



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CRIMINAL CASE NO. 29 OF 2016

REPUBLIC PROSECUTOR

Versus

P W G ACCUSED

RULING

1. **P W G** is charged with the **offence of murder contrary to section 203 as read with section 204 of the Penal Code Cap 63**. He pleaded not guilty and is now awaiting his trial. He has applied to be released on bail pending trial.

2. The court requested the probation office to prepare pre-bail report that report is now before the court. The probation officer in that report stated that the accused is a 20 year old man. He is described by the community where he resides as being **“a bit mentally challenged.”** The report also revealed that the community and more particularly the family of the deceased are very hostile to the release of the accused on bail. They fear that the accused may cause more harm if granted bail.

3. Counsel for the accused Mr. Abwuor submitted that the mother of the accused was dead. That the only surviving parent was his father. Learned counsel submitted that the charge which the accused now faces was falsely instigated by his father and that that was the reason why his father does not speak favourably about his bail application.

4. Indeed the probation report records that the accused father on being interviewed stated that he did not wish to be associated with the accused. The probation officer stated that the accused father was unwilling to stand surety for the accused because in his view the accused was safer in custody.

5. This court is in agreement with the submissions made by Mr. Abwuor to the effect that the fact that the accused is mentally challenged is not a ground to deny him bail. One of the considerations that the court bears in mind when granting bail is that the accused would attend trial if granted bail. This was stated in the case **Farris C. J. in REX V HAWKEN (1944) 2 DLR 116** where the court stated:-

“The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the judge is satisfied that the bail will ensure the accused appearing at his trial.”

6. Bail is a right recognised under the constitution and it matters not for the seriousness of the charges an accused person is facing nor does it depend on the strength of the prosecution’s case. A case in point is the **REPUBLIC V MAMUSH HIRBO FAJA (2014) eKLR** where the court held:-

“Article 49 (1)(h) provides that an accused person is entitled to be released on bond/bail unless the prosecution has compelling reasons to the contrary. The right to bail is therefore not absolute and it is at the discretion of the court.

The right to bail does not depend on whether or not the prosecution have strong evidence against the accused. The relevant constitutional provision does not classify offences that are bailable or not – Bail is open to all offences including capital offences. The basis of this right has a bearing on the presumption of innocence until proven guilty as provided for by Article 50(2)(a). The seriousness of the offence and the strength of the evidence is therefore, not a basis of denying the accused person bail.”

7. The circumstances in which the accused finds himself that his life is threatened by the community where he resides will be a deciding point in the accused application for bail. The probation report is very clear that the community is unwelcoming to the accused being released on bail. The impression that the court gets from the probation report is that the accused may very well suffer harm from the community. Accordingly in my view, that is a sufficient basis of denying the accused bail pending trial. The accused is denied bail for his own safety.

8. Accordingly the accused application for bail is dismissed. The accused case will as far as is possible be fast tracked since the accused will until further orders of this court be remanded in custody pending his trial.

DATED AND DELIVERED THIS 8TH DAY OF MARCH 2017.

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant:

Accused: Phillip Wangombe Gutu

For Accused:.....

For the State:

Language:

COURT

Ruling delivered in open court.

MARY KASANGO

JUDGE