



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 64 OF 2016
REPUBLIC.....PROSECUTOR
V E R S U S
GARRISON KIPCHIRCHIR.....ACCUSED

RULING

1. The accused herein is charged with the offence of Murder contrary to *Section 203* as read with *204* of the *Penal Code*. It is alleged that on 4th September 2016 at Chemuswa trading Centre in Mosoriot within Nandi County, he murdered *Meshack Kiprop Chirchir*.
2. On 12th October, 2016, the accused denied having committed the offence as charged and on the same day, his learned counsel *Mr. Magut* made an oral application seeking that he be admitted to bond pending the conclusion of his trial.
3. The application is strongly contested by the state. The investigating officer No. 218485 *Zaccarious Bayah* who is the DCIO of Nandi North swore a replying affidavit on 28th November, 2016 in which he opposed the release of the accused on bond on grounds that the accused was a flight risk; that his home environment was hostile and his safety if released was likely to be compromised and lastly, that if granted bond he might harm one of the prosecution witnesses.
4. Those depositions were disputed by the accused in his affidavit sworn on 7th February, 2017. He averred that he lived in Chepkoiyo area in Mosop constituency and not Chemuswa area and it was therefore not correct for the investigating officer to allege that his safety was likely to be compromised if he was released on bond; that the only reason that the investigating officer was opposing his admission to bond was because he was compromised by the family of other suspects who had been arrested together with him but who were subsequently released. He swore that if he was granted bond, he was not going to interfere with any witness.
5. In a further affidavit sworn on 10th February 2017, the investigating officer admitted that the accused had been arrested with four other persons but is the only one who was charged with the offence not because he had been compromised but because he followed the recommendations made by office of the DPP.
6. Upon the state's application, a pre-bail report was filed on 28th January, 2017. I have read the said report. It is not unfavourable to the accused. The Probation officer who compiled the report however noted that the deceased's family was opposed to the admission of the accused to bond pending trial as they were still very bitter with him for the loss of their relative.

7. The application was argued interparties on 27th February, 2017. Learned counsel *Mr. Magut* and learned prosecuting counsel *Ms Oduor* each made elaborate submissions buttressing their respective positions.

8. I have carefully considered the application, the affidavits filed by the accused and the investigating officer; the submissions made by learned counsel and the pre-bail report.

I note that the pre-bail report is not unfavourable to the accused. It does not support the investigating officer's sentiments that the environment on the ground was hostile and that if the accused was released on bond, his safety and security may be compromised.

The report only expresses the views of members of the deceased's family who were opposed to the admission of the accused on bond on grounds that they were still bitter over the demise of their relative.

9. It is now settled law that bond pending trial is a constitutional right. And though this right is not absolute, it is only limited by the existence of compelling reasons that would justify its denial. In cases where the prosecution is opposed to the grant of bond pending trial, the burden of proving existence of compelling reasons rests solely on the prosecution.

See: **Republic V Danson Mgunya & Another (2010) eKLR**, **Republic V Daniel Musyoka Muasya (2010) eKLR**.

10. The primary consideration that courts take into account in deciding whether or not to grant bond pending trial is whether an accused person if released will attend his trial when required or whether he was a flight risk. Other considerations include the likely interference of witnesses by the accused, his safety and the public interest.

11. In this case, the main reason advanced for the state's opposition to the accused's application is that the environment on the ground was hostile to him given that the deceased's family was still bitter over the loss of their relative and that therefore, if released on bond, his safety may not be guaranteed. The investigating officer in his replying affidavit also alleged that the accused was a flight risk. This was a general allegation which was not substantiated by any evidence and in my view, it cannot be sustained given that it is clear from the pre-bail report that the accused has a fixed abode. It has not been demonstrated that the accused had done anything to avoid his arrest or to suggest that he was a flight risk.

12. Regarding the claim that if granted bond the safety and security of the accused might be in jeopardy, this claim does not appear to be well founded for the following reasons;

Firstly, it is not supported by the contents of the social enquiry report (pre-bail report) and secondly, an accused person is presumed innocent until proved guilty. As correctly stated by *Mr. Magut* in his submissions, bitterness by members of the deceased's family though natural cannot be a basis for denying an accused person his constitutional right to bond pending trial. In any event, it is not disputed that the accused and the deceased's relatives live in different places and there is no evidence to support the view that the distances between their two areas of abode notwithstanding the accused's life would be in danger if granted bond.

13. I am in concurrence with *Ms Oduor's* submissions that under the *Victims Protection Act 2014*, the victims of the deceased's murder are entitled to express their views in applications such as the one under consideration. However, the victims are only entitled to have their views considered but the court is not bound by those views. It can only take them into account in its determination of whether or not there are compelling reasons to justify denial of bond to an accused person.

14. In view of the foregoing, it is my finding that the prosecution has failed to demonstrate that there are compelling reasons in this case to warrant denial of the accused's constitutional right to bond pending trial. In the circumstances, I find merit in the application and it is hereby allowed on the following terms;

The accused shall execute a personal bond of Kshs. 500,000 together with one surety of the same amount; The surety shall be approved by the Deputy Registrar.

Once released, the accused shall attend mentions before the Deputy Registrar once every three months during the pendency of the trial unless other orders are issued by this court.

It is so ordered.

C. W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 23rd day of March, 2017

In the presence of:-

The accused person

Ms Oduor for the state

Lobolia court clerk

No appearance by Mr. Magut for the accused.