REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION (MILIMANI)

CRIMINAL CASE NO. 101 OF 2014

MARTIN KIHUTI KIBE…….APPLICANT

VERSUS

REPUBLIC……..RESPONDENT

RULING

1. The instant application seeks to have Martin Kahuti Kibe, admitted to bail pending the hearing and determination of his case. The applicant is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that he murdered David Karanja Njoroge on 11th October 2014. He has brought the application through his advocate Ms Susan Nyang.
2. The application is by way of Chamber Summons dated 20th November 2014 brought under Articles 48, 49, 50 and 51 of the Constitution of Kenya and Sections 356 and 357 of the Criminal Procedure Code. It is supported by an affidavit sworn by Ms Susan Nyang and a supplementary affidavit by the applicant.
3. Ms Nyang submitted in support of the application that the applicant is a young person with young family with hopes of seeing his family grow and that he is eager to clear his name; that he has attached a certificate of good conduct from the police and a letter from his area chief confirming that he is of good conduct; that he is entitled to bail under the constitution; that the evidence against him is weak and the defence is eager to persuade the court that the applicant is innocent; that the applicant is the sole bread winner as a driver and his sick child requires medication and school fees, the needs which he cannot attend to while in custody; that he suffers from a chronic medical condition that gets worse due to his continued stay in custody; that he is willing to abide by the conditions set by the court and is ready to attend court until the case is finalized and that his father has sworn an affidavit demonstrating that he is willing and ready to stand surety for the applicant and to ensure he attends court.
4. Counsel further submitted that the respondent's reasons that the applicant may abscond because he attempted to flee after the offence and that the case is serious and he will interfere with witnesses are not backed by any evidence; that the applicant is presumed innocent until the contrary is proved. Counsel urged the court to release the applicant on bail to enable him prepare his defence.
5. The application is opposed by the prosecuting counsel who submitted that the charge is serious and the prosecution is in possession of compelling evidence against the applicant and this may tempt him to abscond; that he is likely to interfere with witnesses because they live in the same plot; that he has threatened with death the key witness in this case; that granting of bail is discretionary on the part of the court and that the court should exercise this discretion and deny the applicant bail because if released on bail, he may make good his threat.
6. In response, counsel for the applicant submitted that the applicant is not a flight risk and that he has family round him and a surety to ensure he attends court; that the alleged key witness was not

residing in the same plot as the applicant.

7. Mr. Odawa, who asked the court to place him on record as holding watching brief for the family of the deceased, came to court after the court had given its orders that the ruling on the bail application would be delivered on 9th December 2014. He told the court that he associated himself with the submissions by the prosecuting counsel. The court allowed him to make brief submissions in the interest of justice and after noting that this was not prejudicial to the applicant.
8. Mr. Odawa submitted that the applicant still lives in the same house and has already paid rent; that he is using his relatives while still in custody to threaten witnesses and that his family is combative. He asked the court to deny the applicant bail/bond.
9. It is undisputed that to be admitted to bail pending the hearing and determination of the case is a right that is guaranteed under the Constitution. It is undisputed too that this right is not absolute but discretionary. It can be denied where compelling reasons exist. It is therefore a right that can be limited to the extent that the limitation is reasonable and justifiable **(see Article 24 of the Constitution).** The burden to prove compelling reasons lies with the state.
10. Compelling reasons have been defined by the courts in various decisions. One such decision is **Criminal Case No. 55 of 2009 Joktan Mayende & 3 Others [2012] eKLR** where the court thus stated:

> **"…….the phrase *compelling reasons* would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution"** (emphasis added).

