



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MURDER NO. 5 OF 2018**

**REPUBLIC.....PROSECUTOR**

**V E R S U S**

**BERNARD MURIITHI GICHOBI (Alias KENNEDY.....ACCUSED)**

**RULING**

1. The application pending before court is dated 07/05/2018 seeking bail pending trial for the accused person who was charged with murder contrary to Section 203 as read with Section 204 of the Penal Code.

**2. DEFENCE APPLICATION:**

He was arrested on 03/02/2018 and was held in remand since then. That his mother passed on and he has been living with his grandmother as his guardian. That the right to bail is a constitutional right under **Article 49(1)(h) of the Constitution** unless the prosecution has compelling reasons to deny him. That there are no compelling reasons that may render him incapable of his right to bail/bond. That he will honour the bond terms that the court will set and will appear in court as and when required.

No pre-bail report has been ordered.

**3. Prosecution**

In response, the prosecution stated that the matter was investigated by Sgt. Chirchir who has been transferred to another station. That he was briefed on the circumstances under which the offence was committed and the witnesses lined up to testify. That one of the witnesses is a minor of about 12 years who is a nephew of the accused person. That there are high chances of the accused interfering with the said witness.

4. In addition, immediately after the deceased was murdered, the accused who was staying with the deceased relocated to another house within Ngurubani market to avoid arrest therefore it is clear he is a flight risk. That members of the public who reside at Karumandi are very bitter against the accused for being suspected to have a hand in the deceased's death and his security is at risk. They therefore urged the court to decline granting bail.

5. Bail is a constitutional right but it is limited because it can be denied where there are compelling reasons not to release him.

Refer to **Republic v Stephen Robi Marwa & another [2014] eKLR**

The Court in dismissing the application for bail pending trial in a murder case stated;

**In the case of Republic –vs- David Nyasora Nyamongo – Criminal Case No.90 of 2010 (unreported) in the High Court sitting at Kisii, Makhandia J (as he then was) stated:-**

***“At the end of the day however whether or not an accused should be admitted to bail, is largely a matter of discretion of the court to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again, the court must bear in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to be released on bail.”***

**The issue in this application then is whether there are compelling reasons why the applicants should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of**

such reasons.

**In the case of *Republic –vs- Danson Ngunya& another [2010] eKLR*, the Court adopting the reasoning in the *M. Lunguzi –vs- Republic CMSCA Appeal NO.4 of 1995* the learned judge stated:-**

***“... In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. That is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order ....”***

**I entirely agree with the above propositions and hold that it is the duty of the state to satisfy me as to the compelling reasons why the applicants herein should not be released on bail/bond pending trial.**

6. The prosecution has proven that one of its witnesses is a minor who is a nephew of the accused therefore there is a risk of interference. The risk of interfering with witnesses is a compelling reason upon which the court will deny the accused bail.

**In *State v Lydia Mwangi Moseki & 2 others [2013] eKLR***

The court in dealing with a similar case stated;

**In considering the allegation of likely interference with witnesses some of who are said to be children of the 1<sup>st</sup> accused aged 8, 3 and 1 ½ years, there appears to be some citation as the 1<sup>st</sup> accused states that her children are aged 18, 16, 12 and 6 years. However, the danger of interference which may exist with regard to an accused over her minor children witnesses must be weighed against the constitutional right to bail to determine whether there are less restrictive ways of preventing such interference without infringing on accused's, right to bail. I consider that, if there existence real danger of such interference, the remedy may be in taking witness protection measures including seeking temporary custody, care and control of the children from a children court rather than refusing the accused's right to bail.**

7. I am in agreement with the decision. The court has to consider whether there are compelling reasons to deny the accused bail. Such reasons are risk of absconding and interfere with witnesses. This must however be examined to determine whether they are sufficient to deny an accused person his constitutional right to bail.

8. In this case the accused portrayed a tendency of being a flight risk. He is said to have killed his dear wife and the only key witness is a minor. Though there maybe protections for the minor witness, the best interests of such a witness are paramount. It is therefore in the best interest of the witness that gives evidence before the appellant is released on bail. Though the accused is presumed innocent until proved guilty, I take the view that the minor witness should give evidence before the accused is released. The witness may be heard on priority basis. In view of these I order that:-

- 1) The minor witness who is a Nephew of accused will testify before bail is considered.
- 2) A pre-bail report shall be file by the Probation Officer in view of the alleged hostility to the accused by members of the public.
- 3) I decline to release the accused on bail at this stage.

**Dated at Kerugoya this 14<sup>th</sup> day of February 2019.**

**L. W. GITARI**

**JUDGE**