REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 30 OF 2012

MOSES KARANI…….....…...1ST ACCUSED/APPLICANT

DOUGLAS KURIA KARIUKI…….....2ND ACCUSED/APPLICANT

VERSUS

REPUBLIC…….....…….RESPONDENT

RULING

The applicants are charged with the offence of murder contrary to **section 203** of the **Penal Code** as read with **section 204** of the same Code. It is alleged that on the 12th day of August, 2012 at Gichira Village jointly with others not before court, the applicants murdered one Robert Kariuki Githithi.

The applicants denied the charge when it was formally read to them in court on 17th September 2012; accordingly, a plea of not guilty was entered.

When the case was mentioned before me for the first time on 25th November, 2014, counsel for the accused persons informed the court that the application for bail pending trial had been argued, apparently before my predecessor at the station, Justice Wakiaga, and that the court had then sought for a pre-bail report on the accused persons before making its decision on whether the accused persons should be released on bail.

On her part, the state counsel, Ms Maundu, informed the court that despite the fact that she had written to the investigations officer to give any reason as to whether there existed any compelling reasons why the accused persons should not be released on bail, the officer had not responded; it was therefore assumed that there were no reasons, compelling or otherwise, to deny the accused persons bond.

I have had occasion to study the pre-bail report that was filed in court by the Probation Officer of Nyeri Central District as directed by the court. As far as the first applicant is concerned, the report says that much as the victim's family have no issue with the applicant being released on bail, they are worried that the community may not readily accept him back; the deceased's family fear is informed by the threat to lynch the applicant by a mob immediately after the deceased was murdered in the year 2012. As for the second applicant, the probation officer was of the view that he could be released on bail as there is no threat of hostility from the deceased's family and that he has an alternative residence away from where the deceased hailed.

Article 49(1) (h) of the Constitution which addresses the issue of bail pending trial and which therefore applies to the applicants' quest to be freed on bond says:-

> ***49. (1) An arrested person has the right-***
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> ***(a)…***
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> ***(b)…***
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> ***(c)…***
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> ***(d)…***
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> ***(e)…***
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> ***(f)…***
>
> ***(g)…***
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> ***(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.***

As I have stated in previous rulings on applications of this nature, if the state had opposed the application for bail, it would have been easy to consider whether the reasons for its objection amounted to what may be accepted as compelling reasons as contemplated in **article 49 (1)(h)** of the **Constitution.** In the absence of such an objection, there are no reasons at all, against the grant of bail.

The probation officer's report that the first applicant was almost lynched by a mob at the time he was arrested does not appeal to me to be a compelling reason to deny the applicant bail; it is not clear from the officer's report whether the mob he referred to was from the applicant's community and whether that threat was informed by the heat of the moment and has ebbed away with time. There is also no indication from the report that the officer interviewed any member of the community from which the applicant hails on any threats to his security should he be admitted to bail. All I can see is that he interviewed members of the applicant's family who have no problem with any of the applicants being admitted to bail pending their trial.

In these circumstances all that the court is left with is to consider the reasonable conditions upon which the applicants may be released on bail.

A useful guide in this respect is the decision by Chesoni, J (as he then was) in the High Court case of **Nganga versus Republic (1985) KLR 451.** In that case, the learned judge said, that in exercising its discretion to grant an accused person bail under the constitution and the relevant provisions of the **Criminal Procedure Code**, the court has to consider various factors. It said:-

> ***"Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions…generally in principal, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it shown by the prosecution that there are substantial grounds for believing that:***
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> a. ***The accused will fail to turn up at his trial or to surrender to custody; or***
> b. ***The accused may commit further offences; or***
> c. ***He will obstruct the course of justice***
>
> ***"The primary purpose for bail is to secure the accused person's attendance at court to answer***

the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:

a. ***The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found to be guilty: where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.***

b. ***The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused person is strong, it may be justifiable to remand him in custody.***

c. ***The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.***

d. ***Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.***

e. ***Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with the prosecution witness if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference.***

It, therefore, follows that the court, in exercise of its discretion under section 123 (1) or (3) of the Criminal Procedure Code, in considering the accused's constitutional right to bail, it does not do so in the abstract but also considers the factors I have outlined above."

The decision in which these factors were outlined was made long before **article 49 (1) (h)** came into existence but in my humble view, as long as they are not contrary to this provision of the Constitution, they remain relevant considerations on whether bail should be granted and where it is granted, the terms under which it would be granted; depending on the circumstances of each particular case, they may well be described as 'compelling reasons' against grant of bail in the context of **article 49(1) (h)** of the Constitution. It would appear that primary consideration is the need to secure the attendance of the accused person or persons in court whenever they are required.

As noted above, none of these factors have been demonstrated to exist in the circumstances of this case and thus it is safe to conclude that no compelling reason has been given to deny the accused persons bail pending their trial. In the absence of such a reason, I would allow their application and admit them to bail pending their trial upon the following terms:-

1. Each of the accused persons shall execute a bond of **One Million Five Hundred Thousand Shillings (Kshs 1,500,000/=)** with two sureties of the like sum.
2. The applicants shall appear before the Deputy Registrar, High Court, Nyeri, once every month until the completion of their trial;
3. The applicants shall not leave the jurisdiction of this court without the court's prior permission.

Dated, signed and delivered in open court at Nyeri this 13th February, 2015

Ngaah Jairus

JUDGE