



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE NUMBER 8 OF 2016

RepublicProsecutor

VERSUS

Danfornd Kabage Mwangi.....Accused

RULING

The accused in this case faces the charge of murder contrary to section **203** as read with section **204** of the Penal Code.^[1] After the plea was taken on 12th September 2016 counsel for the accused applied for the accused to be admitted to bail pending trial. However, counsel for the DPP stated that she had no instructions on bail application and I directed that the DPP files an affidavit sworn by the investigating officer stating their position on the bail application.

On 10th October 2016, the matter came up before me for hearing of the bail application. Counsel for the accused relied on the provisions of article **49** of the constitution and submitted that the reasons offered in the affidavit filed by the DPP sworn by the investigating officer cites past events and no compelling reasons have been given to warrant rejection of bail.

Counsel for the DPP adopted the affidavit sworn by the investigating officer who cited likelihood of interfering with witnesses.

Article**49 (1) (h)** of the Constitution of Kenya 2010 provides that an arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released. Article **49 (h)** entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail **until and unless** compelling reasons are demonstrated. Section **123** of the CPC [as amended by the Constitution of Kenya 2010 permits bail for all criminal cases] and makes bail available at all times - **at any time while in the accused is in custody or at any stage of the proceedings a court can grant bail**.

Blacks' Law Dictionary^[2] defines the word "compel" to mean "to convince a court that there s only one possible resolution of a legal dispute..." The same word has also been defined to mean "*Evoking interest, attention, or admiration in a powerfully irresistible way.*"^[3]

Since judicial determination of what constitutes "*compelling reasons*" entails determining the constitutional rights of a citizen and interests of the state, it is important to point out the test to be applied. In this regard I find the definition of "*compelling-state-interest test*" in the *Black's Law Dictionary*^[4] highly useful. It defines "*compelling-state-interest test*" in the following terms:-

"A method for determining the constitutional validity of a law of law, whereby the government's interest in the law and its purpose is balanced against an individual's constitutional right that is affected by the law. Only if the government's interest is strong enough will the law be upheld. The compelling state interest test is used e.g. in equal protection analysis when the disputed law requires strict scrutiny."

Courts apply the strict scrutiny standard in two contexts:- when a fundamental constitutional right is infringed,[5] particularly those found in the [Bill of Rights](#) and those the court has deemed a [fundamental right](#) protected by the [Due Process](#) .

To pass strict scrutiny, the law or policy must satisfy three tests:-

1. It must be justified by a [compelling public interest](#). While the Courts have never [brightly defined](#) how to determine if an interest is compelling, the concept generally refers to something necessary or crucial, as opposed to something merely preferred. Examples include national security, preserving the lives of a large number of individuals, and not violating explicit constitutional protections.
2. The law or policy must be [narrowly tailored](#) to achieve that goal or interest. If the government action encompasses too much ([overbroad](#)) or fails to address essential aspects of the compelling interest, then the rule is not considered narrowly tailored.
3. The law or policy must be the [least restrictive means](#) for achieving that interest: there must not be a less restrictive way to effectively achieve the compelling public interest.

There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the constitution and courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.[6]

Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

The general rule in my view is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case. Thus in determining bail public good as well the rights of the accused should be kept in mind.

The principle of the right to bail is more poignantly described in *Republic vs Ahmed Mohamed Omar & 6 others*[7] where **Ochieng J** agreed with the assertion that ‘*compelling reasons*’ are a qualification to the right to bail.

When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision.[8] These criteria have well-articulated in several court decisions. Such criteria include, among others, the following:-

- i. *The nature of the charges.*
- ii. *The strength of the evidence.*

- iii. *The gravity of the punishment in the event of conviction.*
- iv. *The previous criminal record of the accused, if any.*
- v. *The probability that the accused may not surrender himself for trial.*
- vi. *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.*
- vii. *The likelihood of further charges being brought against the accused.*
- viii. *Detention for the protection of the accused.*

The Supreme Court of Malawi in *M. Lunguzi vs Republic*^[9] stated that another ground of refusal is where the court “*is satisfied that the interests of justice so require.*”

I hold the view that after considering the circumstances of each case, the court has discretion to grant or refuse bail provided that the discretion is exercised judicially. In *Republic vs Milton Kabulit & 60 Others*^[10] Justice **Emukule** in a well-reasoned decision said:-

“My understanding of Section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right to an automatic bond or bail are those charged with offences (which maybe referred to as “petty offences”) the punishment of which {if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months”

Though the list may not be exhaustive and each case depends on its own merits, the compelling reasons may include the likelihood of failing to attend court, the character of the accused, the possibility of interfering with witnesses, the interests of justice and even the nature of the offence. Possible rejection of the accused by the community or family may also be a relevant factor.

