



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANGA
CRIMINAL CASE NO. 3 OF 2013

ALEXANDER MBURU WANJIKU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant is charged with murder contrary to section 203 as read with section 204 of the Penal Code. He is alleged to have murdered one Julius Kang’ethe Mburu on 28th March, 2013 at Thika Township within Kiambu County.

The applicant was initially charged with the offence of grievous harm in **Thika Chief Magistrates Court Criminal Case No. 915 of 2013** but this charge was substituted with the charge of murder when the complainant in that case succumbed and died on 28th March, 2013. Apparently, it is the prosecution’s case that the deceased’s death was linked to the injuries he sustained.

The applicant’s plea was taken on 26th June, 2013 and he has sought to be admitted on bail pending his trial. A formal application to this end was filed by the applicant’s counsel on 26th July, 2013. On 7th October, 2013, Mr Solomon Naulikha for the state and Mr Kirubi for the applicant agreed to have the application determined by way of written submissions.

When the application was mentioned on 28th October, 2013 to confirm whether the parties had complied with the court’s directions and had filed and exchanged written submissions, it emerged that only the applicant’s submissions had been filed. Mr Naulikha stated that he had not complied with the court’s directions because he had not received any communication from the officer who investigated the case against the applicant. The state counsel opted not to oppose the application for bail and asked the court to impose such terms as would ensure the applicant attends court should bail be granted.

Under **section 123(1) of the Criminal Procedure Code, Chapter 75 Laws of Kenya** any person charged with any offence except the offence of murder, treason, robbery with violence or an attempt thereof may be admitted to bail pending trial. This provision of the law has now been overtaken by **Article 49 (1) (h) of the Constitution of Kenya 2010** to the extent that a person accused of any offence regardless of whether or not it is a capital offence is eligible to be admitted on bail unless there are compelling reasons for his continued incarceration pending the conclusion of his case.

The state concedes to the application for bail and therefore, unless they are too glaring to be ignored, the subject of whether there are compelling reasons for rejecting the application to admit the applicant on bail

does not arise. The court's only concern is the reasonable conditions upon which the appellant can be released on bail and in this regard I am guided by the principles enunciated by Chesoni, J (as he then was) in the High Court case of **Nganga versus Republic (1985) KLR 451**. In that case, the learned judge said, that in exercising its discretion to grant bail on an accused person under the constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors. He said:-

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions...generally in principal, and, because of 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 shown by the prosecution that there are substantial grounds for believing that:

- a. ***The accused will fail to turn up at his trial or to surrender to custody; or***
- b. ***The accused may commit further offences; or***
- c. ***He will obstruct the course of justice***

“The primary purpose for bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:

- a. ***The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found to be guilty: where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.***
- b. ***The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused person is strong, it may be justifiable to remand him in custody.***
- c. ***The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.***
- d. ***Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.***
- e. ***Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with the prosecution witness if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference.***

It, therefore, follows that the court, in exercise of its discretion under section 123 (1) or (3) of the Criminal Procedure Code, in considering the accused's constitutional right to bail, it does not do so in the abstract but also considers the factors I have outlined above.”

So much jurisprudential ground has been covered on the issue of pre-trial bail and bond ever since this decision was made but these factors for consideration in granting or rejecting a bail application are, to a great extent, as relevant today as they were prior to the promulgation of the Constitution of Kenya 2010; notable developments include that bail is now available to any person regardless of the offence committed. As a factor for consideration, it also matters not how long it is likely to take before the trial is completed unless it is demonstrated that such a time falls within the ambit of what amounts to compelling reasons for not granting bail.

Taking cue from the wisdom of Chesoni J (as he then was) I would allow the Notice of Motion dated 4th July, 2013 and admit the applicant to bail pending his trial on the following terms:

1. The applicant shall execute a bond of Kshs. 2 Million with two sureties of the like sum;
2. The applicant shall appear before the Deputy Registrar, High Court Murang'a, once every month until his trial has been completed;
3. The applicant shall not leave the jurisdiction of this court without the court's prior permission.

Dated, signed and delivered in open court at Murang'a this 22nd day of November, 2013

Ngaah Jairus

JUDGE