REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT CRIMINAL CASE NO. 32 OF 2012

REPUBLIC …………………………...………..…RESPONDENT

VERSUS

JOHN MAINA MUCHERU………………ACCUSED/APPLICANT

RULING

The applicant is charged with murder contrary to section 203 as read with section 204 of the penal code. According to the particulars of the offence, the applicant is alleged to have murdered Joseph Ng'ang'a Mucheru on the 30th day of December, 2011.

On 22nd February, 2012, the applicant took plea and by an application dated 25th March, 2013, he applied to be admitted to bail pending his trial. The application is supported by the affidavit of his counsel, Mr Kirubi and is based on Article 49(1) (h) of the Constitution.

> ***49. (1) An arrested person has the right-***
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> ***(a)…***
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> ***(b)…***
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> ***(c)…***
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> ***(d)…***
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> ***(e)…***
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> ***(f)…***
>
> ***(g)…***
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> ***(h) 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 state did not oppose the application for bail and therefore no reasons, compelling or otherwise

have been demonstrated to exist to deny the appellant bail. The court needs only consider the reasonable conditions upon which the applicant can be released on bail.

In the case of Nganga versus Republic (1985) KLR 451, Chesoni J (as he then was) said that in exercising its discretion to grant an accused person bail under the constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors. It said:-

> ***"Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions…generally in principal, and, 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 shown by the prosecution that there are substantial grounds for believing that:***

a. ***The accused will fail to turn up at his trial or to surrender to custody; or***
b. ***The accused may commit further offences; or***
c. ***He will obstruct the course of justice***

> ***"The primary purpose for bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:***

a. ***The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found to be guilty: where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.***

b. ***The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused person is strong, it may be justifiable to remand him in custody.***

c. ***The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.***

d. ***Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.***

e. ***Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with the prosecution witness if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference.***

It, therefore, follows that the court, in exercise of its discretion under section 123 (1) or (3) of the Criminal Procedure Code, in considering the accused's constitutional right to bail, it does not do so in the abstract but also considers the factors I have outlined above."

Although this decision was given against the backdrop of the old constitution, these factors are still relevant today as they were before the promulgation of the new constitution except that they must be considered in the light of the constitutional provisions relating to bail. These factors outlined by the learned judge (as he then was) in that decision are relevant in considering whether bail should be granted and where it is granted, the terms under which it would be granted subject to the relevant constitutional provisions.

In the application herein, I have already concluded that, in view of article 49(1) (h) of the Constitution and in the absence of any objection from the state, the issue whether the applicants are entitled to bail is not in dispute and therefore these factors are only relevant in consideration of what may be regarded as reasonable conditions upon which bail will be granted.

Taking cue from the decision of Chesoni J (as he then was) in Nganga versus Republic (supra), and considering the nature of the offence with which the applicant is charged and also considering that his trial has already begun I would allow the Notice of Motion dated 25th March, 2013, and admit the applicant to bail pending his trial on the following terms:

1. **The applicant shall execute a bond of Kshs. 2 Million with two sureties of the like sum;**

2. **The applicant shall appear before the Deputy Registrar, High Court Murang'a, once every month until his trial has been concluded;**

3. **The applicant shall not leave the jurisdiction of this honourable court without the court's prior permission.**

Dated, signed and delivered in open court at Murang'a this 21st January, 2014

Ngaah Jairus

JUDGE