



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 90 OF 2012

REPUBLIC **PROSECUTOR**

=VERSUS=

SYLAS KONGOR KIMETO **ACCUSED**

RULING

Before me for determination is Notice of Motion dated 14th March, 2013 filed by the accused. It is brought pursuant to Articles 19, 20, 21, 22, 49 and 50 of the Constitution of Kenya, Section 19 of the 6th schedule of the Constitution read together with Rule 23 of the Constitution of Kenya (supervisory jurisdiction and protection of fundamental Rights and freedoms of the individual), High Court Practice and Procedure Rules, 2006 and all other Enabling powers and provisions of the Law).

The prayer is that the accused be released on bail/bond pending the conclusion of the trial. It is based on the following grounds:-

- (a) That the Applicant was arrested for the charge of Murder and arraigned in Court on 17/12/2012;**
- (b) That the offence of Murder is bailable under the Constitution of Kenya;**
- (c) That the Applicant has a qualified Constitutional right to released on bond orbail on reasonable conditions;**
- (d) That the Applicant has unqualified Constitutional right to be presumed innocent proved;**
- (e) That the Applicant will avail himself and attend the trial until its conclusion;**
- (f) That the Applicant is a Kenyan Citizen who at all material times has resided at his farmer;**
- (g) That the Applicant's family resides in Kenya and there is no intention of relocating from country.**

It is further supported by the affidavit of one, **Richard Kipkiror Chebor**, a nephew of the accused sworn on 14th March, 2013. The gist of the Supporting Affidavit is that the accused is, under the Law entitled to bail or bond, that he is not a flight risk and is presumed innocent until proved guilty.

The Application is opposed vide a Replying Affidavit sworn by a number **233603** Inspector **Allan Theuri**, Officer Commanding Station, Nginyang Police Station. He deposes that the accused allegedly used a gun to murder the deceased, which gun has not yet been recovered, that the tension between the family of the accused and that of the deceased is still high and that if the accused is released on bond, members of public are likely to turn against the accused and that the release of the accused is likely to cause public outcry.

In response to the Replying Affidavit, the Applicant has through his nephew filed a Supplementary Affidavit sworn on 30th April, 2013. It is deposed in the affidavit that the issue of the recovery of the gun has no relationship with the release of the accused on bond, that the offence was committed in Lombur village, East Pokot Constituency which is about 50 km away from Sibilo within Baringo North Constituency where the accused lives, that the Respondent has not demonstrated how the security of the Applicant will be endangered if he is released on bond and that there are no compelling reasons to warrant the Court to deny the accused his Constitutional right to bail.

The application was canvassed before me on 7/5/2013. **Mr. Mulati**, State Counsel submitted that if the accused is released on bail, he is likely to interfere with witnesses. He stated that the tension between the family of the deceased and that of the accused was still high and there was likelihood that if the accused is released on bail, members of the public may turn against him.

In rejoinder, **Mr. Marube** for the accused submitted that the reasons advanced by the Respondent were not satisfactory or compelling enough to warrant denial of the orders sought.

Mr. Marube referred this Court to two cited cases, namely:-

1. **Aboud Rogo Mohamed & Another -vs Republic (2011) e KLR,**
2. **Danson Mgunya & Another -vs- Republic (2010) e KLR.**

I have accordingly considered the application, the Replying Affidavit, the Supplementary Affidavit, the submissions made respectively, the cited cases and I take the following view.

Under Article 49(1) (h), an accused person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released.

My task therefore is to determine whether the two main reasons advanced by the Respondent in opposition to the application are “**compelling**” as to warrant the accused to be denied bail.

In considering what are the compelling factors, Courts exercise discretion having due regard to each individual case. That is to say, there is no standard principle applied by Courts in determining what the compelling reasons are as envisaged under Article 49 (1) (h) of the Constitution.

Moreso, in making such consideration, Court must warn itself that an accused is presumed innocent until and after he/she is proved guilty.

In general, some of the factors the Courts have considered in a similar application include but are not limited to; the likelihood of the accused to disobey terms of the bail, the likelihood of the accused in interfering with witnesses and the seriousness of the offence. In the latter case, if the offence carries a stiff penalty such as death, it may, most likely compel an accused to abscond trial in fear of facing the harsh penalty.

