



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL CASE NO. 39 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

ISAACK KAGIRI WANJIKU.....ACCUSED

RULING

Introduction

1. On 30th January 2019, the accused applied under certificate of urgency for bail pending trial pursuant to the provisions of articles 49 (1) (h), 20, 21, 23, 24, 25, 27, 28 and 29 of the 2010 Constitution of Kenya and all other enabling provisions of the law. It was certified urgent.
2. The application is grounded on the grounds set out on the face of the notice of motion and the applicant's 14 paragraphs supporting affidavit.
3. The application is opposed by the state on the basis of the strength of the evidence of the nine prosecution witnesses, who have testified before me.

The case for the applicant.

4. The major grounds in support of the application are as follows. First, that the accused is charged with murder contrary to section 204 of the Penal Code (Cap 63) Laws of Kenya, which is a bailable offence. His being remanded at the Government prison violates his liberty and that he stands to suffer irreparably and is not a flight risk. The orders sought are in conformity with the Constitution and no prejudice will be caused to the respondent, if the applicant is released on bail.
5. In his supporting affidavit, the applicant has deposed to the following major averments. He has averred that he has been in custody since **12th November 2017** and has been co-operating with the investigations. He presented himself at Kericho police station. He further has deposed that his continued detention pending conclusion of his trial undermines and contravenes his presumption of innocence, which is recognized by the Constitution. The offence charged is bailable and that he has a right to bail, unless there are compelling reasons that militate against his release. That following advice from his advocate, the accused believes that he has an unqualified right under article 50 (2) (a) of the Constitution of Kenya to be presumed innocent, until the contrary is proved. The other grounds are a duplication of the grounds set out in the notice of motion in support of the application. It is therefore unnecessary to cite them.

The submissions of the applicant

6. Mr. Langat, counsel for the applicant has filed written submissions in support of the application. In his submissions counsel has replicated the grounds and the averments that are in the notice of motion and the affidavit of the applicant. I will not therefore reproduce them herein. However, he has added the following to his submissions. He has submitted that the prosecution case against the accused is weak and has noted that there is no direct eyewitness evidence. And this he submits cannot persuade the court to deny the applicant bail. He has referred to the finding of the body of the deceased in a house, which the prosecution claims belonged to the accused. Counsel submits that there is doubt whether the accused bought this house or was merely a witness in the sale agreement of the subject house. He also submits that the ongoing trial within trial in respect of an alleged confession made by the accused should not be taken into account.
7. As regards the accused being a flight risk, counsel submits that the accused surrendered himself to Kericho police station, as proof of his co-operation with the investigations. He also has submitted that the pre-bail report indicates that the community members have no objection to his release on bail, since he has no previous records of criminality.

The case for the prosecution

8. The prosecution has opposed his release on bail on the strength of their case through the nine witnesses, who have testified before me. The evidence of Samuel Liu (Pw 7), who is the investigating officer, is that he received a signal from Kericho police station that the accused had surrendered to that station. He then proceeded there to collect the accused. It is alleged that the deceased was murdered on 8th November 2017. On 9th November 2017 Agnes Nyawira (Pw 2), reported the disappearance of the deceased to Pw 7. Her evidence is that the deceased was a girl friend of the accused. The body of the deceased was found half way buried under the bed in the house of the accused. This is in a nut shell the basis of the prosecution objection to the release of the accused on bail.

ISSUES FOR DETERMINATION.

9. I have considered the affidavit evidence of the accused and the sworn evidence of Pw 7 and Pw 2. In considering the evidence, I am alive to the fact that I am not determining finally the credibility of the prosecution witnesses. This can only be done at the end of the trial. The only issue is whether there are compelling reasons to deny the accused bail. From the affidavit evidence of the accused and the sworn evidence of Pw 2 and Pw 7, I find that on 11th November 2017, the accused surrendered himself at Kericho police station in Kericho county. This was three days later after the death of the deceased. There is no evidence as to why the accused did not surrender to any police station within Narok county. In his affidavit evidence the accused is silent as to why he decided to surrender in Kericho Police station and not in any police stations within Narok county. Questions arise as to whether he was running away or not. It must also be borne in mind that the evidence of Pw 2 is that the deceased was the girlfriend of the accused. The circumstances surrounding the recovery of the body of the deceased half buried under the bed of the house of the accused, if believed appear to be serious.

10. After considering the totality of the foregoing evidence, I find that the accused is a flight risk, hence his surrender at Kericho police station and not to any police station within Narok County. Furthermore, it also appears that the circumstances surrounding the recovery of the body of the deceased half buried under the bed in that house, appear to be serious. The fact that the evidence is circumstantial against the accused does not in itself make it weak as submitted by Mr. Langat. Circumstantial is subjected to the same treatment as oral evidence in terms of admissibility and relevance. That evidence is of no lesser weight just because it is circumstantial evidence. To treat that evidence as weak amounts to ignoring evidentiary rules of admissibility, relevance and probative value, which rules apply to direct evidence.

11. Furthermore, Mr. Langat submitted that the remand of the accused in custody pending trial undermines and contravenes his presumption of innocence, which is recognized by the Constitution. This submission is not correct. The remand in custody is intended to ensure the accused is available for trial. It also ensures that the accused does not defeat the course of justice in situations, where an accused is a flight risk or will interfere with the witnesses. The remand of the accused in custody has nothing to do with his innocence or guilty.

12. Additionally, Mr. Langat also submitted that the accused co-operated with the police during investigations and therefore he is not a flight risk. He further submitted that his community is not opposed to his release, since he has no previous criminal records according to the pre-bail report. These submissions ignore the fact the trial has reached a very advanced stage in which the prosecution is on the verge of closing their case. That evidence although of a circumstantial nature is not weak evidence. It is very strong evidence and in particular the circumstances of the recovery of the body of the deceased in the house of the accused is such that the accused is a real flight risk. The accused only surrendered at Kericho police station after realizing that he could not evade the long arm of the law forever. That explains why he fled from his house and his surrender three days following the death of the deceased. It also explains why he did not surrender to any police within Narok county.

13. Furthermore, the fact that there is an alleged confession, which now is subject to an ongoing trial within a trial is a matter that is not for consideration in this application. I have not therefore taken it into account.

14. In the premises I find that his being a flight risk is a compelling reason to deny him bail within the meaning of article 49 (1) (h) of the Constitution.

15. The application for bail fails and is hereby dismissed.

Ruling signed, dated and delivered in open court at Narok this 3rd day of November 2019 in the presence of Mr. Omwega for the state and Mr. Langat for the accused.

J. M. Bwonwong'a

Judge

4/11/2019