



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO 66 OF 2019

REPUBLIC.....RESPONDENT

VERSUS

JOHN KAMAU MURIATHI.....ACCUSED

RULING

1. The applicant was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which was that on 21st July 2018 at Cabanas stage along Mombasa Road near Rapid Kate Logistics Embakasi Subcounty murdered **GIDRAFF MWANGI MARORO**.

2. He pleaded not guilty to the said charges and in compliance with the provisions of **Article 49 (1) (h)** the court directed the prosecution to file affidavit if any on compelling reasons and in compliance with the Judiciary Bail and Bond Policy Guidelines further directed the Probation Department to file Pre-bail Report.

3. In opposing the release of the Applicant on bond, the prosecution through PC JOSEPH MUEMA on 23rd January, 2020 filed an affidavit in which it was deponed that the accused had been on the run for over one year since the commission of the offence and was only arrested on 27th September, 2019 thereby demonstrating that he was a flight risk who was likely to abscond from the jurisdiction of the court, should he be released on bond.

4. It was further contended that the accused was aware of the weight of the prosecution case and that the crucial witnesses were well known to him as they used to work with him at the Cabanas but stage thereby there was a likelihood that he will intimidate and interfere with them.

PRE-BAIL REPORT

5. At the time of his arrest the accused was residing at Kariobangi North with his wife and children though his rural home is at Kariti village of Muranga County. He was working as a leader of matatu touts manning General motor stage along Mombasa Road, having previously worked at the City Cabanas matatu stage for ten (10) years, he was also engaged in clothes business at Muthurwa market which is operated by his wife, who stated that life without the accused who was the main breadwinner was challenging.

6. His family reported that he has a troubled upbringing as a result of parent break-up and subsequent rejection by his step father who pushed him to the streets of Nairobi. They were willing to support him in case he was granted bond. On the other hand, the victim's family stated that he was married with one and two months old child with the wife being expectant at the time of his death. They stated that the accused was a dangerous person who will make witnesses develop cold feet about testifying against him.

7. On community views it was stated that the accused was dreaded in the area, feared by his fellow matatu touts and very violent against those who crossed his path. The members of the public expressed the view that if released on bond they will turn against him, a view supported by the security agencies from the area who expressed the view that his release would compromise the safety of potential witnesses.

SUBMISSIONS

8. At the hearing hereof Mr. Okeyo for the prosecution submitted that having gone underground for a period of one year, he might if released on bond disappear and defeat the course of justice. He contended that the prosecution witnesses were known to him and the likelihood of interference with them was real. Mr. Tunya for the accused submitted that the issue of the accused being a flight risk were mere allegations since he continued to live with his family at Kariobangi North totally aware that he had committed a corporal offence and did not run to his rural home in Muranga.

ANALYSIS AND DETERMINATION

9. Bail is a constitutional right of every accused person which right under Articles 49(1)(h) and 24/25 of the constitution can only be limited where there are compelling reasons advanced by the prosecution to the satisfaction of the court on a balance of probability. In trying to define what compelling reasons means, Justice Mativo in **REPUBLIC v DANFORD KABAGE MWANGI [2010] eKLR** had this to say:-

“Blacks' Law Dictionary defines the word "compel" to mean "to convince a court that there is only one possible resolution of a legal dispute..." The same word has also been defined to mean "Evoking interest, attention, or admiration in a powerfully irresistible way."

Since judicial determination of what constitutes "compelling reasons" entails determining the constitutional rights of a citizen and interests of the state, it is important to point out the test to be applied. In this regard I find the definition of "compelling-state-interest test" in the Black's Law Dictionary highly useful. It defines "compelling-state-interest test" in the following terms:-

"A method for determining the constitutional validity of a law of law, whereby the government's interest in the law and its purpose is balanced against an individual's constitutional right that is affected by the law. Only if the government's interest is strong enough will the law be upheld. The compelling state interest test is used e.g. in equal protection analysis when the disputed law requires strict scrutiny."

Courts apply the strict scrutiny standard in two contexts:- when a fundamental constitutional right is infringed, particularly those found in the Bill of Rights and those the court has deemed a fundamental right protected by the Due Process."

10. What constitutes compelling reasons are captured in the Judiciary Bond/Bail Policy Guidelines has now received adequate Judicial pronouncements with Justice Odunga in **REPUBLIC v ROBERT ZIPPOR NZILU [2018] eKLR** stating as follows:-

*“15. That case (**REPUBLIC v DANSON MGUNYA & ANOTHER 2010**) eKLR was decided before the policy on Bail/Bond was formulated. It is now clear that interpreting the right to bail, Section 123 of the Criminal Procedure Code gives the parameters for the grant of the right to bail as follows:-*

(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 regards to all the relevant circumstances and in particular

a) The nature or seriousness of the offence

b) The character antecedent, associates and community ties of the accused person

c) The defendant's record in respect of the fulfilment 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 filed to surrender to custody and that if released on bail (whether or not subject to conviction) it is likely that he would fail to surrender to custody.

b) Should be kept in custody for his own protection.

16. In **KELLY KASES BUNJIKU v REPUBLIC [2017] eKLR Muriithi J**, was of the view that:-

“In the second limb of paragraph ‘b’ of subsection (1) of Section 123A must be read separately and disfunctionally from the first part so that the court considers whether the accused is released on bail (whether or not subject to conviction) it is likely that he would fail to surrender to custody..... of course the accused is standing trial for all the alleged offences of robbery with violence, escape from lawful custody and assault and he is entitled to the presumption of innocence. It is no derogation of his right to that presumption of innocence that he is refused bail. It is merely the exercise of the court's mandate to grant bail as constitutionally empowered. It only means that the court finds a compelling reason within the meaning of the constitution to refuse bail in the particular case.” (Emphasis added).

11. In this case, the following compelling reasons were advanced by the prosecution and confirmed by the pre-bail report. The accused went underground for a period of one year which though he denied, confirms that he is likely to abscond from the court should he be released on bond. It has further been demonstrated that the accused is an influential leader of the matatu touts and that most of the likely witnesses are fellow matatu touts whose presence is likely to intimidate and interfere with. There is also the issue of the security of the accused should he be released on bond as confirmed through the Local Administration which the court cannot wish away.

12. I am therefore satisfied that the State has placed before the court enough compelling reason to enable me deny the accused his constitutional right to bail at this stage. The accused shall therefore remain in custody until all the witnesses who are or were matatu touts at the stage where the offence is alleged to have occurred have testified and their evidence secured upon which he shall be at liberty to apply for

review of this order and it is ordered.

Dated, signed and delivered at Nairobi this 21st day of May 2020 through Google Teams.

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J. WAKIAGA

JUDGE

In the presence of

Ms. Onunga for the State

Mr. Tunya for the accused

Karwitha/Court Assistant

Accused person present