In *Hassan Mahat Omar & Another Vs Republic*,^[11] the court rendered itself thus:-

“What amounts to compelling reasons as envisaged in Article 49(1) (h) of the Constitution is a matter of judicial discretion. Kenya does not have statutory guidelines to govern the granting of bail. However, a glimpse at pertinent laws of other common law countries such as the Bail Act of England and Section 60(4) of the Criminal Procedure Code of South Africa, gives us examples of issues to consider in determining whether or not compelling reasons exist in a given case.”

Where the accused applies for bail, the Judge, who is independent and impartial, will make his/ her decision in accordance with the law having considered all the relevant information placed before the Court. The Judge will, amongst other things, analyse all the relevant factors relating to both the individual circumstances of the offence with which the accused is charged (e.g. the seriousness of the offence) and the individual circumstances of the accused (e.g. whether they have previous convictions). This means that each application for bail is unique; even where two people have been charged with an offence together (“co-accused”) their individual bail applications will be unique because their personal circumstances will differ (e.g. one co-accused may have previous convictions for similar offences whereas the other co-accused has not).

The “relevant and sufficient” reasons which may permit the accused to be remanded in custody rather than being granted bail (also known as the “grounds for refusing bail”) are limited to: Risk that the accused will fail to appear for trial if they are released on bail;

- i. *Risk that the accused will interfere with the course of justice while on bail (e.g. that he will*

destroy evidence that could be used against them at their trial or that they could interfere with witnesses who are due to give evidence at their trial);

ii. Risk that the accused will commit further offences while on bail;

iii. The accused would be at risk of harm (from himself/herself or from others) against which they would be inadequately protected if released on bail; or

iv. Risk to the preservation of public order if the accused is released on bail.

At least one or more of the above grounds ought to be proved to the satisfaction of the court. Mere allegations or possibility is not enough. Bail cannot be refused simply because the accused has been charged with a very serious offence; but the seriousness of the offence can be taken into consideration as a factor in determining if one of the grounds for refusing bail exists (e.g. the seriousness of the offence may increase the risk that the accused will fail to appear for their trial).

The burden of proving to the court that one or more of the above grounds for refusing bail exists rests on the prosecution. If the prosecution fails to do so, then the presumption in favour of bail prevails and the court will admit the accused on bail.

I am not satisfied that on a balance of probabilities there exists compelling reasons that justify the denial of bail in this case. The issues raised in the affidavit by the investigating officer are mere allegations which cannot be construed to qualify to be compelling reasons.

Accordingly, I allow the bail application and order as follows:-

- i. The accused be released on a bond of **Ksh. 500,000/=** plus one surety of a similar amount; **OR**
- ii. Alternatively the accused may be released upon payment of a cash bail of **Ksh. 300,000/=** plus one surety of a similar amount.
- iii. That the sureties shall be approved by the Deputy Registrar of this court.
- iv. That the accused must attend all mentions and hearing dates as may be fixed from time to time during the pendency of this case or when required by the court unless such attendance is dispensed with by the court.

Signed, Delivered and Dated at Nyeri this 26th day of October 2016.

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya

[2] Eighth edition

[3] <https://en.oxforddictionaries.com/definition/compelling>

[4] Supra

[5][5] [Skinner v. State of Oklahoma, ex. rel. Williamson, 316 U.S. 535 \(1942\)](#), cf. [Buck v. Bell 274 U.S. 200 \(1927\)](#)

[6]Supreme Court of India in Masroor v. State of Uttah Pradesh and Anor (2009) (14) SCC 286

[7] {210}eKLR

[8] Supreme Court of Nigeria in Alhaji Mujahid Dukubo-Asari vs Federal Republic of Nigeria SC 20A/2006

[9] Misc. Appeal No. 1 of 1995

[10] [2011} eKLR

[11] Nairobi High Court Criminal Revision No. 31 of 2013, Lady Justice L.A Achode