REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL CASE NO. 21 OF 2012

JUILUS MWANGI……..……..……..1ST APPLICANT

DAVID NJOROGE……..…….2ND APPLICANT

VERSUS

REPUBLIC……....…….RESPONDENT

RULING

As early as November, 2008, the accused persons were charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They are alleged to have murdered one Joseph Mwati Kariuki on the night of 24th and 25th October, 2008 at Mbombo village in Murang'a south district in the central province.

Although the accused persons took their plea way back in November, 2008, it was not until 7th October, 2013 when the hearing commenced after their case had been transferred to this court from Nyeri where it had been initiated. A perusal of the record shows that the hearing could not take off on several occasions either because the defence counsel or the state counsel were not ready. On other occasions, the court would on its own motion adjourn the matter because it could not be reached. When it was due to take off in this court, it could not proceed as scheduled since this court was appointed as an election court and was at the material time hearing election petitions that arose out of the 2013 general elections.

By a Notice of Motion dated 18th March, 2013, the accused persons made an application to be released on bond pending their trial and it is clear from the affidavit in support of the motion that their application was prompted by the promulgation of the new constitution whose article 49(1) (h guarantees the right to be admitted to bail pending trial on reasonable conditions unless there are compelling reasons to the contrary.

On more than one occasion, the state informed the court that it intended to respond to the application by way of a replying affidavit; however, such an affidavit was never filed and ultimately, more particularly on 4th December, 2013 the state counsel told the court that he was unable to respond to the application because the investigating officer had persistently failed to respond to his three previous letters in which he had sought to be informed whether there were any reasons why the applicants should not be released on bail. The counsel asked the court to make a ruling based on the submissions made by the accused person's representative. In those premises, the application for bail was not opposed.

Article 49(1) (h) of the Constitution which the applicants have invoked in their quest to be freed

pending their trial says:-

> ***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)…***
>
> ***(e)…***
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> ***(f)…***
>
> ***(g)…***
>
> ***(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.***

If the state had opposed the application for bail, it would have been easy to consider whether the reasons for its objection amounted to what may be accepted as compelling reasons as contemplated in Article 49 of the Constitution. In the absence of such an objection, there are no reasons at all, against the grant of bail. There are also none that can be said to be manifest on the record. In these circumstances all that the court is left with is to consider the reasonable conditions upon which the applicants may be released on bail.

A useful guide in this respect is the decision by Chesoni, J (as he then was) in the High Court case of Nganga versus Republic (1985) KLR 451. In that case, the learned judge 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."

These factors are relevant in considering whether bail should be granted and where it is granted, the terms under which it would be granted. 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 fait accompli and therefore these factors are only relevant in consideration of what may be regarded as reasonable conditions upon which bail will be granted.

Following the factors outlined in the decision of Chesoni J (as he then was) in Nganga versus Republic (supra) I would allow the Notice of Motion dated 18th March, 2013, and admit the applicant to bail pending his trial on the following terms:

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

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

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

Dated, signed and delivered in open court at Murang'a this 20th January, 2014

Ngaah Jairus

JUDGE