



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO. 22 OF 2014

DABASO BUKICHA JARSO.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

By a Notice of Motion Application dated 24th July 2014 and brought pursuant to the provisions of Article 49 (1) (h) of the Constitution 2010, the Applicant has sought to be admitted to bail pending trial.

The gist of the application is that the Applicant will abide by any bail/bond terms set by the court and that the accused person is presumed innocent until proven guilty.

The application was opposed. Mr. Mulochi Learned Counsel for the State sought to rely on an affidavit sworn by Corporal Vincent Ndunda, the investigating officer in this case, who deposed inter alia that key prosecution witnesses are well known to the accused person and that if he is released on bail/bond, there is high possibility that he will interfere with witnesses; that his detention is necessary in order to maintain confidence in the administration of justice having regard to all the circumstances; He further contended that the right to bail/bond as enshrined in the Constitution is not absolute and is at the discretion of the court.

It was urged by Ms. Thibaru counsel for the accused person, that that the contention by the Learned State Counsel that the accused person will interfere with witnesses is a mere allegation and that the same needs to be supported by facts. For this proposition, Counsel sought to rely on the case of **JAFFER V REPUBLIC CRIMINAL APPLICATION NO. 1 OF 1972** where the Court of Appeal held inter alia that where the allegation of tampering with witnesses is made, it should be supported by facts showing reasonable cause for that belief. With regard to the Pre Bail report prepared by the probation officers, Learned Counsel submitted that the offence was committed a year ago and that this was sufficient time for the deceased's family to heal and come to terms with the loss.

According to a pre-bail report filed in court on 27th November 2014, there were mixed views on the accused's release on bail to the community. The family of the deceased was categorical that they did not want anything to do with the accused and the deceased's father was very bitter. On the other hand, the family of the accused stated that they wanted the accused around. The probation officer urged the court to use its discretionary powers to determine bond suitability of the accused.

I have considered this application, submissions by counsel, investigating officer's affidavit and the pre

bail report. In **Ng'ang'a vs. Republic 1985 KLR 451** Hon. Chesoni J, as he then was held, commenting on principles to be considered in applications for bond:

“1.The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should consider the following factors

(a) In principle, because for 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 is shown by the prosecution that there are substantial grounds for believing that:

- (i) The accused will fail to turn up at his trial or to surrender to custody;**
- (ii) The accused may commit further offences; or**
- (iii) He will obstruct the course of justice.**

(b) The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

- (i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- (ii) The strength of the prosecution case;**
- (iii) The character and antecedents of the accused;**
- (iv) The likelihood of the accused interfering with prosecution witnesses.**

Even though an arrested person has a Constitutional right to bail/bond pursuant to Article 49 (1) (h) of the Constitution, the said right is not absolute since the same provision provides that an arrested person shall not be released if there are compelling reasons. The Constitution does not define what compelling reasons are, and each case depends on its own special circumstances.

Although the prosecution alleges likely interference of witnesses by accused if released, there is no evidence to that effect See **Jaffers** case (supra). Besides, I have seen the witness statements some of them are independent of both accused and complainant and unlikely to be interfered with.

The accused and deceased are related. As per the Pre Bail Report, the accused has a known fixed abode with a family. From the report there are mixed reactions from either side of the accused family wanting him while the deceased family being bitter. The offence was committed a year ago and in my view the tempers and emotions must have subsided and there is no real apprehension of the accused being harmed if released. The key consideration in an application for bail is whether the accused will turn up for trial. Having a fixed abode the prosecution has not demonstrated that the accused is likely to jump bond.

For the above reasons, I find that the prosecution has not alluded to any compelling reasons that would lead this court to deny accused bond. I therefore allow the application and direct that accused be released on bail as follows:

1. Accused to deposit in court cash bail of Ksh.50, 000/-.

2. In addition he should avail a surety of Ksh.500,000/-

3. The accused is warned not to interfere with witnesses and to be of good conduct during the pendency of this case. In default the bond will be cancelled.

DATED AT MERU THIS 20TH DAY OF MARCH, 2015.

R. P. V. WENDOH

JUDGE.

Omari holding brief for Mr. Thibaru for accused

Mr. Kariuki Mugo for State

Kirimi Court Assistant

Accued present