



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL CASE NO. 57 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

JOSEPH KIBET ROTICH.....ACCUSED

RULING

The accused is charged with the offence of Murder contrary to *Section 203* as read with *Section 204* of the *Penal Code*. The particulars of the offence are that on the 13th day of August 2018 at Ng'enyelai location in Eldoret West Sub-County, Uasin Gishu County he murdered Mercy Chesang. What is before the court is an application for bond by the accused person.

APPLICANT'S CASE

The applicant filed an affidavit on 8th October 2018 and the application was heard in court on 4th December, 2018.

The accused person's advocate made submissions on the application and the affidavit. He stated that under *Article 49(1) (h)* of the *Constitution* bond is to be given unless there are compelling reasons. Further, that they need to be founded in evidence and well presented in court.

On the issue of hostility on the ground, he submitted that the accused can live elsewhere. Further that the averment at paragraph 8 that the accused is at risk is a baseless statement as there is no reason or evidence given to back it. The replying affidavit was averred by the applicant, does not disclose compelling reasons.

The applicant also submitted that there was no affidavit by the grandmother on the alleged fear.

RESPONDENT/PROSECUTION'S CASE

The prosecution filed a replying affidavit and submitted in court over the application. The affidavit was sworn by the investigation officer, *CPL James Songok*. The investigating officer stated in his affidavit that due to the cruel way in which the deceased was murdered releasing the applicant may provide a good chance for revenge. The main witnesses are the grandmother and father to the deceased and they all live in the same compound so the grandmother fears for the life. Further, that the accused person fled after the offence only to surrender himself at the police post out of fear for his safety. He also stated that the accused is considered a flight risk.

The prosecution further stated that they relied on the pre bail report which was unfavourable. In opposing the application, the prosecution relied on the pre-bail report and the affidavit by the investigation officer.

ISSUE FOR DETERMINATION; WHETHER THE APPLICANT SHOULD BE GRANTED BOND.

Article 49 (1) (h) of the *Constitution* states;

- 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.

In **Republic v David Muchiri Mwangi (2018) eKLR** the court observed; Bail is now a constitutional right of every accused person under Article 49 (1) (h), which can only be limited where there are compelling reasons which compelling reasons must be proved by the prosecution on a balance of probability. What constitutes compelling reasons are now well settled in the Kenya Criminal jurisprudence which can be discerned through a ray of authorities, one being **Republic v Mgunya & another (Supra)**.

- (i) The nature of charge.
- (ii) The strength of the evidence which supports the charge
- (iii) The gravity of the punishment in the event of conviction.
- (iv) The previous criminal record of the accused if any.
- (v) The probability that the accused may not surrender himself for trial.
- (vi) The likelihood of the accused interfering with witnesses or that he may suppress any evidence such as incriminating him.
- (vii) Likelihood of further charged being brought against the accused.
- (viii) The probability of a finding of guilt.
- (ix) Detention for the protection of the accused
- (x) The necessity to procure a medial or social report pending the disposal of the case.
- (xi) Accused persons own safety, security and protection – REPUBLIC V KIMUNYA.
- (xii) If the accused person is likely to pose public danger by being released on bail.
- (xiii) If by releasing the accused on bail public confidence in the administration of justice will be dismissed.
- (xiv) The character antecedents, associations and community ties of the accused person.

In **REPUBLIC V DANFORD KABAGE MWANGI (2016) eKLR** the court held that;

“The burden of proving to the court that one or more of the above grounds for refusing bail exist rests on the prosecution. If the prosecution fails to do so, then the presumption in favour of bail prevails and the court will admit the accused on bail.”

The accused/applicant is charged with a capital offence which carries on the higher side a death sentence. This gives rise to likelihood of temptation to abscond. The offence was allegedly committed on 13th August, 2018 and is still fresh in the minds of villagers, relatives and neighbours. Some are still irritated about the alleged occurrence and might be tempted to revenge against the applicant if released on bond. The witnesses who are applicant’s relatives also fear of their security and interference. There is as well indication that the applicant is a flight risk.

Having weighed the above reasons, I do find them compelling to warrant denial of the applicant’s bond as of now. However, if situation changes on the ground in future, the said application can be revisited. For now it is unmerited and is accordingly rejected.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 3rd day of March, 2019.

In the presence of:-

- (1) Mr. Ondieki for the accused
- (2) Ms Mumu for state /prosecutor
- (3) Mr. Mwelem- Court Assistant