



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 43 OF 2015

ALEX KIPCHIRCHIR APPLICANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The accused herein *Alex Kipchirchir* through his learned counsel *Mr. Miyienda* made an oral application on 27th July, 2015 seeking to be admitted to bond pending his trial. On the same day, upon request by the learned prosecuting counsel *Miss Mwaniki*, the court directed that a pre-bail report be filed before the application was argued interparties.
2. A pre-bail report was subsequently filed on 21st September, 2015. It was not favourable to the accused. According to the probation officer who compiled the report, the deceased was the accused's step brother and members of their family had not yet come to terms with his loss. It was also reported that members of the community the accused hails from were still hostile towards the accused and that if released on bond at this point in time, his safety would be at risk. It was then recommended that for his own safety, the accused should remain in custody pending his trial.
3. When the application came up for hearing interparties on 21st October, 2015, *Miss Mwaniki* relying on the probation report opposed the application. She submitted that if the accused is admitted to bond pending trial, his safety and security will be compromised given that his community had expressed hostility towards him. She argued that for his own safety, the accused should remain in custody pending his trial.
4. On his part, learned counsel *Mr. Miyienda* urged the court to admit the accused to bail contending that the alleged hostility in the community could be circumvented by the accused relocating to a different location if he is admitted to bond. He submitted that the accused has relatives living in other places and he therefore had alternative places of abode.
5. I have considered the application, the contents of the pre-bail report and the rival submissions made by learned counsels.

It is common ground that an arrested or accused person has a constitutional right to be admitted to bond or bail pending trial.

Article 49(h)(i) of the *Constitution* provides 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**”.

The constitution does not however specify what constitutes “compelling” reasons to justify denial of bond. It leaves it to the discretion or the good sense of the court to determine what amounts to a

compelling reason given the circumstances of each case.

6. The primary consideration the court must bear in mind in deciding whether or not to grant bond or bail pending trial is whether an accused person will honour the terms of bond granted and attend his trial whenever required to do so; Put another way, whether the accused is a flight risk. Other factors which the court may consider include the following; but are not limited to
 - i. The likelihood of interference with investigations and the prosecution witnesses.
 - ii. The safety and security of the accused.
7. In this case, the state opposes the application for bond on grounds that the accused's home environment is hostile and his safety may not be guaranteed if admitted to bond at this time. It is noted that the state relied entirely on the pre-bail report and although I have no reason to doubt the contents of the report considering that it had been compiled by an independent stake holder in the criminal justice system, it is my view that the state should have in addition fortified its opposition to the application by availing some evidence in the form of a replying affidavit. However, the omission to file an affidavit in this case does not adversely affect the state's position since the information contained in the pre-bail report was not disputed by the accused.
8. When issues regarding the safety of an accused person are raised in an application for bond pending trial, the court must take them seriously since the court, being the custodian of the constitution and the bill of rights therein which includes the right to life is duty bound to protect the life of an accused person or avoid any situation which may expose an accused person's health, limb or life to risk. This is more so because an accused person is presumed innocent until proved guilty.
9. That said, I wish to now consider *Mr. Miyienda's* suggested solution to the hostility towards the accused on the ground.

It is important to note that *Mr. Miyienda's* submissions were not based on any evidence since no affidavit was filed on behalf of the accused confirming that he has relatives who lived away from the hostile community who were ready to offer him accommodation if granted bond. The said submissions were at best statements from the bar which cannot take the place of evidence.

10. It is noted that this is a relatively fresh matter the offence having been committed as recently as 2nd June, 2015. Considering that the deceased is the accused's step brother, it is understandable that there is anger and bitterness towards the accused in his community since not much time has passed since the deceased's murder to allow their wounds to heal and come to terms with their loss.

I agree with the state that the safety of the accused might be compromised if he is admitted to bond at this point in time. In my view, this is a compelling reason to justify denial of bond pending trial for now. The application may be revisited in future when the said hostility has died down. For the above reasons, I decline to admit the accused person to bond pending trial. The application is accordingly rejected.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 22nd DAY of October, 2015.

In the presence of:-

Accused

Miss Mwaniki for the Republic

Mr. Lesinge court clerk