



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 21 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS -

EDWARD WAITHIRU KAGO.....ACCUSED

RULING

By his Notice of Motion dated 12th March 2014, the applicant seeks for orders that he be granted bail. In his supporting affidavit, the applicant depones that he is a young person aged 35 years with two children of tender age and a wife. He is a potato vendor at Githurai which business helps him to earn a living to support his family. He states that he has a home in Githurai and he is not a flight risk. The applicant argues that his continued detention is affecting his family in that he is the sole breadwinner. If granted bail the applicant undertakes to fully comply with all the conditions which the court may impose on him. Mr. Gongo holding brief for Mr. Mutitu for the accused submitted that bail is a constitutional right which should be accorded to the accused unless the prosecution proves that there are compelling reasons. The presumption of innocence forms the basis of granting bond to the accused irrespective of the strength of the evidence. He argued that the replying affidavit is merely speculative and does not demonstrate existence of any compelling reasons.

Mr. Okeyo for the State relied on the replying affidavit in opposition of this application and puts forth four (4) grounds. It is argued that the families of the applicant and the deceased are closely related and there is a likelihood that if the applicant is released on bond, he will interfere with the prosecution witnesses. The applicant lived in a rented house in Githurai during the incident and has since vacated the premises to an area called Miiri in Githunguri. In his supporting affidavit, the applicant has omitted to give any details of his residence. This makes it difficult for the police to locate him in the event of absconding. The members of public were hostile to the applicant after the incident forcing him to escape till he was arrested. Due to this hostility, the prosecution feels that the applicant may be harmed by the public if released on bail. It is also alleged that the applicant has threatened one of its witnesses namely Dominic Ngugi. The seriousness of the offence and severity of the sentence is the fourth ground of opposition.

Article 50(2)(a) of the **Constitution** presumes the accused person innocent until proven guilty. The strength of the evidence, the seriousness of the offence and the severity of the sentence should not affect the rights of the accused under **Article 49(1)(h)** of the **Constitution**. Release on bail in a case of murder which is a capital offence should not necessarily lead to a temptation to abscond. The accused if attempted to abscond will be dealt with by the existing legal mechanisms. The court will in every needy

case impose conditions while granting bail which the accused is obligated to comply with.

The investigating officer in his affidavit depones that the accused threatened his uncle one Dominic Ngugi D3 that he will be the next victim. This is a witness of the prosecution who is yet to testify. The court called for a pre-bail report which was filed on 29th May 2014. The report describes the relationship between the families of accused and deceased as frosty – which has deteriorated after the incident. During the interview of the family members, sentiments of anger, revenge and bitterness were expressed. The incident took place early this year and it appears that the emotional loss of deceased's family is still fresh in their minds. The accused has a history of threats which was to the effect that he had severally threatened the deceased with death and that the matter had been reported to Githunguri Police station.

The pre-bail report confirms that the accused threatened D3 Dominic Ngugi with death. Given the history of the accused and the frosty relationship of the two families I find the prosecution's fear of interference with witnesses well founded.

The hostile relationship between the two families on its own does not amount to a compelling reason under **Article 49(1)(h)**. However, it is important to give the family of the deceased time to heal and come to terms with the loss taking into consideration the sentiments expressed in the pre-bail report. It goes without saying that after a reasonable period, the probation officer may come up with a different assessment.

It was observed in the case of **Watoro vs. Republic (1991) KLR 220** at pg. 283:

“I think I have made it clear over a number of rulings in bail applications that I take the view on authority that the paramount consideration in a bail application is whether the accused will turn up for his trial.”

This case was cited in the case of **Republic vs. Danson Mgunya & Another 2010 eKLR** where the provisions of **Article 49(1)(h)** of the **Constitution** were examined by Ibrahim, J as he then was. It was held in this case that all other factors in a bail application must be considered with this central principle in mind.

The courts made it clear in the two decided cases that the central principle must be considered alongside other factors arising in any bail application. In the application before me I am convinced that the prosecution have proved that interference with witnesses is a compelling reason under **Article 49(1)(h)**. The accused person may not necessarily be a flight risk but he is likely to interfere with the prosecution's witnesses if released on bond at this stage.

For this reason, I decline to allow the application dated 12th March, 2014 and dismiss it accordingly.

The applicant may bring a fresh application after the key witnesses have testified.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered in open court on the 25th day of **June 2014** in the presence of:

1. Accused

2. Mr. Konga for State

F. N. MUCHEMI

JUDGE