



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NUMBER 12 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

DANIEL NDEGWA WACHIRA.....ACCUSED

RULING

On 21.10.2015 counsel for the accused **Mr. Muthui Kimani** made an oral application seeking to have the accused released on bail pending trial and cited the provisions of Article **49 (1) (h)** of the Constitution of Kenya 2010 which provides that an arrested person has a 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. He further submitted that there are no compelling reasons to warrant denial of bail, that the accused is not a flight risk and will not interfere with witnesses and that if granted bail, the accused will abide by the conditions that the court may deem fit to impose.

Miss Chebet for the state opposed the application and relied on the contents of a replying affidavit sworn by **PC Nancy Nekesa Wanyonyi** who states that the accused is charged with the murder and that he wounded another person in the process of committing the said offence. She submitted that the alleged offence was committed barely **3** months ago and the situation on the ground is rather volatile and there is a likelihood of members of the public attacking the accused by way of revenge and added that soon after the offence members of the public burnt the accused's house and she pleaded that it is in the safety of the accused that he remains in custody.

I have considered the submissions by both counsel for the accused and the state counsel. I have also looked at the said replying affidavit and generally the facts presented to me and the relevant law and authorities.

Article **49 (h)** entrenches the right of the arrested person to be released on bail pending charge or trial unless there are compelling reasons for refusing bail. The accused is constitutionally entitled to bail ***until and unless*** compelling reasons are demonstrated. If compelling reasons arise or are demonstrated after the arrested person has been released or granted bail, the court may properly review the matter on the basis of the compelling reasons shown. Section **123** of the CPC [as amended by the Constitution of Kenya 2010 permits bail for all criminal cases] and makes bail available at all times - ***at any time while in the accused is in custody or at any stage of the proceedings a court can grant bail.***

In determining the application before me, I find useful guidance in the words of the Supreme Court of India in **Masroor v. State of Uttah Pradesh and Anor**^[1] where it stated as follows:-

“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The

valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”

Granting bail entails the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on the one hand, and the public interest on the other. On the one hand is the duty of the court to ensure that crime where it is proved, is appropriately punished, this is for the protection of society; on the other hand it is equally the duty of the court to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed under the constitution. This position was expressed by the court of appeal in **Gerald Macharia Githuka vs Reoublic**.^[2]

The cornerstone of the justice system is that no one will be punished without the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive.

The general rule in my view is for the courts to try to strike a balance between the need for a tie to the jurisdiction and the right to freedom from unnecessary detention of an accused before conviction, and the need to bear in mind the circumstances surrounding each case. Thus in determining bail application public good as well the rights of the accused should be kept in mind.

Article **49 (1) (h)** of the Constitution guarantees the right to bail unless there are compelling reasons to warrant the refusal. Thus, the right to bail is not absolute. Clearly, the right to be released on bail or bond is constitutionally circumscribed by the presence of ‘compelling reasons.’ The right to be released on bail is, with the greatest respect, not ‘an inalienable right’ as was correctly stated by Justice Ibrahim (as he then was) in **Republic vs Danson Mgunya & Another**.^[3] By definition, an in alienable right is a sacrosanct right, an absolute, unassailable and inherent right and not transferable. It is a non-negotiable right. Like the right to life, a fundamental inviolable right. Compelling reasons is a qualification to the right to bail. The principle of the right to bail is more poignantly described in **Republic vs Ahmed Mohamed Omar & 6 others**^[4] where **Ochieng J** agreed with the assertion that ‘*compelling reasons*’ are a qualification to the right to bail.

The Supreme Court of Nigeria in **Alhaji Mujahid Dukubo-Asari vs Federal Republic of Nigeria**^[5] set out several criteria on whether or not to grant bail. **Justice Ibrahim T. Mohammed JCS** stated:-

“When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have well-articulated in several decisions of this court. Such criteria include, among others, the following:-

- i. *The nature of the charges.*
- ii. *The strength of the evidence.*
- iii. *The gravity of the punishment in the event of conviction.*
- iv. *The previous criminal record of the accused, if any.*
- v. *The probability that the accused may not surrender himself for trial.*
- vi. *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.*
- vii. *The likelihood of further charges being brought against the accused.*
- viii. *Detention for the protection of the accused.*

The Supreme Court of Malawi in **M. Lunguzi vs Republic**^[6] stated that another ground of refusal is where the court “*is satisfied that the interests of justice so require.*”

I hold the view in addition to considering the circumstances of each case, the court has discretion to grant

or refuse bail provided that the discretion is exercised judicially. In **Republic vs Milton Kabulit & 60 Others**^[7] **Justice Emukule** in a well-reasoned decision said:-

“My understanding of Section (sic) 49 (1) (g) (h) is firstly, that the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the application. Secondly, the only accused entitled to a right to an automatic bond or bail are those charged with offences (which may be referred to as “petty offences”) the punishment of which {if found guilty and convicted) is either a fine only, or imprisonment for a term of less than six months”

Though the list may not be exhaustive and each case depends on its own merits, the compelling reasons may include the likelihood of failing to attend court, the character of the accused, the possibility of interfering with witnesses, the interests of justice and even the nature of the offence. Possible rejection of the accused by the community or family may also be a relevant factor.

It has not been alleged that the accused may fail to attend court nor was it alleged that he is a flight risk. In fact his lawyer submitted that the accused is ready to abide by any conditions that this court may impose. Also, no allegations were made that the accused may interfere with the witnesses. Counsel for the Respondents main ground is that the accused may be hurt by the public who may be inclined to revenge. Much as the court is concerned with the safety of the accused, the court takes the view that such an eventuality amounts to acts of lawlessness which ought to be discouraged in a civilized society and ought to have no place in modern society where law and order is functioning. In any case such allegations are premised on mere apprehension and no cogent proof has been offered. The alleged act of burning the accused house illegal as it is may have been a reaction by the public acting at the heat of the moment and ought not to be a ground to justify continued incarceration of the accused against his constitutional right to be granted bail.

I find useful guidance in the position adopted by the Apex court of India^[8] which held that deprivation of personal liberty must be founded on the most serious considerations relevant to welfare of the society. The said court had this to say:-

“Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of procedure established by law”

Accordingly, after carefully examining the arguments presented by both parties in this case and the relevant law and guided by the several judicial pronouncements cited above I hereby order as follows:-

- i. The accused be released on a bond of **Ksh. 300,000/=** plus one surety of **Ksh. 500,000/=**; **OR**
- ii. Alternatively the accused may be released upon payment of a cash bail of **Ksh. 250,000/=** plus one surety of **Ksh. 500,000/=**.
- iii. That the sureties shall be approved by the Deputy Registrar of this court.
- iv. That the accused must attend mentions before the Deputy Registrar of this court at least once per month during the pendency of this case or when required by the court and must be present during the hearing of this case unless such attendance is dispensed with by the court.

Dated at Nyeri this **28th** day of **October** 2015.

John M. Mativo

Judge

[1] (2009) (14) SCC 286

[2] Criminal Appeal No. 119 of 2004

[3] Mombasa HCCR CASE No. 26 OF 2008

[4] {210}eKLR

[5] SC 20A/2006

[6] Misc. Appeal No. 1 of 1995

[7] [2011} eKLR

[8] Brijesh Singh and Another vs State {2002} CriLJ 1362