No. 2795

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 90 OF 2010

REPUBLIC...PROSECUTOR

-VERSUS-

DAVID NGASORA NYAMONGO...ACCUSED

RULING

Vide Notice of motion dated 23rd February, 2011 and filed in this court on the following day, **David Nyasora Nyamongo**, herein after ***"the applicant",*** sought that he be released on bail pending the hearing of this case. The application was expressed to be anchored on article 49(1) (h) of the constitution and section 124 of the **Criminal Procedure Code.**

The grounds in support of the application were that it was his constitutional right to be released on bail, he had a family to take care of, he was sickly and finally that he was ready to abide by any terms that the court may impose in allowing the application. The affidavit he swore in support of the application merely expounded and or elaborated on the aforestated grounds in support of the application.

At the hearing of the application interpartes, **Mr. Nyagwencha,** learned counsel for the applicant merely reiterated the grounds in support of the application and the affidavit in support thereof.

In response, the state through **Mr. Gitonga,** learned state counsel opposed the application by submitting that the offence charged was serious as it was allegedly committed by the accused on his wife. If released, he is likely to be pursued and lynched by relatives of the deceased. The release sought therefore is likely to expose the applicant to security risk. Given the likely punishment to be imposed on the applicant if convicted, it made it likely that he may abscond. With regard to his sickness, counsel submitted that Kisii

G.K. Prisons operated a competent dispensary where the applicant could be treated. If need arose, he could even be referred to Kisii Level 5 hospital for further treatment. Finally, he submitted that if the court was inclined to grant the application, it should impose strict terms to meet the ends of justice. In support of his submissions, counsel relied on the unreported case of **Republic V Milton Kabuga & 6 others NKR Cr. Case number 115 of 2008.**

Perhaps at this juncture a brief history leading to the instant application would be in order: By information dated 18th October, 2010 and filed in court on the even date, the state charged the applicant with the offence of murder contrary to section 203 as read with section 204 of the **Penal code.** It was alleged that on 15th May, 2010 at Obwari location in Nyamira District within Nyanza Province with others not before court, he murdered **Hellen Nyamongo**. When arraigned before this court on 12th November, 2010 on the information, he entered a plea of not guilty and the case has not been scheduled for hearing on 15th June, 2011. It is conceded by both sides however, that the victim was the applicant's wife.

It requires no gain saying that prior to the promulgation of the constitution of the 2nd republic of Kenya on 27th August, 2010, the law then prohibited the grant of bail to accused persons on capital charges. That was provided for in Section 72(5) of the repealed constitution as well as section 123 of the **Criminal Procedure Code**. All this however changed with the coming into force of the new constitution. After the effective date of the constitution, section 49(i) (h) thereof permitted the release of an accused person charged with a capital offence, unless there were compelling reasons not to do so. Thus those charged with capital offences were put on similar footing with those charged with non-capital offences when it came to bail. They are now entitled to bail as a matter of right and that right can only be restricted or taken away by court if there are compelling reasons.

At the end of the day however, whether or not an accused should be admitted to bail, is largely a matter of discretion of the court to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the sentence which the offence carries and the overriding consideration of granting bail which is whether the accused will turn up for the hearing of this case once granted bail. Again, the court must bare in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so, pending such trial, the accused ought to be released on bail.

The issue in this application then is whether there are compelling reasons why the applicant should not be released on bail, what are those compelling reasons and who carries the burden of satisfying the court with regard to those compelling reasons if at all.

In the case of **Republic V Danson Ngunya & Another (2010) e KLR** adopting the reasoning, in the Malawi case of **M. Lunguzi V Republic (MS CA Appeal No.1 of 1995** the judge stated: ***"… In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order…".*** I would reiterate the same proposition in this application. So that it is up to the state to satisfy the court as to the compelling reasons why the applicant should not be released on bail. How does the state do so? Some courts have maintained that, it should by way of evidence availed through affidavits. Other courts have taken the view that oral submission would suffice. I prefer to take the middle ground. Where possible affidavit evidence may be tendered. That however, should not preclude oral submissions on the issue.

