



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIM. CASE NO. 11 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

MUEMA MUTIA.....ACCUSED

RULING

1. Muema Mutia (the “Accused Person”) is charged with murder contrary to section 203 as read together with section 204 of the Penal Code. He was first arraigned on 13/02/2017. He pleaded not guilty to the charge.
2. The Accused Person has applied for bail. Through his counsel, he filed a formal application dated 11/07/2017. One witness – a minor – has already testified in the case in a bid to accommodate the witness as a vulnerable witness. I requested for a bail report and set a date for a bail hearing. The bail hearing was eventually held on 12/07/2017. By that time, the Bail Report had been filed in Court.
3. Mr. Wachira urged me to grant bail on terms the Accused Person could afford. He argued that the Accused Person is presumed innocent until proven guilty. Mr. Wachira argued that the fear expressed by the Prosecution that the Accused Person is a flight risk comes from an orientation that presumes that the Accused Person is guilty – which is the opposite of the Constitutional dictate. He argued that the fact that the Accused Person was arrested away from where the crime was committed does not make him a flight risk. This is because, Mr. Wachira argued, the Accused Person is presumed innocent by law and has freedom to move until that freedom is taken away by the Court after due process.
4. Mr. Wachira argues that there is no evidence that the Accused Person was hiding when he was arrested. He referred to the Affidavit by the Accused Person which depones that the Accused Person had gone home to see his family. Lastly, Mr. Wachira said that the Accused Person is ready and willing to comply with any Court orders issued.
5. Ms. Mutheu, for the State, opposed bail. She relied on the findings in the Bail Report and a Replying Affidavit. The opposition to bail is based on the single reason that the Accused Person is, in her view, a flight risk and will likely abscond. Ms. Mutheu argued that the Accused Person is alleged to have committed the offence on 07/01/2017. According to the affidavit of PC Robert Ochola, the Accused Person immediately disappeared from Gachie village where the offence was committed and where he used to live. The Accused Person was only traced to his rural home through particulars obtained from the Registrar of Persons and through his mobile phone.
6. Even while at his rural home, PC Ochola deponed, it took three days to finally arrest him because he

was hiding somewhere other than his parents' house. It was only through the assistance of a local chief that he was finally arrested. PC Ochola deponed that it took the local chief more than one week to finally track him.

7. Finally, both PC Ochola and the Bail Report indicate that the Accused Person has no fixed abode his wife having left with their three children.

8. Ms. Mutheu was of the opinion that the information in the Pre-bail Report and Replying Affidavit is sufficient to deny bail in these circumstances since both the conduct of the Accused Person after the crime as well as his lack of fixed abode above establish, on a balance of probabilities, that the Accused Person is a flight risk.

9. Turning to analysis of the arguments presented by the parties, I begin with first principles: Bail is a constitutional right enshrined in Article 49(1)(h). An Accused Person can only be denied bail if there are compelling reasons. Hence, the Constitutional standard for denying bail is "compelling reasons" test. The burden is on the Prosecution to establish the existence of the "compelling reasons" that would justify denial of bail. Finally, our emerging jurisprudence is clear as to the kind of evidence needed to establish the "compelling reasons": the evidence presented must be "cogent, very strong and specific evidence" and that mere allegations, suspicions, bare objections and insinuations will not be sufficient. See, for example, **R v Muneer Harron Ismail & 4 Others [2010] eKLR**. However, it is also true that the standard of proof required is on a balance of probabilities. There is no requirement that the Prosecution proves the compelling reasons beyond reasonable doubt.

Indeed, such a standard would be impossible to meet at this point in the trial. See, **Bail and Bond Policy Guidelines** at p. 19.

10. There is no question that the question whether the Accused Person is a flight risk and likely to abscond is a key one in determining if there are compelling reasons to deny bail. If the Prosecution can demonstrate, on a balance of probabilities, that the Accused Person is likely to abscond, bail will normally be denied.

11. Here, the incident that led to the death of the deceased happened on 07/01/2017. There is credible evidence before the Court that the Accused Person disappeared from his usual place of residence immediately after the incident. While the Accused Person claims he went to visit his rural home, the timing of his visit raises some questions. In any event, when the Police went looking for him in his rural home, they did not find him in his parents' house. The Accused Person's story that he went visiting is therefore suspect. It is also noteworthy that while the Accused says that his wife and children relocated to their rural home, they could not be traced there by the Police when they were looking for the Accused Person. Finally, it is noteworthy that it took the area Chief, who knows the area and the people well, one week to trace the Accused Person in the village.

12. This history coupled with the seriousness of the charge the Accused is facing is sufficient warrant well justified doubts whether it is likely that the the Accused Person might abscond if released on bail. That is the single most important factor in determining whether to grant bail or not. On that score, bail is denied. However, the case shall be listed for hearing on a priority basis on account of this denial of bail. I, therefore, find that there is credible evidence, on balance, to constitute compelling reasons to deny bail in this case. The Accused Person shall continue to be held in custody during the pendency of the case or until the Court reconsiders this bail decision.

13. Orders accordingly.

Dated and delivered at Kiambu this 17th day of July, 2017.

.....

JOEL NGUGI

JUDGE