



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC CRIMINAL APPLICATION NO. 1 OF 2019

JOHN KOOME.....APPLICANT

V E R S U S

REPUBLIC.....RESPONDENT

RULING

1. The application pending before court is dated 28/01/2019 seeking bail pending trial in Wang'uru Criminal Case No. 449 of 2018 where the accused was charged with the offence of assault contrary to Section 251 (1) of the Penal Code with an alternative charge of intent to provoke breach of peace contrary to Section 94(1) of the Penal Code.

2. That the said offences are bailable offences and he has a right to be presumed innocent until he is proven guilty. That he worked as a PSV driver at Ngurubani stage in Mwea town until the time of his arrest. He was granted bail when his case came up for plea on 07/08/2018 but later on 19/09/2018 his bail terms were cancelled and he was not informed as the court did not conduct the hearing in a language he could understand. That he has a constitutional right to bond/bail and he undertakes to attend all mentions and all trial sessions without fail as directed by the court.

3. The prosecution did not file replying affidavit but responded orally in court. He relied on the record of the trial court where the complainant brought to the attention of the court that the accused had previously assaulted her and she forgave him. She pleaded for the court to cancel bail as the accused had threatened to kill her. The trial court called for P.O.R which recommended that bail be cancelled as the accused was a threat to the complainant.

4. The accused stated that the P.O.R(Probation Officers Report) was contradictory as it stated that the accused was of good standing and it is only the complainant who said there was threat.

5. I have considered the application. The issue for determination is whether the accused should be released on bail pending trial. Right to bail is a constitutional right under **Article 49(1)(h)** which provides:-

“(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.”

6. It will not be denied unless there are compelling reasons. Such compelling reasons are the likelihood that the accused will not attend trial. **Section 123 A(2)(a) of the Criminal Procedure Code**. It provides:-

“123A. (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

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;”

7. Seriousness of the offence which may influence an accused to abscond. In **Oluseye Oledaji –v- R** the court stated that an accused who was charged with terrorism related offence and could not raise Kenyan sureties was a flight risk and was denied bail.

8. Other compelling reasons are likelihood of committing other offences, endangering safety of victims, likelihood of interfering with witness

and being a threat to security and safety of the public and the safety of the accused. Where these compelling reasons are proved with cogent evidence the court will deny an accused person bail. The list is not be exhaustive and each case must be determined on its own merits.

In **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.

9. The prosecution has not proven that there is the risk of the applicant absconding, and whether he will turn up for the hearing of his case once granted bail. The only reason adduced is that the accused is a threat to the complainant. We have not had the privilege of reading the P.O.R(Probation Officers Report) but both the parties herein agreed that it stated the complainant indicated the accused was threat to her.

Bail pending trial is a constitutional right which should not be denied to an accused person unless there are compelling reasons not to release him. It is trite that an accused person is presumed innocent until proved guilty. The principal consideration is whether the accused will turn up for trial.

10. The accused was released on bail, the allegation by the complainant that accused threatened him is a mere allegation. There is no evidence that she reported the matter to the police concerning the threats. The complainant could be in a mission to settle scores. A mere allegation of threat which was not reported to the police for them to investigate and confirm or disapprove the allegation remains just that, mere allegation. It cannot be a compelling reason. There is no allegation that the accused is likely to abscond. For the court to deny an accused person bond, there must be cogent evidence and not mere allegations. It is the prosecution which bears the burden to prove that there are compelling reasons.

11. I find that the prosecution has not substantiated the claim that the accused has threatened to kill the applicant. There is no compelling reason to deny the accused bail.

12. I order that the accused shall be released on bail pending trial in Criminal Case No. 449/2018 at Wanguru Law Courts.

13. The accused shall be released on a bond of Kshs 50,000/- plus one like surety, to be approved by the trial Magistrate.

Dated at Kerugoya this 7th day of March 2019.

L. W. GITARI

JUDGE