



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CRIMINAL CASE NO.92 OF 2014

REPUBLIC.....RESPONDENT

VS

T K K.....1ST ACCUSED

J M K.....2ND ACCUSED

RULING

By a Notice of Motion Application brought pursuant to the provisions of Article 49 (1) (h) and 159 of the Constitution of Kenya and Rules 3, 4,5,8,19,23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the accused persons have sought to be admitted on bail/bond on such reasonable terms or conditions as the honourable court may deem fit to impose.

The gist of the application is that the applicants are students; that the 1st applicant is a minor; that the accused persons have a constitutional right to bond and are presumed innocent until proven guilty and that they are ready to abide by any terms or conditions which the honorable court may deem fit to impose.

The accused persons also contend that they were young persons who cannot interfere with adult witnesses in anyway and that there was no tension or threat of revenge to their lives because after they closed school in November 2014; they were at home in [particulars withheld] till they were arrested.

The accused person's biological mother, J M swore an affidavit deposing inter alia that the two pre bail reports mirror which were filed on his case clearly the sentiments of all the parties interviewed and is actually true and that the accused persons have never been at large. She further sought to rely on the affidavits sworn by S K, P K, D K, F M, and J M all of whom were said to be friendly neighbours of the accused person's mother in support of the pre bail reports and the application for bail.

The Application was opposed via several replying affidavits sworn by the investigating officer, PC Victor Owando, Mr. Mulochi Learned Prosecution Counsel, and several family members of the victim's family. PC Victor Owando deposed that all the prosecution witnesses reside in the same locality and are neighbours of the accused persons; that there is a high possibility that if released on bail/bond, the accused persons will interfere with witnesses thus undermining the prosecution's case; that there was so much tension on the ground with the local community threatening to revenge the death of the deceased

and that even though the murder of the deceased took place on 31st August 2014, the accused persons went into hiding and were only apprehended on 12th December 2014; that though the offence of murder is now bailable, the grant of bail is not absolute but is an exercise of the court's discretion.

Before the court considered this application, it asked for pre-bail reports. The said reports were filed but are shallow and cannot aid this court much in arriving at a fair decision whether or not to grant bond. Be that it as it may, in respect of the 1st accused it was stated in the report that when this court asked for the report, the victim's family became desperate and started hunting down and sought to arrest more suspects as a result of which there was a scuffle and one of the victim's brother was cut with a panga and that further the suspect had stated that if given bail, he will relocate to a far place from home. With respect to the 2nd accused, it was stated the community members dismissed the victim's spouse's claims that she was threatened, forcing her to flee and that during the interview with the suspect, he had stated that if given bail, he will relocate to a place far from home. No mention was made of the victim's family.

The contents of the pre-bail reports were strongly opposed by both the Learned Prosecution Counsel and the victim's family members. G G (the deceased's wife) deposed inter alia that after murdering the deceased way back on 31st August 2014, the accused persons, though students, absconded school and disappeared until 4 months later when they were arrested and arraigned in court; that even at the time of arrest, the two accused persons who were armed with swords resisted arrest and pounced on her brother-in-law; that when Mr. Mbogo came to interview her on 16th February 2015, she narrated to him all the foregoing matters but was shocked that the said probation officer elected to deliberately ignore the said crucial information; that she feared as a parent that there was real danger for the deceased's family members, relatives and friends including herself and her children, who are still nursing the painful loss of their dear one; that there is likelihood of revenge attack on the accused persons if released on bond. She also deposed that the pre-bail reports prepared and presented to court by the probation officer were not a true reflection of the feelings and aspirations of the family of the deceased and neither was the opinion and recommendation reached by the said probation officer in the two reports informed by the information on the ground.

Mr. Mulochi, Learned Prosecution Counsel on the other hand reiterated the contents of the affidavit sworn by G G and 2 other relatives of the deceased by deposing inter alia that the two reports were not factual and do not capture the version of the interview and that in light of the concerns raised by the deceased's family, there appears to be serious compelling reasons that should persuade the honourable court not to grant bail/bond to the accused persons herein.

I have considered the pre-bail reports, the respective affidavits by the parties and the authority relied upon by the prosecution.

Even though an arrested person has 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. Though the Constitution does not define what compelling reasons are, each case would depend on its own circumstances. Some of the grounds that the court will consider in granting bond are:

- 1. That the accused will turn up for his trial, which is the primary consideration;**
- 2. That the accused will not interfere with witnesses;**
- 3. The court will consider accused's antecedents and character;**
- 4. The security of the accused person if released on bond.**

See *Ng'ang'a V Republic (1985) KLR 451*.

Whether accused persons are a flight risk; whereas the accused persons claim to have been in school and

only closed in November, the State's is adamant that they had gone underground for three months. They purported to produce broadsheet results for term 3, 2014 (TJ4) but the same is not conclusive. Besides, the broadsheet does not represent all the three accused persons. The accused are said to have said that they will leave the local jurisdiction to a place far off if released. The question is whether they will attend court for the hearing of this case if released.

With regard to the accused persons' contention that there is no tension or threats of revenge against their lives, the reaction by the deceased's family is telling, that the family members of the deceased are still very bitter, emotions are still high and there is real likelihood of revenge attacks on the accused persons. The accused persons' security is not guaranteed. The offence was committed just over 6 months ago. The possibility of threats or retaliation cannot be ruled out.

I now turn to the pre-bail reports that were filed in court. As I earlier stated, the pre-bail reports were shallow and were really of no value in helping this court arrive at a justifiable conclusion. The pre-bail reports made no mention of the victims. It seems the Probation Officer did not do any inquiry from the local administration and other independent people.

Of importance to note is also the conduct of the accused persons at the time of arrest. It is not denied that one of the accused's relatives was injured in a scuffle. The question that ponders in my mind is whether they will keep the peace if released or they will be a source of intimidation to the deceased's family and or witnesses.

With regard to the contention that the accused persons are young persons and students and that one of them is a minor, whereas this court sympathizes with the predicament that the accused persons find themselves in, there is nothing unusual or exceptional with the accused persons being young and one of them being a minor. **Article 53 (1) (F) of the Constitution** provides as follows:

“53 (1) every child has the right-

(F) not to be detained, except as a measure of last resort, and when detained, to be held-

- i. for the shortest period of time; and***
- ii. separate from adults and in conditions that take into account of the child's sex and age.***

(2) a child's best interest are of paramount importance in every matter concerning the child”.

From the above passage the Constitution does not bar the court from detaining minors if it is in their best interests. It is evident from the affidavits on record that the deceased's family is still bitter with accused persons. Having found that there is possibility/likelihood of revenge or retaliation against the accused persons, it is in the best interests of the accused persons to remain in custody for the time being to avoid retaliatory attacks. See **R. V. MAULID JALDESA & ANOTHER 43/2012**.

Having said the above, this court will require an independent social enquiry to be made by another probation officer and should take into account the views of the local administration and independent persons in the community apart from the two families to enable the court reconsider the application. The said report be availed to this court after 6 months for a reconsideration of the bond applications.

For all the forgoing, I am satisfied that there are compelling reasons not to admit the accused persons to bail. The application is declined.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF JUNE, 2015.

R.P.V. WENDOH

JUDGE

PRESENT:

Faith, Court Assistant

Mr. Omari Holding Brief for Mr. Mbaabu for Accused

Accused, All Present