



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL CASE NO.36 Of 2014

REPUBLIC.....RESPONDENT

VS

WILLIAM GITONGA NTOMARIO.....RESPONDENT

RULING

By a Notice of Motion Application dated 11th July 2014 and brought pursuant to the provisions of Article 49 (h) of the Constitution Kenya 2010, section 123 and 124 of the Criminal Procedure Code CAP 75 of the laws of Kenya, the Applicant has sought to be admitted to bail/bond pending the hearing and determination of this suit

The gist of the application is that the instant suit has been pending in court since 24th May 2014, and that the offence is bailable and that the Applicant is the sole breadwinner of his family and his incarceration is causing hardship and further that the Applicant is frail and ailing and that further incarceration is likely to put his health at a greater risk.

The application was opposed. Mr. Mungai Learned State Counsel for the state sought to rely on an affidavit sworn by PC Joseph Masango, the investigating officer in this case, who opposed the application for bail/bond by deposing inter alia that key prosecution witnesses reside in the same locality with the accused person and that therefore there is a high possibility that the witnesses would be in contact with the accused person who know the kind of evidence they will tender against him and is likely to inflict fear or interfere or threaten them or commit further offences and that during investigations he found the mood of the community towards the accused to be vengeful and members of the community might harm him, meaning that his life will be in danger if released on bail and that further his detention is necessary in order to maintain confidence in the administration of justice having regard to all the circumstances; including the apparent strength of the prosecution's case, the gravity of the nature of the offence the circumstances surrounding its commission and the potential for a lengthy term of imprisonment provided for in law. He further contended that the right to bail/bond as enshrined in the Constitution is not absolute and is at the discretion of the court.

It was contended by Mr. Kaume for the Applicant inter alia that the Applicant is presumed innocent till proven guilty and that accused 1 is already on bail and that further the applicant will abide by all the bail/bond terms that the court may give.

I have considered this application, submissions by counsel and investigating officer's affidavit. In **Ng'ang'a vs. Republic 1985 KLR 451** Hon. Chesoni J, as he then was held, commenting on principles to

be considered in applications for bond:

“1.The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should consider the following factors

- a. **In principle, because for 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 is shown by the prosecution that there are substantial grounds for believing that:**
 - i. **The accused will fail to turn up at his trial or to surrender to custody;**
 - ii. **The accused may commit further offences; or**
 - iii. **He will obstruct the course of justice.**
- b. **The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;**
 - i. **The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
 - ii. **The strength of the prosecution case;**
 - iii. **The character and antecedents of the accused;**
 - iv. **The likelihood of the accused interfering with prosecution witnesses.**

I am alive to the fact that this case and the principles enunciated above, were decided and applied before the enactment of the new Constitution. In a more recent case **REPUBLIC V MOSES KENU OLE PEMBA (2010) Eklr** Emukule J declined an application for bail pending trial by a person charged with murder. The Learned Judge in that case recalled that the repealed Constitution had ruled out bail for such offences and further held that under section 123 of the Criminal Procedure Code, the courts were still prohibited from granting bond or bail in such offences except in cases involving children suspects who are exempted from the death penalty and the Judge further observed that there were also subsidiary reasons for denying bail.

Even though an arrested person has Constitutional right to bail/bond pursuant to Article 49 (1) (h) of the Constitution, the said right is not absolute since the same provision provides that an arrested person shall not be released if there are compelling reasons. Though the constitution does not define what compelling reasons are, each case would depend on its own circumstances.

The accused person is facing a serious charge of murder whose sentence is a mandatory death sentence. The accused was arrested in May, 2014 whereas the offence was committed in May 2013. If he had wanted to interfere with witnesses, then he would have done so between 2013 – 2014 before his arrest. Counsel for the State alleged that the accused is a flight risk and that he had gone underground for the one year but the Investigation Officer who swore the replying affidavit never deponed to the accused having ran away or efforts made to arrest him. There is therefore no evidence that accused 2 ever went underground and that he is therefore unlikely to attend court if released on bond.

I have read the pre-bail report and it seems it is only the deceased’s family which disapproves accused 2’s release on bond whereas the community has no objection.

For all the above reasons, I am of the view that there are no compelling reason that would warrant the accused being denied bond. I therefore allow the application to release accused 2 in bond. I grant bond on the following terms.

1. Cash Bail of Ksh.50,000/-
2. Surety to sign a bond of Ksh.400, 000.
3. Deputy Registrar to approve the surety.

DATED SIGNED AND DELIVERED THIS 18th DAY OF DECEMBER, 2014

R. P .V. WENDOH

JUDGE

Mr. Mungai for state

Ms Nelima holding brief for Mr. Kariuki for accused 2.

Kirimi Court Assistant

Applicant present