



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 2 OF 2020

REPUBLIC.....DPP

VERSUS

JOSEPH MAINA WANGAI.....ACCUSED

RULING

This matter comes up now for the application of the accused dated 18.2.2020 seeking that the applicant be placed on bail pending his trial. It is supported by the affidavit of the applicant of even date. While canvassing the application, Mr. Kibathi for the applicant submitted that the accused shall not abscond and is ready to abide by any terms that the court could impose upon him in granting bail. Counsel also maintained that the accused undertakes not to interfere with the prosecution witnesses and that he is presumed innocent till proved guilty. Maintaining that there are no compelling reasons, counsel urged that the accused be released on reasonable terms.

Ms. Onunga, for the state, objected to this application. First that the accused is a flight risk. Counsel submitted that the accused had gone underground from 22.11.2019 and was only arrested on 16.12.2019, a period of about 1 month. It was further submitted that he has not given his place of abode nor shown any personal attachment like family.

It was further submitted that accused is likely to interfere with the witnesses who are well known to him. Counsel prayed that accused be remanded in custody pending trial of his case.

And in a short reply, counsel for the accused maintained that the prosecution has not shown any of the allegations made I opposing this application.

I have considered the submissions of both learned counsel, I have also considered the application, the affidavits in support of the same and the replying affidavit of the investigating officer. Article 49(1)(h) of the constitution stipulates;

Article (49)

(1) An arrested person has the right-

(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”

This provision confirms the position that the right to pre-trial bail is a constitutional right to all the accused persons irrespective of the charge. The rider to the proviso is however, that where the prosecution sides proves the existence of any compelling reason, then the said right may be denied. These, to me are any reason, good enough or sufficient enough as to justify the denial of the right. In the bail-bond policy guidelines, which is an agreed guide in criminal process, the factors that may be considered in determining the issue of compelling reasons, are listed to be the following amongst many others:-

- The nature of the charge or offence and the seriousness of the punishment to be meted out in case of conviction.
- The strength of the prosecution’s case.
- Likelihood of interference with witnesses.
- Character and antecedents of the accused person.

- Whether accused is likely to abscond.

- Peace, public order and security.

This list is not exhaustive and as it has been held severally by this court, the strength or otherwise of the grounds raised by the prosecution would be determined according to the circumstances of each case. In this case, the prosecution raised at least 3 main reasons which I shall deal with as follows: -

(i) That accused is likely to interfere with witnesses:

It was alleged that since the accused is well known to the witnesses, he is likely to interfere with them if released on bond. No evidence was however, shown by the prosecution to show this. Failure to show any actual or perceived interference with the witnesses can only mean that this allegation remains just that. An allegation lacking in any substantive proof. This, it has been held severally, cannot constitute a compelling reason. (see HCCR 10/2020, Republic versus Lucy Waitera Njuguna & Another (NAI), HCCR 12/2020 Republic Versus Wycliffe Mogaka Ongeru). The absence of proof of this allegation means that this ground must fail.

(ii) That accused is likely to abscond:

On this ground, this court notes that the main basis of the right to bail is enable the accused to conduct his trial while he is out on remand custody. It is not a licence for the accused to escape never to face his trial to conclusion. And on this I am guided by the decision of the Court of Appeal in Nganga Versus Republic (1985) KLR 451.

From the submissions made in court, the alleged incident took place on 23.11.2019 and it was not until 16.12.2019 that the accused was arrested, almost a month later. He had allegedly abandoned the scene or where he initially stayed never to return. He was also nowhere or never to be seen. In his submissions, counsel for the accused has not given any plausible explanation on this. This can only point to one conclusion. That the accused had gone underground in a bid to escape any possibility of facing trial over this incident. And therein lies the dangers, and indeed the proof of the suspicion of the prosecution that if he is released on bail, he will abscond never to turn up for his trial. I so find.

(iii) That accused has no known place of abode:

As shown above, the bail-bond policy guidelines postulates that this may be a factor to be considered in granting bail. Once this claim has been made by the prosecution, it is the view of this court that it was for the accused to clearly show that he indeed has a fixed place of abode. This is particularly so in view of the stipulation at paragraph 7 of the replying affidavit that he was only found sleeping on the streets at Kiamaiko area. In the absence of proven place of abode, this court is not convinced that could be traced or even served when needed to appear in court. This alone, to me, would be a compelling reason good enough to enable this court deny the accused the right to bail.

Considering the above observations, I am convinced that the prosecution has shown the existence of compelling reasons good enough to make this court deny the accused the enjoyment of the constitutional right to bail. I therefore find no merit in the application of the applicant dated 18.2.2020 for bail and dismiss the same. I order that accused be remanded in custody pending the trial and determination of his case.

D. O. OGEMBO

JUDGE

5.6.2020

Court:

Ruling read out in open court in the presence of Mr. Kibathi for the applicant, the applicant and Mr. Okeyo for the state.

D. O. OGEMBO

JUDGE

5.6.2020

Mr. Kibathi

We pray that the accused be interviewed. He is in remand.

Mr. Okeyo:

He may review the application after Covid.

Mr. Kibathi:

We would have wanted that the interview be done.

Court:

Due to the Covid 19 restrictions, the applicant may not be interviewed at the present. I rule that the applicant do review this application after the lockdown has been loosened. It is then that the probation officer could get access to the prison facility.

D. O. OGEMBO

JUDGE

5.6.2020