



REPUBLIC F KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL CASE NO 8 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

MARK PEMBA LOSIKANY.....ACCUSED

RULING

The case for the applicant

1. The applicant under certificate of urgency and pursuant to the provisions of article 49 (1) (h) of the Constitution, 2010, the Bail and Bond Policy Guidelines and all enabling laws, has applied for bail pending trial on a charge of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63) Laws of Kenya.
2. The application is supported by six grounds that are set out on the face of the notice of motion and his twelve paragraphs supporting affidavit.
3. The major grounds in support of the application are as follows. The applicant pleaded not guilty on 20th November 2018 and has overwhelming chances of success in being acquitted. The accused has a right to bail and there are no compelling reasons to deny him bail. The applicant is likely to suffer, while in remand before the matter is heard and determined. The accused is presumed innocent and no prejudice will be occasioned to the prosecution and the victims.
4. The applicant has deposed to the following major matters in his affidavit. The applicant worked as a security guard with Cargill Dam site along the Narok-Bomet highway and is a law abiding citizen. The prosecution will call relatively many witnesses some of whom will be impossible to trace. The applicant will have served a substantial part of his life time in remand before his case is heard and determined. He also has averred that he has a constitutional right to bail.

The submissions of the accused.

5. Mr. Kambo, counsel for the applicant has filed written submissions replete with many authorities. Based on the Canadian case of **Rex v Hawken (1944) 2 DLR 116**, counsel submitted that the object of keeping the accused in custody prior to trial is not that he is guilty, but is on the basis of the necessity of having him available for trial. Furthermore, that court further stated that bail should be granted when the court is satisfied that the bail will ensure the accused attends his trial. Again based on **Republic v Nahason Muchiri Mutua [2016] ECLR**, counsel submitted that presumption of innocence applies to both those in custody and those admitted to bail and the admission to bail is done on the basis that there are no compelling reasons to deny them the right to bail. Additionally, counsel cited **Republic v Danford Kabage Mwangi, High Court Cr. Case No. 8 of 2016**, in which the court set out the grounds upon which bail may be refused, which include the risk that the accused will fail to turn up for his trial, that the accused may interfere with witnesses and that the accused will interfere with the course of justice. He therefore submitted that any of the grounds set out in that case must be proved to the satisfaction of the court.
6. He also submitted that the burden of proving that one or more of the grounds exists rests on the prosecution. Furthermore, counsel also cited the **Bail and Bond Policy Guidelines, paragraph 4.9** in which the courts are urged to evaluate the presence of compelling reasons based on the twelve criteria set out therein. Among the criteria set out therein include the following. The seriousness of the punishment to be imposed, the strength of the prosecution case, the likelihood of interfere with witnesses, protection of the accused, the relationship between the accused and potential witnesses and the need to protect victims of the crime.
7. Furthermore, counsel has submitted that where bail is opposed on the ground that the accused is likely to interfere with witnesses, the prosecution must demonstrate a more than whimsical probability of interference, citing **Republic v Gerald Mutuku Nyalita & Another, HCCR No. 44 of 2015** in support thereof. Counsel also cited **Republic v William Kipkorir Chirchir & Another, HCCR NO. 28 OF 2018**, in which the court stated that intimidation, interference and threatening witnesses are serious matters and are compelling reasons, where evidence of such intimidation, interference or threats is provided to the trial court. That court pointed out that it must be shown that it is the accused who perpetrated those acts.

8. Finally, counsel cited *Republic v John Muchira Gatimu, HCCR NO. 2 OF 2017*, in which the court was of the view that a pre-bail report is not mandatory.

9. In the light of the foregoing, counsel has urged the court to grant bail to the accused, since the prosecution have failed to prove that there are compelling reasons to deny the accused bail.

The case for the prosecution

10. The prosecution has opposed the application. It has filed a nine paragraphs replying affidavit through No. 71375 Cpl Moses K. Lutenyo. He is the investigating officer and matters that he deposed to are partly derived from his position as the investigator and partly derived from information received. He has deposed to the following major matters. On 30th September 2019 he received a complaint from Weldon Senjura Kenga, who is a key witness in this case, and who had been bonded to testify on 30th September 2019, expressed fear following intimidation by the mother of the accused. This report of witness intimidation was booked vide OB No. 22 of 1st October 2019 at Narok police station. He has opposed the release of the accused on bail until four witnesses namely Frederick Losikany, Weldon Senjura Kenga, Stephen Murrar Nkarrabali, and Moses Lemara Nkuruma have completed testifying. Some of the key witnesses are close relatives of the accused and if released, the accused is likely to intimidate them. It is therefore in the interests of justice to deny the accused bail.

The submissions of the prosecution.

11. The prosecution has opposed the application citing interference with witnesses as a reason for such opposition. Based on the affidavit of the investigating officer, in which it is deposed that one key prosecution witness namely Weldon Senjura was threatened and intimidated by the mother of the accused. the matter was reported to the police and booked under OB NO 22 of 1/10/2019 of Narok police station. Counsel has cited *Republic v Lucy Njeri Waweru & 3 Others (2013) ECLR*, in which that court held that the burden of proof rests on the prosecution to prove that if accused are released on bail, they are likely to interfere with witnesses. Counsel has also cited the *Bail and Bond Policy Guidelines, paragraph 4.9.*, in which interference with witnesses is a ground to deny an accused bail. Counsel has submitted that the accused is likely to interfere with witnesses, based also on the pre-bail report of the probation officer.

ISSUES FOR DETERMINATION

12. I have considered the affidavit evidence of the parties, their submissions including the authorities cited. As a result, I find the following to be the issues for determination.

1. Whether or not there is a likelihood of the accused interfering with witnesses. I find from the authorities cited that interference with witnesses, where it is proved to exist is a compelling reason to warrant denial of bail to an accused person. The evidentiary burden of proving interference with witnesses lies on the shoulders of the prosecution, which must be proved by credible and cogent evidence. The basis of denial of bail on this ground is that the accused will by his conduct defeat the course of justice. Interference may be done by the accused in person or through his agents. In either case there has to be evidentiary proof.

13. In the instant application, I find the affidavit evidence of the investigating police to be credible and cogent. As a result, I further find that their will be interference with witness Weldon Senjura Kenga, if the accused is released on bail which will defeat the course of justice.

14. In the premises, I find that the application fails and is hereby dismissed.

Ruling signed, dated and delivered in open court at Narok this 3rd day of December, 2019 in the presence of Ms Karia and Mr. Kambo for the applicant and Mr. Omwega for the respondent.

J. M. Bwonwong'a

Judge

3/12/2019