



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL CASE E007 OF 2021

REPUBLIC.....PROSECUTOR

VERSUS

PURITY KAGENDO1ST ACCUSED

JAPHET KINYUA MBOANI.....2ND ACCUSED

RULING

INTRODUCTION

1. The accused persons are charged with Murder contrary to Section 203 as read with Section 204 of the *Penal Code* (Cap 63) Laws of Kenya. They are arraigned in court vide information dated 22/2/2021.

2. The particulars of the offence are that, (1) Purity Kagendo (2) Japhet Kinyua Mboani on the 4th day of February, 2021 at Kaanwa market in Meru South Sub County within Tharaka Nithi County unlawfully murdered Dominic Njagi Muthigani.

3. The accused have moved the court vide a notice of motion filed under certificate of urgency dated 21st.04.2021, for their release on bail/bond citing various reasons as enumerated in the supporting affidavit as follows:-

- i. That the accused persons have constitutional rights to be released on bail/bond pending trial.
- ii. That the accused persons have the right to be presumed innocent till the contrary is proven.
- iii. That the accused persons are husband and wife.
- iv. That the accused persons' immediate family members are ready and willing to stand surety for them.
- v. That the accused persons shall abide by all the terms and conditions that the court may set.

4. On the 12th.05.2021, PC Joseph Nampaso of Service No.69700 filed a replying affidavit opposing the application for bond/bail by the accused based on the following grounds:-

- i. That he is the investigating officer and thus seized of the facts of this matter.
- ii. That he did interrogate the members of the community around the accused persons' area and gathered information that there is a likelihood of revenge should the accused persons be released on bond.
- iii. That the witnesses fear for their safety should the applicants be released before they testify since they come from the same area as the applicants.
- iv. That the application for bond be suspended until the civilian witnesses have testified.

5. On the 25/2/2021 the court directed that a pre-bail report be filed on 23/3/2021 the probation officer's report was filed in court. The report recommends that:-

- i. Though the accused have a constitutional right to reasonable bond/bail terms, releasing them at this time may pose a to their

safety.

ii. That the likelihood of retaliation from the deceased's family is very likely and therefore recommends that their released on bail be shelved at this stage for their own safety.

6. The application was argued orally in court. This is therefore a ruling as to whether the accused may be released on bail/bond.

ANALYSIS AND DETERMINATION

7. The issue for determination is whether the accused persons may be admitted to bond/bail.

8. The right to bail or bond is a fundamental right enshrined in the Bill of Rights. **Article 49 (1) (h) of the Constitution** provides that an arrested person has a 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. Article 49 of the constitution stipulates that:-

“An arrested person has the right to:

a)

h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

10. Further, **section 123 A(1)** of the **Criminal Procedure Code** which is to be read with **section 123** thereof provides as follows:

“123A(1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the court shall have regard to all the relevant circumstances and in particular -

(a) the nature and 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 having committed the offence.”

11. Subsection (2) thereof stipulates that 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.”

12. In **Michael Juma Oyamo & another v Republic [2019] eKLR**, the Court of Appeal pronounced itself as follows in respect to compelling reasons that can justify denial of bail/bond:

“Article 49(1) (h) of the Constitution states that 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”.

It is therefore clear that such constitutional right can only be limited if the prosecution satisfies the court that there are compelling grounds to warrant its denial to an accused person.....what amounts to compelling reasons as defined by the High Court in R v Joktan Malende and 3 Others Criminal Case No. 55 of 2009 as follows:

“..... 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. In **Republic v Nuseiba Mohammed Haji Osman [2018] eKLR** where the Court stated,

inter alia:

“Denial of a constitutional right is not a matter to be treated lightly and therefore any claims made against an accused person aimed

at curtailing the constitutional right to liberty must not be made on speculation or conjecture.”

14. In this case, this court has been called upon to weigh the accused persons’ right to bail under Article 49(h) against the compelling reasons given by the prosecution urging the court not to release them on bond/bail.

15. The investigation’s officer stated that the accused persons will be exposed to danger if released on bond since the members of the family of the deceased are likely to revenge the death of their kin which may lead to further public disorder. Further, that the witnesses are close family members of the deceased and they therefore fear for their safety if the applicants are released. This is equally confirmed by the Probation Officer.

16. Bail pending trial is not an absolute right as it may be denied where there are compelling reasons to deny the accused person bail. The right to bail is guaranteed under the Constitution and is based on the right of an accused person to be presumed innocent until proved guilty. It follows that since the accused bears no burden to prove his innocence, it is upon the prosecution to show that there exists compelling reasons to deny the accused bail.

17. Such compelling reasons are supposed to be weighty depending on the circumstances of the case in order for the court to be convinced that the accused ought not to be released on bail pending trial. The key consideration is whether the accused person will turn up for his trial.

18. The court exercise discretion to grant bail and to set the bail terms. It is trite that where the court exercises discretion it must do judiciously. In a matter like the one before me the fundamental consideration is the interest of justice which calls on the court to balance the rights of the accused to liberty, the public interest and fair administration of justice. It follows that bail not be denied unless there will be good and sound reason which amount to compelling reasons not to.

19. The judiciary has come up with a bail and Bond Policy to guide the courts when dealing with matters of bail/bond. Under the bail and Bond Policy it states as follows:-

“The following procedures should apply in the bail hearing.

(a) The prosecution shall satisfy the court on a balance of probabilities of the existence of compelling reasons that justify the denial of bail. The prosecution must therefore state the reasons that in its view should persuade the court to deny the accused person bail including the following:-

(a) That the accused is likely to fail to attend court proceedings, or

(b) That the accused person is likely to commit or abet the commission of a serious offence or,

(c) That the exception to the right to bail stipulated under Section 123A of Criminal Procedure Code is applicable in the circumstances or

(d) That the accused is likely to endanger the safety of victims, individuals or the public or

(e) That the accused person is likely to interfere with witnesses.

(f) That the accused is likely to endanger the safety of victims, individuals or public.

(g) That accused is likely to interfere with the witness or evidence.

(h) That the accused is likely to endanger national security, or

(i) That it is in the public interest to detain the accused in custody.

20. In this case the court has had the benefit of a social inquiry report filed by the probation officer which shows that the safety of the accused is not guaranteed if they are released on bond/bail. This court has the duty to ensure the safety of the accused pending trial. It is in the interest of justice that the accused remain in custody for their own safety.

21. For these reasons I order that:-

1) The application for the release of the accused on bail/bond is declined.

2) They will be remanded in custody until the case is finalized.

Dated, signed and delivered at Chuka this 13th day of July, 2021.

L.W. GITARI

JUDGE