KENYA LAW
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Njiru & another v Republic (Criminal Case E010 of 2024) [2024] KEHC 5113 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5113 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CRIMINAL CASE E010 OF 2024

LM NJUGUNA, J

MAY 8, 2024

BETWEEN

LEWIS MUTETI NJIRU .... 1ST APPLICANT

STEPHEN MUSYOKI WAMBUA .... 2ND APPLICANT

AND

REPUBLIC .... PROSECUTION

RULING

1. The applicants face the charge of murder contrary to section 203 as read together with section 204 of the *Penal Code*. The particulars of the offence are that on 26th January 2024 at Mutuobare village, Riachina Sublocation, Mutuobare location, Mbeere South sub-county in Embu County, the applicants, jointly with others not before court, murdered Ann Nyakio Gitonga.
2. They both pleaded not guilty and a plea of not guilty was duly entered. After taking plea, counsel for the applicants made an oral application seeking that the accused persons be released on bail/bond terms. The court directed the applicants make a formal application in that regard and they complied.
3. In his application seeking to be released on bail/bond terms, the 1st applicant stated that he has remained in custody since his arrest and that the case seems like it will take a long time. That he has a fixed abode in Embu and will appear in court whenever required to do so. That he is a husband and father and he works as a bodaboda operator to sustain his family. He stated that if granted bail/bond, he will comply with whatever conditions the court will set.
4. The 2nd applicant, in his application, stated that he is a father of 2 small children and the sole caregiver of his elderly mother and that he has a right to be released on bail pending hearing of the case. That he hails from Kitui but he came to Embu to work as a casual labourer being the breadwinner of his family. He stated that he is willing to comply with whatever conditions the court will put in place.

5. The investigating officer opposed the applications through an affidavit dated 12th March 2024 in which he stated that the applicants do not have identification documents showing their true identities and how they can be traced in case they fail to comply with bail terms. That the applicants have weak social ties and it is difficult to identify their true families, parents and friends because they are not known. That at the time of their arrest, the applicants identified themselves as hustlers with no known employers or place of business. That they threatened to kill the only eye witness, a minor, together with his family if he testified against them. That the said eye witness was taken into police custody before being taken into the witness protection program. He urged the court not to grant the applicants bail since there was no way of tracing them in case they jumped bail.

6. When the applications came up for hearing, the parties stated that they did not wish to file written submissions but would rely on their pleadings.

7. An accused person is presumed innocent until proven guilty. It is on this basis that applications for bail are founded. Bail and Bond Policy Guidelines recommended that:

> " The presumption of innocence dictates that accused persons should be released on bail or bond whenever possible. The presumption of innocence also means that pretrial detention should not constitute punishment, and the fact that accused persons are not convicts should be reflected in their treatment and management. For example, accused persons should not be subject to the same rules and regulations as convicts."

8. However, the right to bail is not without limits as provided under Article 49(1)(h) of *the Constitution* which provides for the right to bail pending trial as follows:

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

9. The court may deny bail under certain circumstances and where the court is satisfied that there are compelling reasons to deny bail. Section 123A of the *Criminal Procedure Code* provides instances where bail may not be granted, as follows:

> " (1) Subject to Article 49(1)(h) of *the Constitution* and notwithstanding section123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—
>
> (a) the nature or seriousness of the offence;
>
> (b) the character, antecedents, associations and community ties of the accused person;
>
> (c) the defendant's record in respect of the fulfillment of obligations under previous grants of bail; and;
>
> (d) the strength of the evidence of his having committed the offence;
>
> (2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—
>
> (a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection."

10. The Bail and Bond Policy Guidelines provide guidance on factors the court can consider in assessing whether or not to grant bail. They are, inter alia;

    a. The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.

    b. The strength of the prosecution case.

    c. The character and antecedents of the accused person.

    d. The failure of the accused person to observe bail or bond terms.

    e. The likelihood of interfering with witnesses.

    f. The need to protect the victim or victims of the crime.

    g. The relationship between the accused person and the potential witnesses.

    h. The best interest of child offenders.

    i. The accused person is a flight risk.

    j. Whether the accused person is gainfully employed.

    k. Public order, peace and security.

    l. Protection of the accused persons.

11. With this in mind, I have taken note that the 1st applicant lives within the community where the offence occurred while the 2nd applicant's home is in Kitui and he lives in Embu where he works for a living. The investigating officer stated that the true identity of the applicants is not known since at the time of arrest, they did not possess any identification documents. He also deposed that the applicants' social and family circles are weak and/or untraceable and so they may not be easily traced if they jump bail. He stated that the only eye witness in the case is being placed under the witness protection program because the applicants threatened to kill him and his family.

12. The investigating officer's apprehension that the applicants will interfere with witnesses, cannot be ignored. In fact, it may well be a compelling reason to deny bail pending trial. A compelling reason is not merely an allegation. In the case of *Michael Juma Oyamo & another v. Republic* (2019) eKLR the Court of Appeal adopted the meaning of the phrase "compelling reasons" as was stated in the case of *R v Joktan Malende and 3 Others* Criminal Case No. 55 of 2009 where the Learned Judge held as thus; -

    > " ..... The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standards set by *the Constitution*."

13. Previous courts have addressed themselves on the issue of whether interference with witnesses is a compelling ground to deny bail. In the case of *Republic v. Gerald Mutuku Nyalita & Another* (2015) eKLR it held that; -

    > " In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49 (1) (h) of *the Constitution* of Kenya, the Prosecution must, in

my view, demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family, filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before the court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court. The tenderness of age or the mental acuity of the witness may be factors to be considered in the determination as to the likelihood of interference. The nature of the testimony of the witnesses – as eye-witness or circumstantial – is also relevant…"

14. Similarly, in the case of *Republic v. Patrick Ntarangwi* (2020) eKLR, the court held that:

> " In considering the question of bail or bond, the court should balance the right of an accused, pursuant to the presumption of innocence, to be released on bail pending his trial against the public interest of prevention of crime and the right of the victims to access to justice. The right of the victims to access justice no doubt will be gravely affected if the prosecution witnesses are interfered with."

15. In the circumstances, I find that to grant bail to the applicants would mean to hamper justice itself. Consequently, the applications for bail are both hereby dismissed.

16. It is so ordered

DELIVERED, DATED AND SIGNED AT EMBU THIS 08TH DAY OF MAY, 2024.

L. NJUGUNA

JUDGE

……………………………………for the 1st Applicant

……………………………………for the 2nd Applicant

…………………………………… for the State