



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 31 OF 2019

REPUBLIC PROSECUTOR

VERSUS

NAFTALI NJAMI KINUTHIA ACCUSED

RULING

NAFTALI NJAMI KINUTHIA is charged with the offence of Murder, contrary to *Section 203* as read with *Section 204* of the *Penal Code*.

The particulars of this offence are that on the 19th day of April, 2019 at around 10.30 a.m at Moi Teaching and Referral Hospital in Eldoret East Sub County, within Uasin Gishu County, the accused murdered *Ivy Wangechi*.

The defence led by *Mr. Mbiu*, the Advocate for the accused made a strong application for bond/bail in respect of the accused herein. In the application they relied on various applicable Articles of the Constitution of Kenya 2010, and *Section 123 (A)* of the *Criminal Procedure Code*. The outstanding *Article* is *49(i)(h)* which states that:-

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The defence following the clear provisions of the law submitted that bail is a right for every accused person irrespective of the offence allegedly committed, unless and until there are compelling reasons advanced to warrant its denial. The onus of prove of compelling reasons to warrant bail denial lies on the prosecution. Of paramount consideration in weighing whether to grant or deny bond is likelihood of the accused to abscond or attend court upon release. The defence averred that the accused is willing to attend court as the court may direct and abide by any terms the court may pronounce.

In addressing the issues raised in the affidavit of *CPL Josephat Langat*, sworn on 27th day of May 2019 and a pre bail report made on the issue by *P. W. Wafula*, dated 27th May 2019, the defence submitted that a compelling reason is something so strong, convincing and undeniable. The prosecution need persuade the court by demonstrating actual evidence on such allegations as the likelihood of failure by the accused to attend trial, by showing that he attempted to leave the country by procuring a visa or passport. If alleged he is likely to interfere with witnesses, actual evidence of attempt to communicate with such witnesses or sending of emissaries to influence them need be adduced. Seriousness of the offence is not by itself enough evidence to persuade the court. They relied on Bail and Bond policy guidelines which states that factors should be analysed on serious presentations and not mere allegations.

On public security as well as that of the suspect they averred that the state is endowed with resources to protect any person and a suspect cannot be protected by incarceration.

The issue of overwhelming evidence against the accused was also addressed in that no evidence so far is adduced in the matter, and presumption of innocence to an accused need be upheld. The alleged

confession by the accused is not in court's record for consideration.

The court was urged by the applicant not to factor the pre-bail report by the probation officer and the affidavit by *Winfred Kingori*.

Applicant averred that accused place of abode, both rural and where he was living before arrest are known. If it's feared he may interfere with

witnesses they can be placed under state protection. The accused will be secure on bond given that he does not live where the threat is said to be. He lives in Nairobi and the state is also capable of protecting him while on bond.

The state prosecutor, *Ms. Kagali* opposed the bond application. She called the court to balance upon the accused right to bond and the interest of justice, as per the Bail and Bond guidelines. She averred that there are compelling reasons upon which the accused should be denied bond. She relied on the replying affidavit by *CPL Joseph Langat* which paragraphs 6 to 15 discloses such compelling reasons.

Mr. Ndegwa for the victim's family also opposed the accused's release on bond. He relied on Bail and Bond Policy, paragraph 4(9) which indicates

parameters of compelling reasons as:-

(1) Nature of the charge – He averred that the offence of murder is likely to attract a death sentence, of which is more likely to tempt the accused to abscond. If he happens to abscond, an injustice will be occasioned to the victims and the public. He as well relied on Probation officer's report which avers likelihood of the accused absconding if released on bond, and chances that he may not be safe. He urged the court to weigh the right of the accused against that of the victim.

Mr. Ondiek also did submit on behalf of the victim's family. He submitted that the case is heavily covered by the media and the suspect's safety cannot be guaranteed if released on bond. For his safety, he need be held in custody.

CPL- Joseph Lang'at was cross examined by *Mr. Mbiu* on his affidavit. What came out of the said cross examination is that the averments in the affidavit were not founded on actual evidence or facts.

In determining this application, I have considered the provisions of *Article 49(i)(h)* of the *Constitution of Kenya 2010*, which provides that:-

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The above provision of the constitution makes it clear that the right to bail or bond to an accused person is not absolute. It is limited by presence of compelling reasons which would warrant its denial. The court in determining this application should establish what constitutes a compelling reason and whether such a reason or reasons have been availed. In the case of ***Republic –vs- Danford Kabage Mwangi [2016] EKLK***, the court relied on definition in Black's Law Dictionary of the word “compel” which means, to convince a court that there is only one possible resolution of a legal dispute....

It also means, “*Evolving interest, attention, or admiration in a powerful irresistible way.*” In the case of ***Republic –vs- Mgunya and Another [2011] 2EA 36***, the court made useful suggestion on what constitutes compelling reasons as:-

- (i) The nature of the 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 possibility that the accused may not surrender himself for trial.
- (vi) The likelihood of the accused interfering with the witnesses or that he may suppress any evidence such as incriminating him.
- (vii) Likelihood of further charges 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 medical or social report pending the disposal of the case.
- (xi) Accused persons' own safety, security and prosecution.
- (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 demeaned.
- (xiv) The character, antecedents, associations and community ties of the accused person.