In the instant case, guided by the Replying Affidavit, the Respondent opposes the application on three main grounds, namely,

1. That the gun, which was the murder weapon has not yet been recovered;
2. That the tension between the family of the deceased and that of the accused is still high and members of the public are likely to turn against the accused;
3. The release of the accused may cause public outcry.

With regard to issue No. 1, I would consider this as a serious point that Court cannot wish away. While the defence did not quite deny that a gun was used, I am still minded that the accused is innocent until proven guilty. However, it is clear that the police are still conducting investigations with a view to recovering the gun. Such a weapon, in so far as it has not been recovered poses a security threat to the public. Therefore, if I were to consider granting bail to the accused, the likelihood of his interference with such investigations and efforts are eminent. This to me, is a compelling reason why I may not accord him bail/bond.

Issue No. 2 relates to the security of the accused. In the case of **REPUBLIC -VS- DANSON MGUNYA AND ANOTHER (2010) E KLR**, the Judge referred to a Nigerian Authority – **Alhaji Mujahid Dukubo – Asari -vrs- Federal Republic of Nigeria S.C. 20 A/2006**. In the case, the Court enunciated the criteria to be used in considering an application for bail, one of which which is detention for the protection of the accused.

I wholly concur with this authority. It goes against the spirit of the protection of the right to sanctity of life to release an accused when there is a likelihood that he may lose his life due to mob justice. When such a concern as to doubt the security of the accused when granted bail is brought to the attention of the court, the latter should act conscientiously in deciding whether or not to grant bail.

The Replying Affidavit clearly states that the public may turn against the accused due to the heightened emotions caused by the death of the deceased. The probability that the accused is likely to be harmed is evident on this ground too. I would be compelled not to grant him bail, notwithstanding that he may be living far from the scene of the crime.

However, such circumstances may change. Tempers may go down and the accused shall be at liberty to reapply for bail.

In the **Republic -vrs- Danson Mgunya & Another (Supra)**, the Court found as not compelling reasons not to grant bail, the fact that the security of the accused was threatened. It said as follows:-

“The allegations about their security and possibility of being harmed by the public is not supported by any evidence – in any case, the members of the public are deemed to know the law and the consequences of taking the law in their own hands ---”

While I agree with the court in the above decision, in the instant case, the police have demonstrated the threat posed to the accused's life by way of the contents in the Replying Affidavit. It is deemed that the Officer Commanding the Station nearest to the scene where the offence was committed is in touch with the reality on the ground. I have no reasons to doubt what he has said. And it is for this reason, I think the accused is better protected while in custody until such a time it is safe to release him.

On issue No.3, it is my view that no iota of evidence has been given to demonstrate that there would be public outcry if accused is granted bail. Whilst this reason may be tied to issue No.2, it would be imperative upon the police to cause one such member of public to swear an affidavit or give evidence in respect thereof that the public is opposed to the accused being granted bail. I do therefore find this reason as unfounded and not compelling enough to warrant the accused not to be granted bail.

Counsel for the Applicant has argued that it is the accused's Constitutional right to be granted bail. However, the mere fact that an accused can afford to meet the terms of the bail/bond cannot, of its own, move the Court to concede to the request made by the accused.

This fact is clearly demonstrated in the case of **Republic -vrs Milton Kibulit & 6 others, High Court (Nakuru) Criminal Case No. 115 of 2008**, in which Hon. Justice Anyara Emukule J. held:-

“ I think i have demonstrated by argument in the major body of this ruling that capital offences and other acts of mass murder and destruction of property for whatever reason, ideological or religious bigotry are universally condemned, and because of inconsistency of judicial opinion, call for legislation on bail. I have also argued that it is against the public interest, both local and international that it is against public policy that it is not justifiable in an open and democratic society based on human dignity, equality and freedom that perpetrators of capital crimes be granted bail merely because they are able to meet the tough financial or other conditions and terms”.

In the **ABOUD ROGO MOHAMED & ANOTHER -VS- REPUBLIC (2011) E KLR**, I do not find that the issues canvassed in that application quite compare with the instant case and I do not therefore wish to delve much into it. But for clarity purposes, court was of the view that the prosecution had not advanced good argument, merely on ground that they had a good case against the accused persons, that would be sufficient reason(s) not to avail them bail. Accordingly, the court granted the accused persons bail, but with stiff conditions.

In the upshot, I find that this application not merited and dismiss it accordingly.

DATED and DELIVERED at ELDORET this 20th day of June, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Marube Advocate for the Accused

Mr. Wainaina for the State

