



REPUBLIC OF KENYA
HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE 19 OF 2014

LESIT, J.

REPUBLICPROSECUTOR

V E R S U S

JOHN NG'ANG'A.....ACCUSED

R U L I N G

1. The Accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code Cap 63 Laws of Kenya. The particulars of the offence are :

“On the night of 24th February, 2013 at Mwemuto Village in Gatundu South within Kiambu County, jointly with another not before court murdered JOSEPH NJAU NJOROGE.”

2. The accused through his Advocates E.B.Nyamongo & Co. Advocates has filed a Chamber Summons Application dated 16th May 2014, seeking to be admitted to bail pending trial. The Application is brought under S. 364(1)(b) of the Criminal Procedure Code, CAP 75 Laws of Kenya and Article 49(1)(h) of the Constitution of Kenya.

3. The application is premised on the following four summarized grounds:

a. That the accused person was charged with murder and pleaded not guilty to the said offence and hence should be regarded innocent of the offence until proved guilty.

b. That the accused person has been in custody since the 1st January 2014.

c. That the offence for which the accused is charged is bailable.

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 PC J. Wakoli of Gatundu Police Station, the Investigating Officer in this case. The Affidavit opposes bail on grounds inter alia that:

a. That the accused person if released on bail may be a flight risk, having committed the offence in the broad view of the prosecution witnesses, the temptation to abscond is real.

b. That the accused person if released on bail may intimidate the witnesses for the prosecution who are his village mates residing in the same neighborhood at Mwimuta village.

c. That the accused had not shown how he intends to earn a living or family ties and so may be difficult t

6. Mrs. Nyamongo the Defense Counsel in her submissions urged that though the offence was serious, the Constitution allows for bail for all offences. She further urged that the accused was merely a suspect in this case of an offence which occurred during the electioneering period. Counsel urged that the accused had a fixed abode and was therefore not a flight risk.

7. Mrs. Nyamongo, in view of issue raised by the prosecution, urged that the accused also had an alternative place to stay in Naivasha where his mother lives, and if directed by the court as part of bond terms, the accused was ready to live there. In further response to the prosecution's replying affidavit, Counsel urged that the accused person was 23 years old and worked as a bodaboda rider to earn a living. In the premise counsel argued that no compelling reasons had been advanced by the Prosecution to deny the accused bail and urged the court to consider giving conditions if it felt inclined to grant bail to the accused person.

8. A Pre-bail Probation report on the accused has been filed and I have considered it. The report includes information gathered from the area Chief, the relatives of the accused, and the father of the deceased. The Probation Officer was non committal on whether bond was recommended for the accused. The relatives of the deceased opposed bail. The mother of the accused indicated that her home was burnt down by residents of their rural home where incident occurred as a result of the incident, that she had relocated many kilometers away to new land and had no intentions of returning. The Area Chief confirmed that accused life would be endangered if he ever returned home.

9. I have considered the application, the affidavits for and against the application and the submissions by the defense counsel as well as the Prosecution.

10. 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.

11. In **Republic –vs- Danson Ngunya& another [2010] e KLR**, where Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then it (State) must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

12. The principles applicable in an application for bail pending trial were considered in the case of **Ng'ang'a vs Republic 1985 KLR 451** where Hon. Chesoni J, as he then was 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 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 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.”

13. The case cited herein above was based on the Constitution before 2010. However the principles applicable under the Constitution 2010 are basically similar save to add that the offences in which bond can be considered have now widened. All offences are now bailable.

14. Part of the considerations for bail is the likelihood of the accused turning up for his trial, and where he fails the possibility of his apprehension. The possibility to apprehend the accused is pegged to him having a known place of abode, him having a source of income and family ties that could make it easier to trace him. In this case the accused had a fluid residence and job in the sense he was a rider, employed to do that job and lived in rented premises. The accused cannot be said to have a reliable source of income as he will have to start afresh.

15. As for a known place of abode, the accused rural home was burnt down by irate residents after this incident forcing his mother to relocate to a new place where she says she is unknown and also knows no one. She is therefore yet to settle down. The accused has indicated that he could stay with his mother if the court ordered so.

16. Regarding the reaction of the victims of this offence, the father of the deceased has great reservations to accused release for two reasons. The first is the fact the father of the deceased had received death threats and feels he would live in fear if the accused was released. The second reason is that the accused was likely to abscond if granted bail as he had tried to escape before his arrest.

17. The Area Chief on his part said that even though there was no objection to accused release on bond, his life would be endangered if he ever returned to Gatundu. The Chief confirmed that the home of the accused parents had been burnt down as a result of this incident.

18. I have carefully considered this application. On the basis of what has been presented before me I find first and foremost that the accused life would be at risk if he is released on bond. The residents of his home town demonstrated this clearly when they set the accused home on fire. The threat was serious enough as it was the sole reason the mother of the accused relocated to a new Town forcing her to start a new life. According to her statement to the Probation Officer, she is yet to acclimatize herself to the new environment. She has ruled out any possibility of her returning to her former home. Even though the accused says that he could go and live with her if court directed so, based on her statement I find that the accused has no direction so far of a fixed abode. The fact he said he can live with his mother if the court ordered means that it was not his plan to live with her. It is fair to say that the accused has not shown where he intends to live and therefore the ability to get him in case he absconds will be a difficult task. Further he does not demonstrate how he intends to earn a living. That too is a great concern as it shows his life will be difficult.

19. There is further complication in accused application. It has been shown that his home was burnt down

by irate residents. The father of the deceased claims he has received threats which he suspects are from the accused. That is difficult to verify although it ought not to be taken lightly. It is however important to note that the Local Administration has said without mincing words that accused life would be endangered if he was released on bond. That is not disputed by the defence except the offer made that the accused too can relocate to another place.

20. I find that the accused place of abode cannot be ascertained, that his life will be at a direct risk if he is granted bail and that the possibility of interference with immediate victims of this case cannot be ruled out. I find that these are compelling reasons to deny accused bail. For that reason I decline this application and the same is dismissed.

DATED AT NAIROBI THIS 13TH DAY OF MARCH, 2015.

LESIIT, J.

JUDGE