



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 56 OF 2015

FESTUS KIPROP KOSGEI APELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The accused *Festus Kiprop Kosgei* is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on 29th August 2015 at Ngoroin village in Nandi County, he murdered *Eunice Jepkemboi Kosgei*.
2. The accused pleaded not guilty to the charges on 23rd September, 2015 and on the same day, learned counsel *Mr. Kenei* who was holding brief for the accused's counsel *Mr. Lagat* made an oral application seeking that the accused be admitted to bond on reasonable terms pending his trial.
3. The state through learned prosecuting counsel *Ms Mwaniki* did not in principle oppose the application but she insisted that if bond was granted, it was to be on condition that the accused should keep away from the prosecution witnesses and that he should relocate from his home to another place. The proposed conditions were informed by recommendations contained in a pre-bail report dated 11th November 2015.
4. According to the pre-bail report, the accused and the deceased hailed from the same village. It indicated that members of the deceased's family had not come to terms with the loss of the deceased and were hostile towards the accused and that the only way that his safety could be guaranteed if released on bond was to have him relocate from his home.
5. The court in its ruling dated 25th November, 2015 declined to admit the accused to bond as prayed noting that it was ill equipped to supervise a condition requiring that the accused relocates from his home to ensure his safety. The court held that the risk of compromising the accused's safety was a compelling reason justifying denial of bail at that time given that the deceased had lost his life about three months previously. The accused was however advised that he was at liberty to renew his application once the security situation on the ground improved.
6. The above is the background against which the renewed application for bail was made by way of a Notice of Motion dated 6th May, 2016.

The application is supported by an affidavit sworn by the accused on 6th May, 2016 in which he deposed that the situation on the ground had now changed and that it was safe for him to be released on bond.

7. At the hearing of the application, the accused was represented by learned counsel *Mr. Lagat* while

learned prosecuting counsel *Miss Mokuu* appeared for the state. Relying on a second pre bail report dated 11th July 2016, *Mr. Langat* urged the court to allow the application arguing that it was more than eleven months since the incident in which the deceased lost his life occurred and that as members of his family had come to terms with his loss, it was safe to admit the accused to bail pending trial.

8. *Ms Mokuu* on behalf of the state opposed the application. In her view, it was still unsafe to allow the application given the findings on the second pre-bail report to the effect that the deceased's family was still hostile towards the accused. She urged the court to reject the application.

9. I have carefully considered the accused's renewed bail application; the rival submissions made on behalf of the parties and the pre bail report dated 11th July, 2016.

It is pertinent to note at the outset that the right to bail or bond pending trial is a constitutional right guaranteed under *Article 49 (1) (h)* of the *Constitution of Kenya 2010*. That right is however not absolute. It is limited to the existence of compelling reasons. The law is that the state has the burden of establishing the existence of compelling reasons in the event that it is opposed to the admission of an arrested or accused person to bond pending charge or trial – See **Republic V Daniel Muasya Musyoka (2012) eKLR; Republic vs Danson Mgunga & Another (2010) eKLR.**

10. The primary consideration in deciding whether or not to grant bail pending trial is whether an accused person would attend his trial as scheduled or is likely to abscond. Other factors that courts consider are inter alia whether the accused was likely to interfere with ongoing investigations or potential witnesses; the safety of the accused and the public interest.

11. In this case, the incident in which the deceased lost his life occurred on 29th August, 2015 according to the information filed in court. This is about 11 months ago. The accused has been in custody since then waiting for the bitterness of the deceased's family members to subside. That bitterness no doubt stems from the belief that the accused was responsible for the death of their loved one but under the Constitution, the accused person is presumed to be innocent until he either pleads or is proved guilty. He is therefore entitled to enjoy his liberty pending trial unless there are compelling reasons to justify denial of his right to bond.

In my considered view, the bitterness allegedly expressed by members of the deceased's family about an year after the deceased's death cannot be as much as it was soon after his death and is not one that is expected to degenerate into the kind of hostility that would pose a real risk to the safety of the accused if he was released on bail.

12. In any event, members of the deceased's family are expected to be law abiding citizens who should not take the law into their own hands. They are expected to allow the legal process to take its course to determine the innocence or guilt of the accused person as charged. It is my finding that the alleged bitterness by the family of the deceased does not by itself constitute a compelling reason to justify denial of the accused person's constitutional right to bail pending trial.

13. For the foregoing reasons, I am persuaded to find that the instant application is merited and it is hereby allowed. The accused shall be admitted to bond on the following terms: He shall be released upon executing a personal bond of Kshs.500,000 with one surety of a similar amount. The surety shall be approved by the Deputy Registrar of this court. Once released, the accused shall attend mentions before the Deputy Registrar once every three months until the case is heard and determined.

It is so ordered.

C. W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 20th day of September 2016

In the presence of:

The accused

Ms Ndambuki holding brief for Mr. Langat for the accused

Ms Odour for the State

Ms Naomi Chonde Court Clerk.