11. In considering whether an applicant should or should not be admitted to bail, the court seized with the matter must balance two interests; those of the applicant and those of the victim or his/her family by protecting their rights. But what are these rights?
12. The applicant has the right to liberty. This is captured under Article 29 of the Constitution which states that **"every person has a right to freedom and security of the person, which includes the right not to be (a) deprived of freedom arbitrarily or without just cause".**
13. The applicant is accused of having committed murder. This is a serious offence whose penalty is death. Is this a just cause to qualify the denial of bail? Probably yes. But then there is the right guaranteed by Article 50 (2) of the Constitution which states that **"every accused person has the right to a fair trial, which includes the right (a) to be presumed innocent until the contrary is proved".**
14. This simply means that even where strong evidence exists, until such a time when that evidence has been placed before the court and tested in court, an accused person like the applicant before the court is presumed innocent. Having strong evidence that is yet to be adduced to inform and persuade the court otherwise than the accused is innocent is not, in my view, a compelling reason. Even where strong evidence exists and the same has been adduced in court, it is my view that each case must be taken individually and there must be evidence that there is substantial probability that the applicant will abscond.
15. The prosecution has stated that the charge is serious. This court takes the view that the citizens of this country while aware that the charge of murder is a serious offence voted for that provision and the death sentence to remain in our supreme law. Again this is not a compelling reason unless again there is reason that the applicant has attempted to flee from justice or is highly likely to do so.
16. In other words the applicant being a flight risk because of the seriousness of the offence is a compelling reason if there is evidence proving the same. I have not been given such evidence other than the statement that the applicant flew after committing this offence. This allegation has not been backed by evidence.
17. Interference with witnesses is a serious matter. It is a perversion to justice because it is aimed at dissuading, compromising, terrifying or in any other manner interfering with a witness in order that the witness does not testify against the applicant.
18. Corporal Namiti deposed in his replying affidavit that the applicant threated one Peris Wairimu, named as a key witness, with death and that if released on bond, he may make good this threat.

Paragraph 7 of the said affidavit refers to a statement by Peris in respect to those threats. This statement said to be marked JM is not attached to the affidavit.

19. Mr. Odawa brought another angle to the threat issue. He submitted that the family of the applicant is combative and hostile and that the applicant, while in custody, is using relatives to threaten witnesses. Again there is no statement by the alleged witnesses concerning those threats. Who are these relatives being used by the applicant to threaten witnesses and who are these witnesses who have been threatened? This court has not been given an answer and the questions remain unanswered.
20. I have considered the documents attached by the applicant. That he has a chronic ailment is not supported by evidence from Remand Prison Health Facility or any hospital to the effect that whatever medical condition he suffers from cannot be managed in remand prison.
21. I have also considered the certificate of good conduct dated 16th June 2014. It is said to be only valid as of the date of issue. It was issued before the date of the alleged murder. I have considered the letter from the chief. The chief based the recommendation that the applicant is a person of good character on the certificate from the police. However it is the law that it is the respondent to prove compelling reasons and persuade this court to deny bail to the applicant.
22. I have considered the affidavit of one Henry Mwangi who deposes that he is the father of the applicant and that he is ready to offer surety in the event bail or bond is granted. In the affidavit he undertakes to ensure that the applicant complies with the conditions for bail or bond.
23. I am alive to the fact that each case must be considered on its unique circumstances. It is a fact that an accused person under our law enjoys certain rights and freedoms. The victim too has rights that ought to be protected and this court must remain vigilant that the course of justice is not comprised or perverted by an accused person who has been admitted to bail/bond. Having considered that the respondent has made general averments in an attempt to persuade the court to deny bail to the applicant and without any proof of the probability that the applicant will abscond, it is my considered view that there are no compelling reasons advanced to persuade me to deny the applicant bail. I therefore allow the application dated 20th November 2014 in the following terms:

i. The applicant is admitted to a bond of one million Kenya Shillings (Kshs 1,000,000) with one suitable surety of the same amount.
ii. In the alternative the applicant is admitted to cash bail of three hundred thousand Kenya Shillings (Kshs 300,000) to be deposited with the Chief Registrar of the Judiciary.
iii. The applicant will attend mentions before the Deputy Registrar of the Criminal Division of the High Court at Milimani every 30 days. The first such mention shall be on 9th January 2015.
iv. The applicant is cautioned against interfering with, whether in person or through any other person, any witness in this case.

It is so ordered.

Signed, dated and delivered this 9th December 2014.

S. N. Mutuku

Judge