REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

MISC CRIMINAL APPLICATION NO. 16 OF 2018

SIMON MURIMI MURIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application pending before court is dated 20/07/2018 seeking bail pending trial in **Baricho Criminal Case No. 746 of 2011**. The appellant was charged with threatening to kill contrary to **Section 223 (1) of the Penal Code**.

That he is a resident of Kiangai village and has good relationship with his neighbors. That he serves as a catechist in Thunguri Catholic Church, Kiangai parish and has never been charged with a criminal offence in the past. That there are no compelling reasons that may render the applicant incapable of being granted bail and he intends to co-operate with the court and shall appear as and when required. That the lower court denied him bail based on probation report that only had sentiments of the complainant.

The Investigating Officer in response stated that the applicant had hired a hit man with instructions to kill the complainant for a fee of Kshs.20,000/=. That he had made a down payment to the hit man and the balance was to be paid after killing the complainant. The plot was discovered and the reported to the police whereby the applicant was arrested.

I have considered the application and the submissions bail pending trial as is a constitutional right which cannot be denied unless there are compelling reasons. Article 49(I)(h) of the Constitution provides:

In the case of **Republic v Stephen Robi Marwa & another [2014] eKLR.** The Court in dismissing the application for bail pending trial in a murder case stated;

In the case of *Republic –vs- David Nyasora Nyamongo – Criminal Case No.90 of 2010* **(unreported) in the High Court sitting at Kisii, Makhandia J (as he then was) stated:-**

> **"At the end of the day however whether or not an accused should be admitted to bail, is largely a matter of discretion of the court to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again, the court must bear in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to be released on bail."**
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> **The issue in this application then is whether there are compelling reasons why the applicants should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons.**

In the case of *Republic –vs- Danson Ngunya & another [2010] eKLR,* **the Court adopting the reasoning in the** *M. Lunguzi –vs- Republic CMSCA Appeal NO.4 of 1995* **the learned Judge stated:-**

> ***"…. In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. That is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order …."***

I entirely agree with the above propositions and hold that it is the duty of the state to satisfy me as to the compelling reasons why the applicants herein should not be released on bail/bond pending trial.

The prosecution has not proven that there is the risk of the applicant absconding, the risk of influencing witnesses and whether he will turn up for the hearing of his case once granted bail. The probation report indicates that the applicant rarely mingles with people, he is a catechist and works as a night guard at Nguguine tea factory. He is married and has two children. It is only the complainant who feels threatened and was afraid that the applicant may interfere with his immediate neighbour.

However, due to the fact that accused person is deemed innocent until proven guilty it will be unfair to deny him bond.

The averments in the affidavit of the Investigating Officer Dismas Syria are allegations which have not been proved beyond any reasonable doubts in a Court of law. It is not a compelling reason. The Probation Officers report heavily relied on the sentiments of the complainant who would not be expected to give a positive report in the circumstances as it is shown they have a dispute over lease on tea bushes. The chief was of a different view. The allegation that the accused may interfere with witnesses is not supported by the Investigating Officer.

I find that the offence for which the applicant is charged is bailable. Bail pending trial is not an absolute right as it may be denied where compelling reasons are proved to the satisfaction of the court. The state has not proved a convincing compelling reason to deny the applicant bail. The appellant has a constitutional right to bail. The right to liberty is precious and should not be taken away on flimsy reasons. In **R – v- Danson Mugunya** (Supra), the court observed that we must interpret the Constitution in enhancing the rights and freedoms granted and enshrined in the Constitution rather than in any manner that curtails them.

I find and hold that the applicant has a right to bail. I order that:-

1) The application has merits.

2) The applicant shall be released on a bond/bail of Kshs 1,000,000/- plus one like surety pending the trial in Baricho Cr. Case No. 746/2018.

3) The surety be approved by the trial Magistrate.

Dated at Kerugoya this 22nd day November 2018.

L. W. GITARI

JUDGE