REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 3 OF 2012

REPUBLIC …… RESPONDENT

VERSUS

BERNARD ANTHONY KIMWERE……. ACCUSED

RULING

BERNARD ANTHONY KIMWERE herein after referred to as **"the Applicant"** is charged with the offence of

"**Murder Contrary to section 203 as read**

with Section 204 of the Penal Code".

The particulars of the offence states that:

"On the morning of 19th January, 2012 at

Bandari College in Mombasa County,

murdered Susan Ruguru Ndungu".

He denied the offence by entering a plea of not guilty and has applied for bail pending trial, under presumably the provisions of Article 49 (h) of the Constitution. The said provisions state Article 49 (h).

"An arrested person has a right to be released on bond or bail or reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released".

Thus, the provisions of Article 49 (h) of the Constitution of Kenya gives any arrested person a constitutional right to bail, save where there are compelling reasons to deny him that right.

Mr. Gikandi who appeared for the applicant submitted that:

· The applicant has a young children in Standard 8, due to take the National examination this year, and another in Form two, and since their mother is the deceased herein, it would be in the interest of these children if their father was released on bail to take care of them.

· That currently, the younger child has been transferred to a school at Dagorreti in Nairobi, and she is being taken care of by her grandmother, aged 71 years.

· Hence, the court should consider the welfare of these children.

· That the applicant is diabetic and requires constant medical attention.

· That, while in custody the applicant, has been dismissed by the employer without benefits. He had worked for Kenya Airport Authority for 7 years.

· In addition, the employer wrote to the accused bankers and his bank accounts have been frozen.

· That, the applicant has a right to presumption of innocence.

· That he has no previous adverse record.

· That, he promises if released on bond, he will honour bond terms, and

· That, even suspects who have been charged with much more serious offences at the ICC have been released on free bond.

Mr. Gioche representing the Respondent opposed bail on the grounds that:

· That, the state is apprehensive if the applicant is released on bond, it may prejudice the case.

This, is because most of the witnesses are from Bandari College where the murder took place and where the applicant was working. Hence, one cannot rule out contact between the applicant, and the witnesses.

· That, the witnesses are willing and ready to give evidence.

· That, the incident happened recently and it involved the murder of the applicants wife, therefore one cannot rule out the fact that, the **"wounds"** are still fresh.

· That, although the state, sympathises with the dismissal of the applicant from employment, that was not on the directive of the State/Respondent.

· That, the children having moved out of Bandari College, to Nairobi works to their advantage, that will work as they will not be exposed to the memories of the events of the death of their mother.

In his final reply and submissions Mr. Gikandi, submitted that

· The applicant is at peace and has no enemies who would warrant his protection.

· That, the biological parents of a child are the best guardians.

· The allegation of compromising witnesses is not supported, even though, with technological development, that is possible from anywhere.

· That, the Court do uphold, the letter and the spirit of the Constitution and grant the applicant bail.

I have considered the application, the submissions in support thereof and opposition thereto; I find that, the principles that govern bail in respect to any other offence will still be applicable even in cases of murder. I say so because in my considered opinion, these principles are of general application.

In that regard, the Primary consideration is whether the **arrested person shall attend Court and be available at the trial. (Njehu Gatabaki Vs Republic High Court Criminal Application NO. 43 of 1993) (unreported).** This principle was also upheld in the case of **Watoro Vs Republic (1991) KLR 220 at page 283 where Porter J, stated:**

"…… I think I have made it clear over a number of ruling in bail that I take the view on authority that the paramount consideration in bail application is whether the Accused will turn up for his trial…."

Thus, where the Court is satisfied that the accused will abscond and fail to take trial, bail may be denied.

Some of the factors that may indicate pre disposition to abscond include:-

(i) Whether the accused has before or after arrest tried to abscond,

(ii) The gravity of the charge and the likely sentence upon conviction,

(iii) The capacity and opportunity of the accused to abscond, such as whether he or she has ready sanctuary or assets abroad,

(iv) The interests and status of the accused in the jurisdiction,

(v) Whether the accused has a fixed abode and job.

Other consideration **that** the Court ought to take into account in granting or denying bail are:-

(i) Whether the accused is likely to commit offences pending trial,

(ii) Whether the accused is likely to interfere with witnesses and evidence, or

(iii) Whether the accused has previous incidents of absconding while out on bail.

As already stated, the bail may be denied under Article 49 (h) of the Constitution, **where there are compelling reasons**. The question is: Are there compelling reasons in his particular case to deny the applicant bail? A serious understanding of these provisions of the Constitution is that, it leaves the answer to this question, to the discretion of the Court, so as to consider each case on its own merit.

What then would be some of the factors to consider when exercising this discretion. I think the following factors

(1) The gravity or seriousness of the offence.

(2) The likely sentence upon Conviction.

(3) The relationship if any between the applicant and the potential witnesses. This is so because, if the applicant is related to the witnesses, there could indeed be a legitimate anxiety of interference with the witness if released on bail.

The charge herein is of Murder and the likely sentence upon conviction is death, this, obviously the applicant will not be at **"peace"** during the trial. The possibility of thinking of flight is real and possible for a person in such a situation. This position was upheld by Porter J, in the case of **Watero Vs Republic (1991) KLR 220 –**

"The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody ……..

What I think is important for the court to bear in mind, and the reason for the caution to remember the presumption of innocence, is that it would be wrong to leap to the conclusion that the Accused was guilty merely because he had been charged and decide the bail application on that

basis.

Nevertheless the seriousness of the offence has a clear bearing which the Court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not of question: it has happened before, and similar cases.

I do not mean to say that a because other people have decided to leave business family and friend, for other crimes, rather than to face prosecution, this applicant will do so, that decision depends on all prevailing circumstances of the applicant. All I mean to say is that the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction ……"

I do note that other factors have been raised by the Respondents, in relation to the possible interference with witnesses and the safety of the applicant if released on bond. I find that unless, there is proof of the same, through a sworn statement or availability of evidence in support,that remains an allegation. The threat to the life of the applicant, should never be an issue, the state has a legal, and moral duty to protect the applicant. Even, the allegations by the state, the wounds have not healed, is completely unsupported.

In the same light, some of the factors the applicant has advanced in support of his application have remained unsupported. The applicant alleges he is diabetic and requires constant treatment and yet, there is no proof of the same. He alleges he has been **"fired"** from employment and his bank accounts frozen. There is no proof. He then fails to indicate where he will be staying in view of loss of employment and access to his **"funds"** in the bank and possibly loss of housing by the employer and in deed there is no proof he has any children and a candidate for, that matter. I therefore order that before I give my final orders in this matter. I shall require a pre-bail report, which must be comprehensive, objective and or impartial, and must take into consideration views of all the stake holders. It would be important to hear the views of the relatives of the deceased, the views of Kenya Airport Authority, the employers of the applicant and/or the deceased, the appellants and/or his relatives, and independent person e.g Administration. I shall then give my final orders thereafter.

G.L. NZIOKA

JUDGE

15TH MARCH, 2012

Dated, signed and delivered at Mombasa.

G.L. NZIOKA

JUDGE

15TH MARCH, 2012

In the presence of:-

Mr. Gikandi for the applicant

Mr. Gioche for the respondent

Matano Court clerk

G.L. NZIOKA

JUDGE

15TH MARCH, 2012

Mr. Gikandi: I apply for the earliest hearing date and I apply to be supplied with certified copy of the proceedings and the ruling made by the Court. I think that this is a fundamental point of Law and we wish to appeal against the decision of the Court, although the decision to have the probation officers report can go on.

Mr. Gioche: No reply

Court: Hearing on the 2nd and 3rd May, 2012. The probation officer to avail the report on **29th March, 2012**. In the meantime the applicant to be supplied with certified copies of the proceedings, and the ruling of the Court.

G.L. NZIOKA

JUDGE

15TH MARCH, 2012