



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO.137 OF 2013

REPUBLIC PROSECUTOR

VERSUS

ABEL MORANGA NCHORE ACCUSED

RULING

1. Abel Moranga Nchore alias Richard Ocharo Nchore referred to as applicant made an oral application to be released on bail pending the hearing of this case. The application was anchored in **Article 49 (1) (h)** of the **Constitution**.

2. The above application was opposed vide an affidavit dated 14th March 2014 sworn by No.65242 PC Julius Tiyana attached to Nyangusu police station and one of the investigating officers in this case on grounds, *inter alia*, that:-

if the accused is released on bail, his life will be in danger as the situation on the ground is highly volatile; having been rescued from members of the public who wanted to lynch him after commission of the murder.

3. Apart from the replying affidavit, this court asked for Bail Assessment Report on the applicant. The report was filed in court on 19th March 2014. The accused person herein is aged 52 years and is a class seven drop out; he is said to be a hard working and social person. He has no criminal records and has never been involved in any anti social activities except the one he is facing now.

4. Further, according to the report, community members and close family members when interviewed indicated that after the death of deceased, accused stayed at his home for a period of 5 months without any animosity. That the case herein an afterthought, there is a succession dispute in relation to death of deceased and a long standing land related dispute. That the accused is the last born son in the family; the deceased is a sister who was never married; they used to stay in the same compound and on the material day, the accused had a harsh exchange with the deceased on where the children of the deceased would stay and whether they would continue to use their grandmother's house. The deceased was not happy with arrangements, consequently she is said to have committed suicide.

5. In his recommendation, the probation officer Samuel Chuma found the accused suitable for bail since the risk level is low to the accused and some of the family members were willing to provide surety for the accused. Moreover, a close family member was willing to provide a land title deed to act as surety to the accused and have also promised to ensure accused attends court orders until the matter is heard and determined.

6. When the matter came before court on 17th March 2014, Mr. Ondari, learned counsel for the accused/applicant submitted that it was not true because he stayed at the home for 5 months before his arrest. He urged the court to give accused reasonable bond terms.

7. Mr. Majale, learned counsel for the State respondent relied on the affidavit sworn by the investigating officer.

8. At this juncture, a brief history leading to the instant application would be in order. The State charged the applicant with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It was alleged that on the 7th day of November 2013, at Mwangare village, at Ebiosi sub location in Nyamache District within Kisii County in the Republic of Kenya, the accused murdered Vanis Barongo Nchore.

9. Article 49 (1) (h) permits the release of any arrested person including persons charged with a capital offence on bail/bond pending trial, unless there are compelling reasons not to do so.

10. In the case of **Republic -vs- David Nyasura Nyamongo – Criminal case No.90 of 2010** (unreported) in the High Court Sitting in Kisii, Makhandia J (as he then was) stated:-

“At the end of the day however whether or not an accused should be admitted to bail is largely a matter of discretion of the court to be exercised in terms of the Constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again the court must bear in mind the other principal purpose for the granting of bail which is therefore the cardinal principle of criminal law that an accused is presumed innocent until the contrary is provided. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to be released on bail.”

11. In the case of **Republic -vs- Danson Ngunga & another [2010] e KLR**, the Court adopting the reasoning in the **M. Lunguzi -vs- Republic (MSCA Appeal No.4 of 1995)** the learned judge stated:-

“..... in my judgment the practice should rather be to require the State to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused to be deprived of his right to be released from detention. The burden should be on the State and not on the accused. He who alleges must prove that is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the State to prove when the court should make such an order”

12. I entirely agree with the above proposition and add that it is the State that has the obligation to not only say but prove that the accused person should not be awarded bail. In the instant case, the state's only reasons why accused should not be granted bail as sworn to by affidavit by one of the investigating officers is that accused was saved from a mob that wanted to lynch him at the time of his arrest.

13. In contrast the probation's report attests to the fact that the accused person lived in the same compound with the deceased for 3 months before his arrest. However, the same report seems to suggest that there were constant quarrels and disagreements between the deceased and accused who were brother and sister respectively.

14. Considering that there is no bad blood against the accused person by his family members and the community at large, the accused has a permanent abode and is infact a family man according to the bail assessment report, and considering the fact that this court is still hearing murder cases for the year 2011, it is ordered as follows:-

1. *Accused may be released on his own bond of Kshs.2, 000,000/= with 2 sureties of a like sum; the sureties to be approved by the Deputy Registrar of this honourable Court;*

2. *The accused shall appear for mention of his case once every month until the case is heard and determined or until further orders of this honourable court, in default, the bond shall stand cancelled and sureties put to account.*
 3. *Mention on 30/07/2014.*
1. Orders accordingly.

Dated, signed and delivered at Kisii this 30th day of June, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Shabola (present) for State

Mr. C.A. Okenye for S. Ondari for Accused

Mr. Bibu - Court Assistant