



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CRIMINAL MURDER NO. 14 OF 2015

SIMON WACHIRA MUTHIKE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON BAIL APPLICATION.

1. The accused Simon Wachira Muthike was charged with the offence of murder in Nyeri HCR No. 37 of 2007. He was convicted and sentenced to suffer death as was the then only legal sentence on the 6/10/2011.

He was dissatisfied and appealed vide Nyeri Court of Appeal case No. 37/2012. On the 15/7/2015, the appeal was allowed. Both the conviction and sentence were set aside for reasons that the proceedings were flawed for failure to adhere to rules of natural justice and want of fair trial.

2. The Court of Appeal however ordered a re-trial before the High Court. This is how this case came to be. The case is now part heard, plea having been taken on the 16/9/2015. The accused has been in custody since 2007. The hearing of the case is yet to be finalized.

3. By **an application dated 15/6/2020** the accused has urged to be released on bail pending hearing and determination of the case, an application based on **Article 49(1)(h)**, and **51(2)(a) of the Constitution**, being his Constitutional right to reasonable bail/bond pending hearing of the case, and the presumption of innocence until proved otherwise.

4. In opposing the bail application, the Learned Prosecutor, Mr. Ashimosi, in his oral submissions urged that bail ought to be denied on grounds that the earlier conviction and sentence were set aside on a technicality and that the accused is aware of his earlier conviction, and thus if granted bail may not turn up in court to finalise the case. He referred to a probation report dated 27/9/2016 which he submits is not favourable to the accused.

5. I have considered the report. The record shows that seven witnesses have testified and five more are yet to testify. The prosecution is apprehensive that if released on bail, the accused may interfere with the remaining witnesses, in addition to being a flight risk due to the previous conviction. The last hearing date was scheduled for the 23/4/2020 that fell within the Covid-19 pandemic. No other hearing date has been taken.

6. Bail is a constitutional right and every accused person is entitled to be released pending hearing of his case, on reasonable conditions, but subject to if compelling reasons are tendered to the court to deny granting the accused bail – **Article 49(1)(h)**.

The burden to prove existence of compelling reasons to deny bail lies on the prosecution.

7. **Section 123A of the Criminal Procedure Code** states some of the compelling reasons; to include:-

a) Nature or the seriousness of the offence.

b) The character, antecedents, association and community ties to the accused person.

c) Defendant record in respect of the fulfilment of obligations under previous grants of bail.

8. The primary consideration when granting bail is whether the accused will turn up for his trial. The court exercises its discretion on whether to grant bail or not, but upon reasons to deny if compelling reasons are tendered. The court has the difficult duty to determine and balance the accused's right to bail, and to be presumed innocent until proved guilty, and the states objection thereto.

9. The court in **Republic –vs- Dunford Kabega Mwangi (2016) eKLR** rendered what it deemed to be compelling reasons that “..... **It is a matter of judicial discretion, as Kenya does not have statutory guidelines to govern the granting of bail.**”

One of the compelling reasons put forth by the prosecution is that soon after commission of the offence, the accused house was pulled down. The local administration in the said report has no major objection save as to state that emotions were still running high following the heinous crime. That was 2016.

10. Relatives of the deceased have since testified. They cannot say that they will not be free to mingle with the accused if released. They have an option of not freely mingling with him. Four years after the report, temperatures may have cooled down. No recent report was filed by the prosecution, nor an affidavit to state any compelling reasons.

11. The offence of murder is indeed very serious. The accused has not been granted bail since 2007. It is not therefore possible to know whether or not he would jump court attendances hence no record in respect of fulfilling of obligations under any previous bail terms.

12. At this stage, I cannot state the strength of the evidence of him having committed the offence as that would be against rules of fair trial and natural justice; a presumption of innocence until proved guilty – **Joseph Mutua Kimeu –v- Republic (2017)eKLR.**

13. For the foregoing, I find and hold that no compelling reasons have been demonstrated to persuade this court to deny bail to the accused.

14. **Consequently, I order and direct that;**

The accused will be released on bond/bail on conditions that;

(a) He will sign a bond of Kshs 350,000/0 with one surety of similar amount, to be approved by the Deputy Registrar of this court.

(b) He shall undertake not to interfere with the witnesses yet to testify.

(c) He shall attend court as and when required to.

15. The court notes that this case has taken too long to be concluded.

The prosecution is urged to prepare the remaining witnesses to testify in the shortest time possible. The court further directs that the proceedings be typed.

16. Further hearing dates shall be taken on the 1/10/2020 when this ruling comes up for delivery.

It is so ordered.

Dated, Signed and Delivered at Kerugoya this 1st day of October 2020.

J. N. MULWA

JUDGE