placed before me whether the state has made a compelling case for his court to decline to grant bail in favour of the accused persons.

Mr. Akula counsel for the respondent relied heavily on the affidavit by the investigating officer Mr. Makori and the presentence report by the Probation Officer on each of the accused.

In the averments contained in the affidavit reference is made against the 1st, 2nd, 4th and 5th accused persons. The investigating officer in his affidavit pointed to the reasons to compel the court to refuse to grant bail. The objectives revoked arrived, the issue that murder is as serious offence, and in the event of conviction the nature of punishment of death, the likelihood of accused persons absconding in view they have no permanent employment or fixed abode.

It was further deponed that if the 1st, 2nd, 4th and 5th accused persons are released there is a likelihood to attempt to influence or intimidate witnesses. The Probation Officer under the discretion of the court conducted an intensive social inquiry and presented a prebail report for each of the accused persons.

In the reports touching on the 1st, 2nd, 4th and 5th accused persons the Probation Officer found that they have no fixed abode. Secondly the community at home and at Namanga was not willing to accept them back. Thirdly the accused persons have no formal or purposeful gainful employment to accord him financial resources to attend court when required to do.

In summary each of the four accused persons were found unsuitable to execute a bond with or without sureties in the event accused absconds Section 131 (1) of Criminal Procedure Code provides for forfeiture. The accused persons at pretrial proceedings must demonstrate that they have in existence assets held and location capable of being held as security by the court during the pendency of the trial. There was no such statement confirming that fact from any of the four accused.

The learned counsel for the state submitted vigorously that the accused persons are aware and familiar with witnesses. It was argued that this being a serious offence the likelihood to intimidate witnesses cannot be overruled. The averment by the state is strengthened by social inquiry report by the Probation Officer.

In considering the affidavit by the investigating officer and the prebail report on the 1st, 2nd, 4th and 5th accused, I am of the following conceded view;

The accused persons have not controverted any of the reasons advanced by the state and the Probation Officer's report as to why they do not qualify to be released on bond. The state has canvassed serious grounds where the safety of the accused might be jeopardized if released at this stage.

The information supplied on the accused means of travel from Moi Bridge Kitale at Kajiado to attend trial can be one of the key factors to be considered. That also brings into question the efficacy of bail and enforceability of bail conditions.

Under Section 126 of the Criminal Procedure Code an accused person is expected the Probation Officer interview the accused persons' parents. The government officers at Namanga where the offence occurred, the County Director Uasin Gishu – the rural home of the accused and the victim parents.

In information supplied by various people during the interview by the Probation Officer cannot just be washed away. The information raises exceptional circumstances which fall under Section 123A to be considered to limit right to bail under Article 49 (h) of the Constitution.

In considering the question under Article 49 (h) and Section 123A of the Criminal Procedure Code and in weighing the interest of justice against the right of accused 1, 2, 4 and 5. I am satisfied that there compelling reasons to deny each one of them bail at this stage.

As stated earlier in this ruling bails laws including the Constitution 2010 do not draw a distinction between bailable and non-bailable offences. However, in order for courts to exercise discretion judiciously the legislation provisions Section 123A of the Criminal Procedure Code and the Bail Policy of the Judiciary provide guidelines to be considered in bail applications.

Under Article 49 (h) of the Constitution the state has the burden to adduce evidence to the satisfaction of the court that any of the exceptions under Section 123A and other circumstances exist which the right to bail in favour of the accused is to be limited.

In respect to the third accused, I have evaluated the application, affidavit evidence and replying affidavit of the investigating officer. The second material placed before me being the prebail report which details the inquiry conducted on suitability of the accused to be released on bail.

There is also the fundamental question to be answered in exercising discretion whether the state has demonstrated that compelling reasons do exist to curtail the right in that inquiry is also the question whether accused faces on any of the exceptions provided for under Section 123A of the Criminal Procedure Code.

The high court has attempted to define what constitutes compelling reasons in various case law. My take is that the pigeon scope what entails compelling reasons is not yet settled.

I therefore in consideration of the matter take into account the legal definition as stipulated in the authorities cited; **REPUBLIC v DORIS AOKO Supra, REPUBLIC v DANSON NGANGA Supra, REPUBLIC v AHMED MOHAMED OMAR Supra.**

The bond proposition in this case as observed earlier is that capital offences, treason, murder, accused charged under security law are bailable unless there are exists compelling reasons not to grant bail.

By these legal principles and provisions of Section 123A of Criminal Procedure Code, courts are guided that if one or more of the compelling reasons and exception listed exist continued detention of the accused will be justified.

The fount at this state of the proceedings is to decide broadly the limits of interest of justice will be met if accused person is released pending trial. That in essence encompasses weighing and balancing all the factors in the promotion of criminal justice that satisfies a right to a fair trial under Article 50 of the Constitution and right to bail under Article 49 of the Constitution.

In the application before me in respect of the third accused, I have weighed one fact after another in striking the balance on the right to his liberty and safeguarding broad spectrum of interest of justice.

I am satisfied that there are no compelling reasons have been shown by the state to persuade me not to exercise discretion in his favour and release him on bail pending trial. The accused's application does not also fall within the exceptions provided under Section 123A of the Criminal Procedure Code to limit right to bail under Article 49 (h) of the Constitution.

Accordingly the following orders shall abide the bail application brought by 1st, 2nd, 4th and 5th accused is hereby declined. The 1st, 2nd, 4th and 5th accuseds shall be held in custody pending trial.

In the event any new material is availed by the accused that exceptional circumstances exist within the postulates of the constitution and the law, they will be at liberty to apply.

As for the 3rd accused, his application to be released on bail succeeds pending trial on the following conditions:

(1) That the 3rd accused do execute a bond of Kenya Shillings Three Million (Ksh.3,000,000/=)

with a surety of identical amount.

(2) The surety to be approved by the Deputy Registrar as provided for in a Criminal Procedure Code Cap 75 of the Laws of Kenya.

(3) The Deputy Registrar to register a restriction with the Land Registry in the event the security provided is tile to land; in the event of a motor vehicle a transfer document by the owner be signed in the interim period to the Deputy Registrar of the High Court.

(4) That the accused is hereby cautioned not to interfere or contact any of the profiled witnesses by the state.

(5) That during the pendency of this trial accused relocates from his place of employment at Namanga Station.

It is so ordered.

Dated, delivered on 28th day of September, 2016 at Kajiado.

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R. NYAKUNDI

JUDGE

Representation: