



REPUBLIC OF KENYA

High Court at Kericho

Criminal Case 29 of 2011

REPUBLIC.....PROSECUTOR

VERSES

DAVID BENSON & KIPKERICH KEMEI CHUMO.....ACCUSED

RULING

The accused herein is charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. He seeks to be released on bail. The accused has been in custody for nine (9) years. He was convicted and sentenced to death. He appealed against conviction and sentence. A retrial was ordered. He prays to be released on account of the fact that he is not in good health and bail is his constitutional right.

In his response to the application Mr. Rogoncho, State Counsel said he was not able to liaise with the investigating officer in the matter to ascertain if there were any compelling reasons as to why the orders sought could not be granted but called on the court to take into consideration the fact that the applicant had been sentenced by the court to death where after he appealed and it was directed that a retrial do take place. He was of the view that the prosecution intended to regularize the technicality that resulted into the order for a retrial. In his opinion, there was an overwhelming chance that the court would arrive at no other decision than the earlier one reached. He also argued that the accused was undergoing treatment while in custody, hence did not see any reason why he had to be released on bond.

According to **Article 49 (1) (h)** of the **Constitution**, it is the right of a person arrested to be released on bail pending trial unless there are compelling reasons precluding him from being free.

The accused was charged during the existence of the constitution that preceded the current one. Then, murder, a capital offence was not bailable. The accused says he has been in custody for nine (9) years. The reason being that he was tried and convicted by a competent court where after he appealed against the conviction and sentence. The Court of Appeal declared the trial a nullity because there had been a misdirection. The trial in the High Court had started while the provision for assessors was in force. The law was amended.

The trial Judge failed to comply with the provisions of **Section 23 (3) (e)** of the **Interpretation and General Provision Act** by discharging the assessors forthwith. This technicality was a misdirection (**Vide David Benson Kipkerich Kerei Chumo –Vs- Republic Civil Appeal No. 115/2009**)

The State Counsel was not able to tell the court of any compelling reasons that may have existed that would help this court reach an informed decision, but he alluded to some reasons that he believed would assist the court.

The issue to be addressed is whether in this case there are any reasons that would help the court reach a just decision. The court is hence called upon to exercise the discretion it has judiciously. In the cited case of **Republic – Verses- Damaris Cheptoo Langat HCCRC No. 34/2009, KERICHO** the court in appreciating the fact that “compelling reasons” have never been defined referred to the case of **Republic Verses Joshua Kibet Cheriot KERICHO HCCR 6/2010** where it is stated as follows:

“Compelling reasons in Article 49 (1) (h) of the Constitution are not defined. But, they must, to my mind, mean reasons that show or prove that it is not in the interest of justice to release the accused person on bail... the reasons in opposition to bail or bond must be cogent and must leave no doubt that justice will suffer if an accused is released on bail or bond.”

I am persuaded by what was stated in the case. I also cannot fail to allude to the case of **ALHAJI MUJAHID DUKUBO – ASARI –VS- FEDERAL REPUBLIC OF NIGERIA** where the court set out some essential criteria. Justice Ibrahim Tanko Muhammad J.S.C held that:-

“... When it come to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

(i)The nature of the charges

(ii)The strength of the evidence which supports the charge

(iii) The gravity of the punishment in the event of conviction

(iv)The previous criminal record of the accused if any

(v)The probability that the accused may not surrender himself for trial

(vi)The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him

(vii)The likelihood of further charges being brought against the accused

(viii)The probability of guilty

(ix) Detention for the protection of the accused

(x) The necessity to procure medical or social report pending final disposal of the case.

The said court stated that the criteria was not exhaustive. Other factors not mentioned my relevant to the determination of grant or refusal of bail to an accused person.”

I am of the view that when determining if justice will be served by the order made, I should take into consideration the criteria mentioned.

In considering the appeal which was against conviction and sentence the Court of Appeal did not discuss the issue of conviction and sentence. It only considered the technicality involved. Looking at the judgment of the Court of Appeal at page 3, it is stated that the evidence established that the two (2) deceased persons (the wife and the son of the accused) were brutally hacked to death while in bed. They suffered horrific injuries which they succumbed to after several hours of painful groaning.

This brings into question the nature of the offence, the strength of evidence to be adduced and the gravity of the sentence to impose in case of a conviction.

I did ask for a social report for the accused person. The attitude of the relatives of the accused as to whether or not he should be released on bail is divided, the matter is therefore still sensitive.

The applicant swore an affidavit of personal circumstances where he expressed how sick he was and what kind of diet he was being given. He sought to be released on bond to seek further medical attention. Annexures thereto are treatment notes. There is evidence that although incarcerated, he gets treatment from Moi Teaching Referral Hospital and even private hospitals. It can therefore not be said that to access such treatment can only be possible while out on bond. Since his family is still divided on his release on bond it would be in the interest of justice that he remains in custody. The reasons given are compelling enough to have him denied bail.

The application is hence disallowed.

It is so ordered.

DATED at KERICHO this 13th day of November 2012

LILIAN N. MUTENDE

JUDGE

COUNSEL APPEARING

Mr. Rogoncho, State Counsel, for the State

Mr. Onganyi, Advocate, for the Accused

Mr. R. Koech, Court clerk