



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO. 4 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

TIMOTHY MWENDA GICHURU.....1ST ACCUSED

JACKSON MUGAMBI MUTWRI.....2ND ACCUSED

NATHAN MURIUKI MUTHURI.....3RD ACCUSED

RULING

Review of denial of bail

1. The accused persons herein are jointly charged with the offence of murder contrary to section 203 as read with Section 204 of the Penal Code. They filed notice of motion dated 30th July and 4th July 2018 seeking for review of the orders dated 5th October 2017 in which they were denied bail/bond terms. The applications were found to lack merit and were dismissed. The court also directed the case to be fast tracked.

2. In denying the accused bail, the court found the fact that one of the suspected accomplice had been burnt beyond recognition by an irate mob to be a relevant consideration and an indication that the security of the accused persons could not be guaranteed if released on bail. It also found that as ex police officers the accused persons are likely to use their influence and training to interfere with witnesses and evidence. In addition, the possibility of the accused persons absconding was also found to be high especially looking at the earlier revelation by the IO of the modus operandi of the accused persons. It also took consideration of the hue and cry of the members of the public and also the expressions of the victims of the crime.

3. The **1st accused person** (*the applicant herein*) has filed application dated 12th October 2019 seeking to be released on reasonable bail/bond terms. The application was supported by the sworn affidavit of the 1st accused person who averred that the situation on the ground has since calmed and that he has been diagnosed with a painful lower back and therefore in need of immediate treatment. The applicant attached a copy of treatment notes and a letter from the Officer in charge Meru Prison to support his averment.

4. The application was opposed by the DPP through the sworn affidavit of Pc **Musa Aol** the officer in conduct of this matter, dated 5/2/2020 who averred that the situation on the ground isn't very much favourable to the suspects. That the hearing of this case has not started and therefore there is a likelihood of the accused person interfering with key witnesses who are well known to him. That witnesses to this case are ready and willing to testify at the soonest time possible.

5. The application was canvassed orally. The applicant submitted that the Replying affidavit contained mere speculations and pleaded to this court to look at the facts, especially the medical records annexed, and the law and allow the applicant bail. On its part the DPP opposing the application submitted that the letter from the prison is not on an official letter head and the author is not a doctor to speak to such weighty health issues. According to the DPP, the Prison Department has capacity to provide for the dietary support required by his condition.

Analysis and Determination

6. I have considered the averments made by both parties and their respective submissions. The main issue for determination is whether this court ought to review the bond terms of the 1st accused person.

7. Release of an accused person on bond is a constitutional right but the right is limited where compelling reasons are established. **Section 123 of the Criminal Procedure Code** is also relevant; Section 123 A specifically provides;

"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 in particular nature and seriousness of the offence, the character, antecedents, association and community ties of the accused person the defendants record in respect of the fulfilment of obligations under previous grants of bail the strength of the chance of his having committed the offence."

8. This application is essentially a review of the earlier decision in which the accused was denied bail. Accordingly, this court will profit from what was stated in the case of **R. v. Nottingham Justices Ex parte Davies [1981] QB 38**, that;

"The court considering afresh the question of bail is both entitled and bound to take account not only of a change in circumstances which has occurred since the last occasion, but also circumstances which, although they then existed, were not brought to the attention of the court. To do so is not to impugn the previous decision of the court and is necessary in justice to the accused. The question is a little wider that "Has there been a change?" It is "Are there any new considerations which were not before the court when the accused was last remanded in custody?"

9. The hearing of this case has not started. One of the compelling reasons for which bail was denied was possibility of interference with witnesses by the accused especially given their police training and modus operandi. This possibility has not dissipated.

10. In addition, bond was denied because attendance in court of the accused was not guaranteed. I do note that the applicant has not shown that he has a fixed abode to negate attribution of being a flight risk.

11. He has however annexed medical reports and a letter from the in charge prisons department. The DPP discredited the said letter for it was not on official letter head. This is a serious concern. No affidavit was filed by the I/C Prison on the letter. I will therefore attach no weight on the letter. On the health status of the applicant, the DPP has stated that there are reasonable facilities in the prison establishment to cater for the medical and dietary necessities of the applicant. Nothing would make me disbelieve the submission by the DPP.

12. In sum, the possibility of interference of witnesses is still rife as the witnesses are yet to testify. In addition, the attendance of the applicant in the trial cannot be guaranteed. I also find that the prison establishment has reasonable facilities to provide any medical care or dietary support required on the applicant's illness. In the upshot, these considerations constitute compelling reasons in the sense of the law which limit the constitutional rights of the applicant to bail/bond and liberty. I therefore reject and dismiss the 1st accused person application dated 12/10/2019. The case should however be fast-tracked to hearing.

Dated, signed and delivered at Milimani Nairobi this 21ST day of APRIL 2020

F. GIKONYO

JUDGE

Representation:

1. Otieno C & Co. advocates, Advocate for the 1st Accused person/Applicant.

callotti9@gmail.com

2. Director of Public Prosecution for the Respondent

dppmerucounty@yahoo.com