In this application, the state has contended by way of oral submissions that the offence charged is serious as it was allegedly committed by the accused on his wife, if the applicant was to be seen walking free, he may be lynched by the deceased's relatives and given the likely sentence upon conviction, the applicant may abscond. These were compelling reasons advanced by the state as to why the applicant should be denied bail. Those considerations were not met with any rebuttal at all from the applicant. They must therefore be taken to be true.

I have no doubt at all in my mind that the offence charged, more so, if as claimed by the prosecution was allegedly committed by the accused on his wife, the fears of the state with regard to the likelihood of the applicant being lynched by the relatives of the deceased is not farfetched. This court takes judicial notice that this is a volatile area where suspects are routinely pursued, attacked and lynched by burning, by either relatives of the victims or self styled vigilantes. Thus this court must consider the safety of the applicant in the circumstances. It is in his paramount interest that he be safe as the families of the deceased are also bitter and could exact revenge, in the best way they know how, which may lead to a state of lawlessness. As stated by **Emukule J** in the case of **Republic V Dorine Aoko NKR H.C. cr. Case no. 36 of 2010 (UR)** ***"…to my mind again, those compelling reasons are the very same ones spelt out in section 72(s) of the repeated constitution, and elaborated in section 123 of the Criminal Procedure Code, namely, that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity (taking of away another person's life, disloyalty to the state of one's nationality or grievous assault and injury to another person or his property) are offences which are by their reprehensiveness not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim, to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk to the street on bond or bail pending his trial. A charge of murder, treason, robbery with violence (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail…".*** I entirely agree with those sentiments in the circumstances of this case. I would only add that with the level of literacy in this area, the villagers might not know the difference between the applicant having secured temporary reprieve by merely being released on bail pending trial or an acquittal. They may well think, mistakenly though, that the applicant may actually had been acquitted of the charge and therefore decide to take the law in their hands.

It cannot be gainsaid that the primary consideration for bail is whether the applicant will avail himself for trial. However, given the likely punishment after conviction, it makes it most likely that the applicant may abscond.

The applicant has raised the issue of taking care of the family. In my view this is not a consideration on whether or not to grant bail. The family and or his children could as well be taken care of by his or the deceased's relatives.

With regard to his sickness, the learned state counsel has correctly pointed out that Kisii G.K. Prison operates a competent dispensary where the applicant can be treated. If his condition does not improve, he can always be referred to Kisii Level 5 Hospital for further treatment.

In the case of **Republic V Milton Kabuga (supra), Emukule J** advanced eight propositions why the applicants who are charged with murder as in the instant case could not be admitted to bail pending trial. These were:-

“…1. That the mandate of the High Court is to ensure the existence of a society where justice, fairness, equality and equity is the foundation and hallmark of the daily lives of the citizen.

2. The offence murder (sic) is grave.

3. The sentence if found guilty is the ultimate penalty death (and not a five or six or more months imprisonment).

4. There is not clear change in legal policy that suspects on capital offences be left off at liberty to access and tamper with witnesses.

5. A legal policy otherwise is an abuse of the values and moues of the people of Kenya, and more so of the surviving reactions of the deceased, and the memory of the deceased.

6. A change of such legal policy is not justifiable in a free and open and democratic society and may encourage calls for self-help and revenge and thus worsened a potentially volatile situation.

7. Public interest considerations militate against the grant of bail of (sic) pending their trial, in capital offences.

8. There are no compelling or exceptional circumstances for the release of the petitioner on bail. The principle of innocence until proof to the contrary is established (sic) is a principle in support of due process in conformity with the principle of human dignity as envisaged murder section 24(1) of the constitution…”.

I agree with some of the above propositions and not all. For purposes of this applicationhowever propositions 2, 3, 5 and 6 are relevant. In effect therefore, the application is found unmerited. Accordingly it is dismissed.

Ruling **dated, signed** and **delivered** at Kisii this 4th day of May, 2011.

ASIKE-MAKHANDIA

JUDGE