



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CRIMINAL MURDER CASE NO. 13 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

CATHERINE WAMBUI MAGONDU.....1ST APPELLANT

SIMON KAGIRI MAGONDU.....2ND APPELLANT

RULING

The two applications pending before court are seeking bail pending trial for the accused persons who were charged with murder contrary to **Section 203** as read with **Section 204 of the Penal Code**.

1st accused

Her application is dated 12/09/2018. She was arrested on 03/09/2018 and was held in remand at Wang'uru police station pending plea taking. That she has been co-operative with the investigating officer and there are no compelling reasons to deny her favorable bond terms or personal bond.

Her pre-bail report indicated that the community is not opposed to her release on bond terms.

2nd accused

His application is dated 25/09/2018. That he is an employee of the National Police service and if he remains in custody he will lose his job for being absent from duty without authority/permission. That he undertakes to abide by any condition that the Court may attach to his release on bail. And he undertakes to attend Court at the time and place mentioned in the bond.

His pre-bail report indicated that the community is not opposed to his release on bond terms.

Prosecution

In response, the investigating officer stated that the deceased's brother lodged a complaint that people suspected to be close family members of the accused persons attempted to abduct the key witness Florence Ndunge Muli but was rescued by members of the public. The incident was reported at Itangi police station vide OB No. 9/9/2018 and at Wang'uru Police Station vide OB 45/10/9/18. In addition, it was reported to the Office of Director of Public Prosecution on 14/09/2018 vide letter annexure SKI. That the police opened an inquiry file Inquiry No. 3 of 2018 where it emerged that the persons who wanted to abduct the key witness are very close relatives of the accused persons.

Later, on 06/10/2018 the brother of the accused persons Mwangi Gathua and Francis Munene Gathua went to the key witness residence carrying 5 litres of petrol. It is believed they wanted to set ablaze her house therefore bail should not be granted.

In **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.”

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.

Article 49(1)(h) of the Constitution provides:-

“(1) 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 compelling reason must relate to the accused. The prosecution has shown that people related to the accused have attempted to abduct key witnesses and reports have been made to the police. This is aimed at crippling the prosecution case against the accused. The issue of interfering with witnesses then becomes a compelling reason to warrant the court not to exercise its discretion in favour of the accused persons. The accused persons are presumed innocent until proved guilty. I note that there is no allegation that the accused are likely to abscond. My view is that where the accused have a right to bail it should not be denied unless there are compelling reasons. The prosecution has shown that there are compelling reasons to deny the accused bail at this stage. I would direct that the matter be given a hearing date on priority and the key witnesses who are threatened be called to adduce evidence. The court will then review the application for bail after the said witnesses have testified. For now I find that the prosecution has adduced compelling reasons to deny the accused person(s) bail. The applications are therefore rejected and are dismissed.

Dated and delivered at Kerugoya this 3rd Day of December 2018.

L. W. GITARI

JUDGE

3/12/18

Read out in open court.