



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 40 OF 2012

LESIT, J.

REPUBLIC.....PROSECUTOR

VERSUS

ALEX MUNGAI KAMENDE.....ACCUSED

RULING

1. The Accused faces one count of murder contrary to section 203 of the Penal Code. It is alleged that:

“On 5th/6th June, 2012 at Mwihoko Estate in Githurai within Nairobi County, jointly with others not before the court murdered one GEORGE NJOROGE GITAU.”

2. The accused through his Advocates M.A. Abongo & Co. Advocates has filed a Notice of Motion dated 22nd September 2014, seeking to be admitted to bail pending trial. The Application is brought under the Constitution of Kenya, Criminal Procedure Code and all enabling provisions of the Law.
3. The application is premised on the following four grounds:-
 - a. **That the Constitution of Kenya protects the rights of the accused person to be admitted to bail on reasonable conditions pending trial.**
 - b. **That this honorable court has jurisdiction to hear, determine and direct that an accused person be admitted to bail.**
 - c. **That the applicant is languishing in custody**
 - d. **That it is in the interest of justice that the applicant be admitted to bail pending hearing**
4. The application is further premised on the supporting affidavit of the accused applicant. The gist of this affidavit is that the accused will avail himself for trial if released on bond.
5. The state has filed a replying affidavit, sworn by **P.C. Moses Wambua**, the Investigating Officer in this case. The Affidavit opposes bail on grounds inter alia :
 - a. **The accused has violent tendencies that will be directed towards the witnesses if released.**

- b. **The accused has not indicated where he intends to stay and there is likelihood he may return to the same area where the crime was committed thereby interfering with witnesses.**
 - c. **The accused has not demonstrated his means or sources of income and livelihood that would sustain him if he is released and has not adequately shown any links family or economic that would prevent him from absconding if released on bail.**
6. The defense Counsel, Mrs. Kinyori dwelt on matters which should have been the subject of a sworn affidavit by the accused to answer the concerns raised by the prosecution in their affidavit. Counsel urged that the accused is a mason and that he would continue with his masonry work once released on bail. Counsel urged that the accused has a home in Mwihoko where his mother resides and that he intends to reside with her there. Counsel submitted that it was unlikely that the accused would abscond as he has relatives namely his mother and siblings.
 7. Mrs. Kinyori submitted that the bond conditions being requested of stiff bond terms would be difficult for the accused to meet as the accused was from a very poor family. The accused person, she urged was willing to report to the nearest Police Station if granted bail and that he promised not to interfere with any witness.
 8. Ms. Gichuhi for the State opposed bail for the accused. The learned Prosecution Counsel submitted that the State was relying on the replying affidavit of the Investigating Officer. Counsel urged that the accused had not shown what he will be doing to earn a living once released on bail. Counsel also urged that the accused had committed the offence with others who are still at large. Counsel raised concern with the fact the witnesses were well known to the accused person.
 9. The Constitution of Kenya 2010 provides under Article 49 (1) (h) that an arrested person has the 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.”*** It is important to note here that the party charged with the responsibility of showing that there are compelling reasons why the bail/bond should not be granted is the prosecution. In this case the prosecution has filed a Replying Affidavit through the Investigating Officer to indicate to the court that there exist such reasons.
 10. Mrs. Kinyori for the accused relied on two authorities. **Rep Vs Rolex Waita Mukunzu Machakos High Court criminal Case No. 37 of 2011** where Dulu, J. cited the celebrated case of Chesoni J. (as he then was) in **Ng’ang’a vs Republic 1985 KLR 451** where the learned judge held:

“ 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.**
- 2. a.) 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.**

Where more than one person are jointly charged with a criminal offence, the case of each accused person must be examined on its own facts and this applies also to an application for bail in which each accused person's application is to be considered on its own facts, circumstances and merit."

11. The other case is **Rep Vs Daniel Musyoka Muasya and others Mombasa Criminal Case No. 42 of 2009** where my sister Odero, J. discusses what may constitute compelling reasons and states:

"The conditions No. (3)& (4) listed above tie in with the constitutional provision that bail may be denied where 'compelling reasons' are shown to exist. Some of such compelling reasons would be the likelihood that an accused may interfere with witnesses, or destroy evidence if released on bail or the likelihood that an accused will not surrender himself for trial if released on bail...the onus must lie with the state who are the investigator and prosecutors of criminal cases to inform the court if any compelling reason exists to deny the accused bail"

12. I am persuaded by this case of some of the grounds which may be advanced by the prosecution, which has the onus to prove this, as compelling reasons to deny an accused bail.

13. I have perused the record of the case and I note that the accused is a young man of 23 years. He has been in custody for a period of over 2 and a half years now. The case has previously been adjourned for lack of witnesses and for failure of the previous defense counsel to attend trial.

14. I have carefully considered the application before me. The Constitution gives an accused person right to bail irrespective of the offence charged, so long as there are no compelling reasons to deny bail. It is the burden of the prosecution to demonstrate that compelling reason to decline bail exists. I also believe that whether or not the prosecution demonstrates the existence or otherwise of compelling reasons, the court must satisfy itself by examining all the facts presented before it and the circumstances of the case, that there exist no compelling reasons to dictate the withholding of an accused person from enjoying bail.

15. In this case the State has presented the fact the accused has a serious offence, the fact other accomplices are at large; the fact accused may know the witnesses in the case and its belief that the evidence they have is strong to oppose bail. With respect these are not compelling reasons. Bail is provided for irrespective of the offence charged. The mere fact witnesses are known is not a reason to deny bail. If the prosecution suggested that there was interference or a likelihood of it, or threats to the witnesses, then that can be considered as a ground to deny bail. Accomplices being at large or a belief evidence against the accused is strong *per se* are also not good grounds.

16. The accused has shown he has a trade he can engage in to earn a living, and his pledge that he will abide by bond terms given by the court. The Defense Counsel submitted that the accused will reside at his mother's residence which is known and can easily be found especially through sureties which will be one of the conditions set for bail.

17. Having considered all the facts and circumstances in this case, I am satisfied that there are no compelling reasons to deny accused bail. I find the accused suitable to be considered for bail. Accordingly I will grant the accused bail with terms.

18. In the result I will allow the accused application and grant him bail in the following terms:

- a. **The accused should deposit a cash bail of Ksh.200, 000/-.**
- b. **In the alternative the accused to execute a bond of K.shs. 500, 000/- and provide one surety of a similar amount.**
- c. **Accused to be confined to live with his mother residence at Mwihoko and to furnish the court with the exact address and location thereof.**
- d. **That the accused is to report on a monthly basis to the investigating officer of this case or the OCS of the station where this offence was reported where a record of the reporting should be kept and availed to court when required.**

2. **The accused should keep peace and not interfere or intimidate or threaten the witnesses in this case or their kin. Any proof of any such interference will result in the bond being cancelled.**

DATED AT NAIROBI THIS 13TH DAY OF MARCH, 2015

LESIT, J.

JUDGE