The above given reasons are consonant to those disclosed under *Section 123A(1)* of the *Criminal Procedure Code* on factors to be regarded by the court in making a decision on whether or not to grant bail and bond to an arrested person. However the said list is not exhaustive given that what amounts to compelling reasons is a matter of Judicial discretion as was rightly held in the case of ***Hassan Mahat Omar and Another –vs- Republic, Criminal Revision No. 31 of 2013 at Nairobi High Court.***

What has been presented to this court as compelling reasons by the parties opposed to bail or bond, for consideration, are:-

(1) The nature of the charge, which is murder and carries a possible death sentence upon conviction. While this is of fact as the accused herein is charged with Murder, given the provisions of *Article 49(i)(h)* which makes all offences bailable unless there are compelling reasons, makes this fact on its own insufficient to warrant denial of bond or bail. What I am simply saying is that given the provisions of *Article 49(i)(h)* it can't be sufficient to argue that the fact that a suspect is charged with murder is on its own a compelling reason to warrant bond denial. It is just an issue to be weighed as it gives rise to temptation by an accused person to abscond, but needs consideration against other subsisting factors.

(2) The strength of evidence in support of the charge.

In this case we haven't heard any evidence and there were no opening statements by the prosecution on weight of the evidence they have against the accused. However, the affidavit of *CPL Joseph Langat* indicates the circumstances under which the offence was committed which reveals presence of eye witnesses, giving rise to a strong case against him. In my view an investigating officer and the prosecutor can guide the court on establishing the strength of the evidence where witnesses haven't been called. It is not an issue only to be established by way of actual evidence adduced in court, as was submitted by the applicant. The later is only possible if the application is made after substantial evidence have been heard, and bond application can be considered soon after arrest. Evidence collected and to be called is worthy consideration.

(3) Gravity of the punishment in the event of conviction.

The offence of Murder carries on the higher side a death sentence. Though any other sentence can be meted, death sentence is also possible and available in law, which raises the temptation to an accused person to abscond.

(4) The probability that the accused may not surrender himself for trial.

The affidavit by *Joseph Langat* says he is a flight risk as he has no fixed abode. However the detailed report by the probation officer (pre-bail report) shows that his parents comes from Chomo Village, Gatanga Sub-County, in Muranga County. Though the report indicates that the accused himself was living at Imara Daima Estate in Nairobi, it is not indicated whether he owns the house or had rented it. He is not married and the only family attachment indicated is of his parents, brothers and sisters. If he does not own the house he lived in, there is nothing major in my view that would stop him from absconding if released on bond. On this the court considers only the possibility of the accused absconding and I find such real given the nature of the offence and the gravity of the punishment in case of a conviction.

(5) Probability of the accused interfering with witnesses.

The affidavit by *CPL Joseph Langat* indicates he is likely to interfere with witnesses if released on bond. The pre-bond report also indicates so as there are possible named witnesses who were close friends to the deceased and the accused, and they themselves fear of such. Actual evidence need not be presented on accused's attempt to interfere. The prosecution is only supposed to raise reasonable grounds of such possibility. The reason I say this is that an accused in custody may lack the opportunity to do so, of which may be readily available upon release. The pre-bail report which carries impressive details on circumstances of the accused person and the case he is charged with, has established possibility of the accused interfering with witnesses if released on bond.

(6) Detention for the protection of the accused.

This is an issue considered by *CPL Joseph Langat* in his affidavit and in the pre-bail report. There were demonstrations on the matter, and the case has attracted a large media coverage. Kenyans are following on it and accused is known by name and physically by a good number of them. University students' leader's views and County Government leader opinion, shows accused may be in danger if released now on bond. I find this real, and a chance the court shouldn't take as of now by releasing him on bond. For his own safety, for now, he needs be in custody.

(7) If by releasing the accused on bail public confidence in administration of justice will be demeaned.

On this consideration, the court is supposed to weigh the legal provisions and the rights of the accused, against the expectation of the public. This is tricky as the court should be guided by the law and not the mood or expectation of the society especially where such mood and expectation is contrary to the legal provisions. While bail or bond is just meant to ensure that a suspect turns up for trial, most Kenyans don't take it that way; they equate it to an acquittal. When such happens the likelihood of demeaning public confidence in the administration of justice is likely to occur. It is also likely to tempt angered members of public in taking the law into their own hands. The court should be alive to this and where it is likely to happen, avoid it by denying an accused person bond.

Having weighed the foregoing issues it is clear that there exists compelling reasons warranting denial of bond or bail to the accused person as of now. The granting of bond or bail is therefore withheld or denied. However if circumstances changes in the course of the hearing of the case the issue can be revisited.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th day of June 2019.

In the presence of:-

- (1) Ms Mbiu for the accused
- (2) Ms Kagali for state prosecutor
- (3) Ms Sarah - Court clerkA