



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL CASE NO. 8 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SILAS KIPCHUMBAKOECH....1<sup>ST</sup> ACCUSED**

**NELLY CHEPKOECH.....2<sup>ND</sup> ACCUSED**

**RULING**

[1] The two Accused persons (hereinafter the Applicants) were arraigned before the Court on **15 January 2019** charged with Murder Contrary to **Section 203** as read with **Section 204** of the **Penal Code, Chapter 63** of the **Laws of Kenya**. It was alleged that on the night of **28<sup>th</sup> and 29<sup>th</sup> December 2018** at Kipkaren Estate in Kapseret Sub-County within **Uasin Gishu County**, they jointly murdered **Derrick Kiprono Chepkwony**. They denied those allegations; whereupon their Advocate, **Mr. Bitok**, applied that they be admitted to bail as they await the hearing and determination of their case.

[2] In support of the application, **Mr. Bitok** relied on **Articles 24(1)(e)** and **49(1)(h)** of the **Constitution** as well as **Section 123A** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** to support his submission that no compelling reasons to warrant the Applicants' continued incarceration have been given by the Prosecution; and therefore there is no justification why the Accused persons should not be released on bond. He urged the Court to also consider the fact that the Accused persons had been held in custody for 12 days before their arraignment; and the fact that the offence of murder no longer carries with it the mandatory death penalty, following the decision of the Supreme Court in the case of **Francis Karioko Muruatetu & Others vs. Republic [2017] eKLR**. Counsel further relied on **Republic vs. Robert Nzilu [2018] eKLR** in urging the Court to allow the application and admit the Applicants to bail.

[3] **Ms. Mumu** for the State opposed the application. She placed reliance on the affidavit sworn on **18 January 2019** by the Investigating Officer, **CI Joshua Nyambu**, in which it was averred that the Applicants are husband and wife; and that the star witness for the Prosecution is the mother of the 2<sup>nd</sup> Accused, and hence the mother-in-law of the 1<sup>st</sup> Accused. For that reason, the Prosecution is apprehensive that, if released on bond at this stage of the proceedings, the Applicants will interfere with their witnesses. It was further averred that the cruel way in which the deceased was murdered is still an issue with his family and the members of the public in the village, who are yet to come to terms with the occurrence; and that if released on bail, the Applicants lives might be put in jeopardy.

[4] Needless to say that bail pending trial is a constitutional right. **Article 49(1)(h)** of the Constitution is explicit that, unless there is some compelling reason, an accused person ought to be released on bail, as a matter of right, pending the hearing and determination of his/her case. The factors that guide the Court in determining such applications are now fairly settled. For instance, in **Nganga vs. Republic [1985] KLR 451, Chesoni, J.** (as he then was) had the following to say which I find instructive:

**“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused, there are a number of matters to be considered. Even without the constitutional provisions ... generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless there are substantial grounds for believing that;**

- a) the accused will fail to turn up at the trial or to surrender to custody or;**
- b) the accused may commit further offences; or**
- c) he will obstruct the course of justice.**

**The primary purpose for bail is to secure the accused person's attendance to court to answer the charge at the specified time."**

[5] And in the **Bail and Bond Policy Guidelines**, the following considerations are set out as relevant factors that ought to be taken into account by courts when faced with an application for bail:

- [a] whether the accused *person is likely to fail to attend court proceedings; or*
- [b] whether the accused person is likely to commit, or abet the commission of, a serious offence; or
- [c] whether the exception to the right to bail stipulated under **Section 123A** of the **Criminal Procedure Code** is applicable in the circumstances; or
- [d] whether the accused person is likely to endanger the safety of victims, individuals or the public; or
- [e] whether the accused person is likely to interfere with witnesses or evidence; or
- [f] whether the accused person is likely to endanger national security; or
- [g] *whether it is in the public interest to detain the accused person in custody.*

[6] **Section 123A** of the **Criminal Procedure Code** on the other hand stipulates that:

**(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 regard to all the relevant circumstances and in particular—**

- (a) the nature or seriousness of the offence;**
- (b) the character, antecedents, associations 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 failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;**

**(b) should be kept in custody for his own protection.**

[7] The Prosecution's apprehension is not that the Applicants are unlikely to turn up for their trial; which is the primary consideration, but that the Applicants are likely to interfere with their key witnesses. No doubt, this is a valid issue that would militate against their release on bail at this stage of the proceedings. However, no particulars were provided as to the particulars of the witnesses concerned or the nature of their evidence. A serious allegation was made that the said witnesses fear for their lives, suggesting that the Applicants, if released would want to eliminate them. Some basis for this trepidation ought to have been given by the Prosecution; which was not done. I therefore find no basis for concluding that if released on bond, the Applicants will interfere with the Prosecution witnesses. In any event, in the Bail and Bond Policy, it is acknowledged as follows regarding this particular ground:

**However, this factor does not inexorably dictate that the accused person should be denied bail. Instead, it may simply require the police or the court to attach suitable bond or bail conditions to ensure that the relationship between the accused person and potential witnesses does not undermine the interests of justice."**

[8] The other ground relied on by the Prosecution in opposing the application for bail is that the lives of the Applicants will be at risk; yet it was also averred that they moved to Lessos in Nandi County, away from the crime scene. Accordingly, I would agree with the position taken by **Odunga, J.** in **Republic vs. Robert Zippor Nzilu [2018] eKLR** that:

**"...in cases where limitations to the right to bail contemplated above exist, the Court must, as provided in Article 24(1)(e) of the Constitution, be satisfied that there are no less restrictive means to achieve the purpose other than the denial of bail. In other words the Court is required to explore the possibility of achieving the primary objective of granting bail, which is the attendance of the accused at the trial, by imposing such conditions that would ameliorate the possibility of the exceptions**

**being a hindrance to the fair trial. The ordinary meaning of the word “compelling” according to *Thesaurus English Dictionary* is forceful, convincing, persuasive, undeniable and gripping. In my view bare averments of threats without elaborating the same or convincing evidence whether direct or indirect cannot amount to forceful, convincing, persuasive, undeniable and gripping evidence in order to amount to compelling reasons.”**

**[9]** In the premises, I am far from satisfied that compelling reasons have been given by the Prosecution to warrant the continued incarceration of the two Applicants. Thus, I would admit them to bail on the following terms:

**[a]** That the Accused persons shall be released on a bond of **Kshs. 1,000,000/=** with two sureties standing for her in like sum to be approved by the Deputy Registrar.

**[b]** That during the pendency of this case, they shall refrain from visiting Kipkaren Estate in Kapseret Sub-County within Uasin Gishu County;

**[c]** That during the pendency of this case, they shall report to the Deputy Registrar once a month or as otherwise ordered by the Deputy Registrar

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2019**

**OLGA SEWE**

**JUDGE**