



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 42 OF 2019

REPUBLIC.....PROSECUTION

VERSUS

MICHAEL KAGOMBE KINYANJUI.....ACCUSED

RULING

1. The accused, Michael Kagombe Kinyanjui, 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 23rd day of June 2019 at Gatheiko area along the Eastern Bypass road in Kasarani Sub-county within Nairobi County he murdered Mary Kalunde.

2. The accused took plea on 17th July 2019 and pleaded not guilty to the charge, and the matter is set for trial. He has now applied, by his application dated 8th August 2019, to be released on bail pending trial. His Advocate, Mr. Ratemo, submitted that the application has been brought under Article 2 (4), 49 (h), 50 (2) (a) and (b) of the Constitution, as well as section 123 of the Criminal Procedure Code. He further submitted that the accused person has pleaded not guilty to the offence and has co-operated with the state. His sister, one Hannah Njeri Kamau, is willing to stand as a surety for him.

3. Mr. Ratemo discounted the fears expressed by the state in the affidavit sworn by No. 51307 Sgt Suleiman Omari Maneno with regard to witness protection and the averment that the witnesses are vulnerable and have expressed concern for their safety in the event that the accused is released on bond. He urged the court to safeguard the rights of the accused under Article 50 (2) (a) and (b) on the presumption of innocent until proven guilty, as well as his rights under Article 49 (h) to be released on bail or bond unless there are compelling reasons to deny him bail. His submission was that the state has not demonstrated that it has sought protection of the vulnerable witnesses through the Witness Protection Agency established under Chapter 79 (perhaps a reference to the Witness Protection Act, No. 16 of 2006). His submission was that the accused is ready and willing to present himself at any time before the court, and the state has not demonstrated how the accused will interfere or intimidate witnesses.

4. The Prosecution opposed the application. Learned Prosecution Counsel, Mr. Okeyo relied on the affidavit sworn by No. 51307 Sgt Suleiman Omari Maneno on 14th August 2019. The Prosecution's position as set out in the affidavit is that the witnesses in the case are vulnerable. They are mostly women, were closely associated with the deceased, and were present when the deceased and the accused met. They had also recorded statements in which they had mentioned the accused with regard to the offence and had expressed fear should the accused be released on bail. Further, that the process of seeking protection for them was ongoing. According to the state, there are chances that the threats manifested by the accused would be carried out should the accused be released on bail.

5. Mr. Okeyo urged the court to allow the prosecution to complete the issue of protection of the witnesses before the issue of bail is addressed. While the state was not seeking to deny the accused bail, it was its wish to balance the rights and safety of the witnesses and the right of the accused to bail. Mr. Okeyo submitted that the process of witness protection takes time and the state should be allowed to complete it.

6. The state further advanced the reason that it was necessary not to grant the accused bail or bond in order to avoid intimidation, compromising and interfering with witnesses related to the accused. These were D1, D5, D8 who, according to the Prosecution, have known the accused person very well and are his close friends whom he knows very well and is able to access easily. The state's position is that it is able and willing to have the witnesses who are close to the deceased and the accused give their evidence before the issue of bail is addressed. Such an order, in its view, was not prejudicial to the accused. Further, the denial of bail was not an infringement of his right to be presumed innocent.

7. In submissions in response, Counsel for the accused observed that the state had not demonstrated any instance where the accused has threatened or intimidated or compromised witnesses; that the witnesses had already provided their witness statements and the state should have organised for witness protection if it was aware of threats of interference or compromising of witnesses.

8. I have considered the application and submissions in support and opposition thereto. There is no dispute that under Article 49(1)(h) of the Constitution, the right to bail is guaranteed to everyone. The only limitation to this right under the Constitution is that there should be compelling reasons, which must be placed before the court by the state, for denying an accused person bail.

9. Section 123 and 123A of the Criminal Procedure Code set out the statutory provisions with respect to bail and bond. Section 123 provides that:

When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail:

Provided that the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance as provided hereafter in this Part.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

(3) The High Court may in any case direct that an accused person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

10. At section 123A, the CPC provides 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 fulfillment 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.

