



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 39 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

JOB MUMASIA MAKHANI.....ACCUSED

RULING

1. The accused prays to be admitted to bail pending trial. His learned Counsel, *Mr. Esikuri*, has lodged a notice of motion dated 10th December 2014. It is supported by a deposition sworn by the accused on even date. Learned counsel submitted that that the accused undertakes to attend his trial and to abide by any conditions of his bond; that he is not a flight-risk; and, that he has a fixed abode. The accused avers that his continued detention has affected his health negatively. He deposes that his incarceration is an affront to his fundamental rights. His learned counsel emphasized that bail is a constitutional right guaranteed by Article 49 of the Constitution.

2. The State contests the application. There is a replying affidavit sworn by *Peter Ngunje*, the investigating officer. Learned State Counsel, *Ms. Karimi Mwaniki*, referred to paragraphs 5, 6 and 7 of the affidavit. The investigating officer deposes that the victim of the alleged offence was a girl aged six; that members of the public were incensed by the homicide and sought to lynch the accused; and, that it is the police who rescued him. It is further deposed that the deceased had been defiled and her body thrown into a river. As a result, there is palpable anger in the village; and, if the accused is released on bond, his safety would be jeopardized.

3. I have studied the comprehensive *pre-bail report* filed in court on 19th March 2015. In the relevant part, the village elder at *Kongoni* area states that the accused was new in the area; that the family of the victim and the larger community are still bitter; and, that the safety of the accused cannot be guaranteed. There is a proposal that the accused may be released on bail on condition that he relocates to his original home in Kakamega. The family of the accused is ready to receive him and to stand surety for him.

4. I have considered the depositions, the *pre-bail report* and rival submissions by learned counsel. The accused faces a *grave* charge of murder; but he is still deemed to be *innocent* until proved guilty. The sentence for murder is *death*. The accused is entitled to protection of the law and a right to release on bail. Under Article 49 (1)(h) of the Constitution, he may be released *unless* there are compelling reasons. See *Republic v Daniel Musyoka Muasya and others*, Mombasa, High Court Criminal Case 42 of 2009 [2010] eKLR, *Republic v Elias Kipkemoi*, Eldoret High Court Criminal Case 42 of 2014 (unreported), *Republic v John Mwenya Chumbe*, Eldoret, High Court Criminal Case 47 of 2014 (unreported), *Republic v Evans Kiprono Yegon*, Kericho, High Court Criminal Case 38 & 40 of 2014

[2015] eKLR, *Republic v Prosper Mutua Nzilani*, Nairobi, High Court Criminal Case 15 of 2013 [2014] eKLR, *Republic v Caleb Oluoch Were & 2 others*, Eldoret High Court Criminal Case 36 of 2008 [2011] eKLR, *Republic v Ali Mcheni Ali* Mombasa High Court Criminal Case 7 of 2011 [2011] eKLR.

5. The overarching purpose of bail is to ensure the accused attends his trial. But in making the decision, the Court must consider, among other factors, the nature of the charge; the likely sentence; possibility of interference with witnesses; the chances of the accused absconding; and, his own safety upon release.

6. The accused is charged for the unlawful killing of *N M* on 16th May 2014 at in *Kakamega County*. The accused has a fixed abode at in *Kakamega East Sub-County*. Due to the alleged defilement, the homicide and dumping of the body into a river, the family of the victim and the local community are understandably irate. From the *pre-bail report*, the family of the deceased is still *very bitter* over the death of their kin. As I have stated, the accused was saved by the police, in the nick of time, from a *lynch mob*. If the accused is released on bail, he would be heading back to the charged environment of the alleged murder. His own *safety* would be at *risk*. The evidence in the *affidavit* and the *pre-bail report* has not been *controverted*.

7. True, the accused may avoid *Kongoni* area and relocate back to his original home in *Kakamega*. I have no concrete evidence that he will settle there. It is not possible for the court to supervise such relocation. His present abode is at *Mawe Tatu*. That unfortunately is the *locus in quo*. He is new there. Although he cohabited with one *P C* and got two children, the couple separated under unclear circumstances. The accused's *health* may have deteriorated in custody; but that is not a compelling ground for his release. The court has to weigh the nature of the offence, the safety of the accused and his rights and freedoms.

8. The twin matters of his own safety; and, the *gravity* of the charge, compel me *not* to release the accused on bail. The upshot is that the application by the accused to be admitted to bail is refused.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 26th day of March 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read at in open Court in the presence of:-

Accused.

No appearance by counsel for the accused.

Ms.Karimi Mwaniki for the State.

Mr. J. Kemboi, Court clerk.