



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.17 OF 2013

FREDRICK NJENGA NJUGUNA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Fredrick Njenga Njuguna is the accused in Criminal Case No. 17 of 2013. He is charged with the murder of **Paul Njuguna Njenga**. The offence was allegedly committed on 25th December, 2012 at **Muchatha Village** within **Kiambu County**. The accused was arraigned in court on 13th February 2013. He pleaded not guilty to the charge and was remanded in custody pending trial which is yet to commence.

The accused (hereinafter the applicant) now wishes to be released on bail pending trial. In his application dated 22nd April 2013, the applicant states *inter alia* that he has a constitutional right to bail under **Article 49 (i) (h) of the Constitution**; that the court has discretion to grant him bail; that there are no compelling reasons to deny him bail; and that he is ill, and has no teeth and therefore cannot benefit from the prison diet. He avers in his sworn affidavit that there is no evidence linking him to his son's death and that he will co-operate with the police in investigations and attend court for his trial and abide by any conditions imposed by the court if released on bail.

The application is opposed by the State through the Replying Affidavit of **Nyangarosi Nyabuba** the investigating officer in the case. He avers at paragraphs 4,5,6, and 8 of the affidavit that there is strong circumstantial evidence against the applicant; that the applicant is likely to interfere with the witnesses who are close family members and neighbours; and, that there are compelling reasons to warrant denial of bail.

In submissions before court tendered at the hearing on 4th July 2013, **Ms Onunga** for the respondent urged the court not to release the applicant on bail for fear that he would interfere with the prosecution witnesses. She explained the investigating officer's depositions at paragraph 8 by stating that the prosecution had lined up two of the applicants' brothers and his mother as witnesses while the rest of the witnesses other than the technical ones were the applicant's neighbours.

In opposing submissions, **Mr. Gomba** while relying on the sworn affidavit of the applicant urged the court to grant the application. He submitted that the applicant had co-operated with the investigation when he was arrested, released and re-arrested again. He drew the court's attention to communication between the Director of Public Prosecutions (DPP) and the police where DPP had advised that the evidence was not sufficient to charge the applicant with the offence of murder.

I have considered the rival affidavits and submissions. The Constitutional grounding of the application is

not contested in this application. It is common ground that the applicant has a right to bail under **Article 49 (i) (h) of the Constitution**. It is also common ground that the court has discretion to curtail the right where there are compelling reasons. Further, it is the duty of the State to bring to the attention of the court the existence of any compelling reasons.

The present application is opposed by the State on account of fear of possible interference with witnesses. It has long been held that an accused ought not to lose their liberty on account of fears of the State and that where there is real possibility of interference with witnesses, there ought to be a factual basis set out for the same. The factual basis must be set out, explained and demonstrated to the satisfaction of the court See **Jaffer –Vs- Republic [1973] EA 39**.

In my view, the respondent “must step out of the realm of imagination and speculation and provide the court with persuasive argument backed by facts and experiences, and circumstances unique to each individual case that would make the court appreciate the need to deny an applicant bail.” See **Republic – Vs- Patrick Gichobi Ngaji & 2 others Criminal Case No. 45/2012 (UR)**.

In this case I am satisfied that the respondent has explained and demonstrated the basis of the fear that the applicant is likely to interfere with critical witnesses. It is highly probable that the applicant would go back home to his wife and brothers and neighbours who are witnesses in the case. It is reasonable to expect under those circumstances that there would either be a flow of sympathy by the family members which may compromise their testimony and trial or anger which may provoke a violent engagement between the witnesses and the applicant. This may threaten peace and harmony in the community.

It is my considered view that the release of the applicant will not serve the interests of justice in this case. However, in order to alleviate the applicants’ suffering as a result of his dental condition at the remand prison, I order that the remand authorities provide him with an appropriate diet.

The application is dismissed. The applicant is at liberty to renew his application after the prosecution witnesses who are his close relatives have testified.

Ruling delivered and signed at Nairobi this 27th day of **August**, 2013.

R.LAGAT-KORIR

JUDGE

In the presence of:

Mosinko :Court clerk

Fredrick Njenga Njuguna :Applicant

Mr. Gomba :Counsel for the Applicant

Mr. Konga holding brief for Onunga :Counsel for the Respondent