11. The principles to be considered in determining whether to grant bail or bond have been considered in various decisions by our courts. In **Ng'ang'a v Republic (1985) eKLR**, Chesoni J observed as follows:

“Just as finding one accused charged with others jointly guilty or innocent does not implicate or set free the co-accused and is not discriminatory treatment, so is the case with granting or refusing bail to one or more accused persons charged jointly with others some of who may be out on bail. This is so because the facts, circumstances and merit of one co-accused may be such that granting him bail is justified, whereas those of his co-accused may mitigate against bail. Each case must be considered on its own merit, facts and circumstances before the court exercises its discretionary powers of granting or refusing bail.”

12. Chesoni J went on to observe that:

“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 (section 72(5)) 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 it is shown by the prosecution that there are substantial grounds for believing that:

(a) the accused will fail to turn up at his 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 of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be

considered:

(a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty: Where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.

(b) The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused is strong, it may be justifiable to remand him in custody.

(c) The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behavior these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail

(d) Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.

(e) Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with prosecution witnesses if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference."

13. The principles enunciated in the above case have been followed in subsequent decisions over the years- see for instance **Andrew Young Otieno v Republic [2017] eKLR** and **Joses Kimathi Murumua & 3 Others v Republic [2013] eKLR**.

14. It is the case that the accused in this case is charged with a very serious offence, the offence of murder. However, under Article 49, he is entitled to bail or bond, unless compelling reasons have been advanced that militate against his being released on bail or bond. Aside from the averment by Sgt Maneno that vulnerable witnesses have expressed concern for their safety, nothing else has been placed before me that can be described as a compelling reason. There is no averment that the accused may fail to turn up at his trial, or that his character and antecedents militate against the grant of bail. Nor has it been shown that he has intimidated witnesses, and aside from the statement of the Investigating Officer, there is no evidence to suggest the likelihood of such intimidation.

15. Indeed, the pre-bail report prepared pursuant to an order of the court suggests the contrary. In the pre-bail report prepared on 28th August 2019 and filed in court on the same date, it is noted that the accused was residing at Ruiru Bypass at the time of the offence. He is 38 years old and was born in Enosupukia in Narok but his family was displaced by the ethnic clashes of 1993. His father is deceased but his mother resides in Subukia in Nakuru while his siblings live in diverse places. He is married and has 3 children.

16. It is indicated in the pre-bail report that the family of the deceased, while apprehensive about the release of the accused on bail, has not expressed any threats or intimidation from the accused or from any quarter. It also indicates that the accused has strong social support and his mother is willing to stand surety for him.

17. The court has a duty to ensure that the rights of an accused person, including the right to be released on bail or bond pending trial, are safeguarded. It however has a duty, should sufficient reason be advanced, to deny such bail if there are reasons to do so. The prosecution advanced the view that in this case the accused should not be granted bail before the vulnerable witnesses have testified, or until the witness protection process has been completed. The prosecution states that the process is lengthy but does not indicate how long it would take.

18. I note that the accused was first arrested on 26th June 2019. He was remanded in custody on 10th July 2019 when he was first brought before the court. He took plea on 17th July 2019. The prosecution has had close to three (3) months to arrange for witness protection, had it desired to do so as submitted by Mr. Okeyo. I am therefore not satisfied that compelling reasons have been advanced that would justify denying him his constitutional right to bail or keeping him in custody pending hearing of any of the prosecution witnesses after which the issue of bail can be revisited.

19. I accordingly allow his application for bail or bond. I direct that he may be released on a bond of Kshs 300,000 with one surety of a similar amount.

20. Orders accordingly.

Dated and Signed at Nairobi this 17th day of September 2019

MUMBI NGUGI

JUDGE

Dated Delivered and Signed at Nairobi this 18th day of September 2019

JAMES WAKIAGA

JUDGE