



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CRIMINAL CASE NO.60 OF 2016**

**PETER MUTUMA M' LAIBUTA.....ACCUSED**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Right to bail**

[1] The accused person is charged with the offence of murder contrary to Section 203 as read with section 204 of the Penal Code CAP 63 of the Laws of Kenya. On 2<sup>nd</sup> February 2017, his legal counsel applied for the Accused to be released on bail pending the hearing and determination of this case. The legal counsel for the accused stated that the accused person will abide by all the terms that the court may impose and that further he will attend court as and when required.

[2] The court directed that a pre-bail report be filed in court within 14 days from the said date. According to a pre-bail report filed in court on 28<sup>th</sup> March 2017, the accused was said to have previously exhibited criminal behaviour in that he had on several occasions attacked the deceased (his wife) - actions which provoked angry residents to be fed up with his behavior and had at one time stormed his house threatening to lynch him but he was rescued by the chief. The report goes further to state that the community where the accused person comes from was opposed to his being released on bail and had destroyed his property. In addition, the report stated that the deceased's family was said to be very bitter and they wished the accused person to conduct his case while in jail since releasing him on bail would evoke memories of their mother. But as would be expected naturally, the accused person's relatives were not opposed to his release on bail.

[3] In reply to the contents in the pre bail report, Mr. Ondieki the legal defence counsel person argued that the contents of the pre bail report were not compelling reasons as memories cannot be erased and will always be there and that further the accused was no longer in danger from the community.

[4] Mr. Mungai the prosecution counsel, argued on the other hand that though bail was a constitutional right it was not absolute and the sentiments of the deceased's relatives and community should be considered. He conceded that though hostility was not permanent and will eventually subside; it is rife at the moment. Thus, it is an important consideration for now in determining the bail application for bail. Consequently, he urged the court to revisit the issue of bail after 3 months.

**DETERMINATION**

[5] I have considered this application, submissions by counsels and the pre bail report. The prosecution relying on the pre-bail report filed herein opposed the release of the accused on bail for now. The major reasons advanced are:-

(i) That the community is still hostile to the accused. At one time, angry mob destroyed attacked the accused, destroyed his property and were baying for his blood only to be save by the area Chief;

(ii) That the family of the victim including his children is opposed to his release on bond. The children claim that every time they see the accused the memories of their late mother- the victim herein- is rekindled.

[6] Mr. Ndubi, legal counsel for the accused submitted that memories will always be there and cannot be erased. It cannot, therefore, be a ground for refusal of bail to the accused. Again, he stated that the contents of the pre-bail report do not disclose any compelling reason to deny the accused bail.

[7] Listening to the foregoing arguments I must resort to a work of the court in **R vs. KOKONYA MUHSSIN [2013] eKLR** won what compelling reasons would be in the sense of the Constitution. In that case, the following was stated that:-

### **Subject of bail becoming familiar**

**The contours of the subject of the right to bail under Article 49(1) (h) of the Constitution are now becoming familiar and clearer as courts are confronted more and more with the subject. The court had the occasion to define the meaning and the scope of the phrase compelling reasons under Article 49(1) (h) of the Constitution in BGM HCCRC NO 55 OF 2009 R v JOKTAN MAYENDE & 3 OTHERS, and upon a deep and thoughtful consideration, held that:**

**...the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution.**

**The court in the JOKTAN MAYENDE CASE stated further that:**

**This high standard is more in accord with the stringent constitutional requirements in Article 24 of the Constitution on Limitation of rights and fundamental freedoms....In light thereof, the court must be convinced by the prosecution that it is proportionate and justified in the circumstances of the case to deny the accused bail.**

**The above test is the exemplar of the constitutional order ushered by the Constitution of Kenya, 2010, when it pronounced that all offences areailable completely departing from the earlier position where capital offences did not qualify for bail, and this explains why the court must be convinced to the set standard that there are compelling reasons for the accused person not to be released on bond.**

[7] Applying the above test, it seems that possible danger to the accused person is the predominant point of objection to him being released on bond. On this ground, I am again citing what I stated in the case of **KOKONYA (supra)** specifically the following passage:-

### **Danger to accused person**

**In some instances, the Prosecution has argued that the accused should not be released on bail due to the security of the accused. They normally cite hostile circumstances surrounding the case. This is a rather difficult ground to prove, but I do not want to slam the door on it or proclaim its potency or its prospects being minimal as a compelling reason under Article 49**

**of the Constitution. Except, it is for the court to evaluate the entire circumstances of the matter and decide whether it qualifies as a compelling reason to deny the accused bail. Initially the Prosecution alluded to political hostility and rivalry between two political factions, and the accused belongs to one of the warring factions, thus making the security of the accused to be at stake. That state of affairs is quite unfortunate at a time of elections. However, the Prosecution seems to have abandoned that ground and did not argued it as a compelling reason, and I have not been called upon to decide on it. So the less I say about that ground at this stage the better. Nonetheless, I recognize there is need for a more searching debate on this ground as a compelling reason to refuse bail under the Constitution.**

I should also hark back to the old wells. At one time, Chesoni J (as he then was) in the case of **Ng'ang'a vs. Republic 1985 KLR 451** stated that one of the ground for which bond may be denied is

**1. Whether the security of the accused will be guaranteed if released.**

In my view, even today, the likelihood of harm being visited upon the accused by the community if he is released on bond is a potent and compelling ground for which bond may be denied. Except, however, and I stated this in the **KOKONYA** case, the ground is a difficult one to prove, for it will require tangible and real proof to be adduced by the prosecution. I wish to be guided by the circumstances of this case. It is not controverted that angry members of the community at one time attacked the accused, destroyed his house and almost killed him only to be saved by the area chief. The kind of hostility depicted here portends danger to the accused person albeit it may be temporary. From the expressions by the members of the community interviewed and the family of the victim, the possibility of real danger to the accused if he is released on bail is still rife and real. It is real especially given the fact that family of the victim including the children of the deceased as recent as the date of the report still expressed anger and bitterness towards the accused. The pitch and life of the anger is understood well given that the victim was the wife of the accused. His children are also in this mix and are potential witnesses. If the accused is released, he will go back to his home and children- these are the very children who states that they are still bitter with him and his presence would only rekindle memories of the loss of their mother in his hands. Such memories never go away but tempered with time may be less traumatic on the children herein who are also victims in this case. The relationship among the accused, the victim and his children is important in considering an application for bail. Accordingly, for now, I am convinced that there is real danger to the accused should he be released on bail. Except, I am acutely aware that such hostility is not permanent. It may subside and the danger it portends be eliminated altogether. Again, looking at the facts of this case, potential interface with witnesses especially the children is real and might not be a pleasant one. Therefore, I am convinced there are compelling reasons to deny the accused bail. He will, therefore remain in custody as this case is heard. I direct also that the case be heard expeditiously. However, should circumstances change, the accused may re-apply. This decision is just intermediate and I may revisit the issue again after three months if this case will not have been heard and determined. It is so ordered.

**Dated, signed and delivered in open court at Meru this 4<sup>th</sup> day of May 2017**

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**F. GIKONYO**

**JUDGE**

**In the presence of:**

Mr. Mungai – for state

Mr. Ondieki for accused - present

Accused – present

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**F. GIKONYO**

**JUDGE**