



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL CASE NO. 42 OF 2015

JAMES KIMUTAI ALIAS BARTHWON APPELLANT

VERSUS

REPUBLIC RESPONDENT

RULING

1. The accused *James Kimutai Alias Barthwon* has been charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that on the 1st day of June 2015 in Kwenoi village in Elgeyo Marakwet County, he murdered *Kibor Yano Alias Christopher Kibor Yano*. He pleaded not guilty to the charges.
2. On 22nd September, 2015, an oral application seeking that he be admitted to bond pending trial was made by his learned counsel *Mr. Cheptarus*. Counsel submitted that the accused has a constitutional right to be granted bond pending his trial which he should be allowed to exercise to enable him access medical attention from his family doctors given his recurrent mental illness.
3. The application is opposed by the state. In her submissions, learned prosecuting counsel *Ms Mokua* relied on a pre-bail report filed in court on 19th October, 2015 and urged the court to dismiss the application. She submitted that the deceased was the accused's uncle and that members of their community had not come to terms with his loss and were not yet ready to receive the accused back in their midst; that the accused was mentally unstable and there was fear that if he is released on bond, he might commit another offence. Counsel was of the view that the accused should continue receiving treatment at the Moi Teaching and Referral Hospital.
4. In rejoinder, *Mr. Cheptarus* informed the court that there were two close relatives of the accused namely *Morech Cheptum Kirop* and *Ronald Kimutai* who live in Baringo and Nairobi respectively who were ready to receive and stay with the accused during the pendency of the trial; that the two wanted to provide the accused with alternative treatment for his mental condition in the form of herbal medicine which is not available at the Moi Teaching and Referral Hospital.
5. I have considered the application, the rival submissions made by *Mr. Cheptarus* and *Ms. Mokua* as well as the contents of the pre-bail report. I find that though indeed bond pending trial is a constitutional right, the right is not absolute. It is limited to existence of compelling reasons that would justify denial of that right. The constitution does not however define what amounts to compelling reasons. It leaves it to the discretion of the trial court to determine what constitutes compelling reasons sufficient to warrant denial of bond pending trial considering the circumstances of each case.

6. In this case, it is not disputed that the accused suffers from a mental illness which is recurrent. From the pre-bail report, it is apparent that he has suffered from this condition for a long time since year 2003. The claim in the pre-bail report that when this illness recurs, he becomes aggressive and projects his anger to those around him has not been disputed by the accused. In the premises, the state's claim that it might not be safe to grant the accused bond at this point in time given his mental state as he is likely to re-offend is not without some merit.
7. Learned counsel's argument that the accused should be granted bond to enable him access alternative treatment in the form of herbal medicine in my view does not hold much water because one, the offer was not made directly by the said relatives say for instance in a deposition but came through counsel in statements from the bar and secondly, there is no guarantee that if the accused is granted bond, he will indeed benefit from the said treatment. Once released on bond, the court will not be in a position to supervise what happens to the accused or ensure that he receives proper treatment for his condition.

Besides, if the said relatives genuinely wanted to assist the accused in the manner proposed, they should have exposed him to that treatment a long time ago and not wait to make the offer when he is already facing criminal charges.

8. In determining an application for bail in a case such as the present one, the court must undertake a delicate balancing act between two competing interests: that is, the constitutional right of the accused to enjoy his liberty pending his trial in view of the presumption of innocence and the interest of the society at large. In my opinion, releasing a person with an unstable mental condition to the public by admitting him to bond pending trial would not be in the interest of justice as this might endanger public safety and the safety of the accused person himself. I think that in this case, the better option would be to have the accused continue receiving treatment at the Moi Teaching and Referral Hospital until his illness is properly contained.
9. In view of the foregoing, I am satisfied that at this stage, the state has demonstrated that compelling reasons exists to justify denial of bond to the accused person. I therefore decline to allow the application. This does not however mean that the accused is precluded from renewing his bond application in future if and when his doctors certify that his mental health has either been fully restored or reasonably contained.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 8th day of February, 2016.

In the presence of:-

The accused

Ms. Mokuia for the Republic

Mr. Jamleck Lesinge – court clerk