REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL CASE NO. 20 OF 2015

REPUBLIC…………………..………..……………...RESPONDENT

VERSUS

KELVIN KIBET ROTICH…………………ACCUSED/APPLICANT

RULING

The applicant is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. The particulars offence are that on the 11th day of September, 2015 at Steward Hostels in Embassy Estate in Nyeri Central District within Nyeri County, the applicant murdered Dennis Kipng'etich. He entered a plea of not guilty on 10th October, 2015.

On 6th November, 2015, the applicant's counsel filed a formal application in court seeking his release on bond pending his trial. The application was made under **article 49 (1)(h)** of the **Constitution** and was supported by the affidavit of the applicant himself. Annexed to that affidavit are the prosecution's witness' statements most of which suggest that the deceased may have died of stab wounds inflicted by the applicant. I make reference to these statements only because the applicant has exhibited them on his affidavit but the truth of their contents will of course be tested at the hearing when these witnesses testify.

In the same affidavit the applicant deposed that he is a 5th year student at Dedan Kimathi University where he was undertaking a degree in Bachelor of Science, engineering prior to his arrest and incarceration. He sought to be released on bond pending his trial so that he could sit for his examinations in December 2015 and proceed to complete his course.

The state opposed the application for bail and in that regard it filed a replying affidavit sworn by Peter Mathya who identified himself as the investigating officer in the case against the applicant. The investigations officer denied that the applicant had registered for any examinations as alleged in his affidavit.

The investigations officer also deposed that both the deceased and the applicant hailed from the same area and since the community from which the deceased hailed had not recovered from his death, it was not safe to release the applicant back to the same community at this time.

The investigations officer was also apprehensive that the applicant may interfere with witness most of whom were his mates at the university; he asked this court to consider the application for bail only after these students had testified.

Article 49(1) (h) of the Constitution which provides for bail pending trial states that:-

49. (1) An arrested person has the right-

(a)…

(b)…

(c)…

(d)…

(e)…

(f)…

(g)…

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

One of the compelling reasons which the state has asked this court to consider and reject the applicant's application is that the applicant and the deceased hailed from the same area and since their community is likely to be hostile to the applicant, it would be unsafe to release him on bail pending trial. The other reason is that the applicant is likely to interfere with witness most of whom are students he is learning with at Dedan Kimathi University.

As for the first reason, the investigations officer has not provided any proof that both the deceased and the applicant hail from the same area; in fact he has not stated which particular 'area' he is referring to in his affidavit. Again there is no evidence that there is any sort of hostility from the either the deceased's or the applicant's community that may endanger the security of the applicant. This reason by the investigations officer is more speculative than compelling.

The second reason given by the state as a compelling reason against the grant of bail is that the applicant is likely to interfere with witnesses. Again this particular reason does not appeal to me to hold any water because first, the investigations are complete and if they are not the investigations officer has not stated so. Secondly, the applicant's fellow students whose evidence the applicant is said to likely interfere with have already recorded their statements and there is no evidence that they are likely to be influenced to say anything contrary to what they have recorded; in any event if that was to happen there are mechanisms within the Criminal Procedure Code, Cap 75 to deal with such kind of scenarios.

One of the oft-cited decisions whenever an application for bail pending trial arises is that of **Nganga versus Republic (1985) KLR 451.** In that case **Chesoni J (**as he then was) said that in exercising its discretion to grant an accused person bail under the Constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors. The learned judge said:-

Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions…generally in principal, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it shown by the prosecution that there are substantial grounds for believing that:

a. ***The accused will fail to turn up at his trial or to surrender to custody; or***

b. ***The accused may commit further offences; or***

c. ***He will obstruct the course of justice***

The primary purpose for bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore, agree with Mr Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In considering whether or not the accused will attend his trial the following matters must be considered:

a. ***The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found to be guilty: where the charge against the accused is more serious and punishment heavy, there are more probabilities and incentive to abscond, whereas in case of minor offences there may be no such incentive.***

b. ***The strength of the prosecution case. The court should not be willing to remand the accused in custody where the evidence against him is tenuous, even if the charge is serious. On the other hand, where the evidence against the accused person is strong, it may be justifiable to remand him in custody.***

c. ***The character and antecedents of the accused. Where the court has knowledge of the accused person's previous behaviour these may be considered, but by themselves they do not form the basis for refusing bail, although coupled with other factors may justify a refusal of bail.***

d. ***Accused's failure to surrender to bail on previous occasion will by itself be a good ground for refusing bail.***

e. ***Interference with prosecution witnesses. Where there is a likelihood of the accused interfering with the prosecution witness if he is released on bail, bail may be refused, but there must be strong evidence of the likelihood which is not rebutted and it must be such that the court cannot impose conditions to the bail to prevent such interference.***

It, therefore, follows that the court, in exercise of its discretion under section 123 (1) or (3) of the Criminal Procedure Code, in considering the accused's constitutional right to bail, it does not do so in the abstract but also considers the factors I have outlined above.

This decision was given against the backdrop of the old constitution but even then, the learned judge acknowledged that admission of an accused person to bail pending trial is a constitutional right and it is upon that understanding that I am of the humble view that the factors which the learned judge expressed as a necessary consideration in granting or declining to grant bail are relevant today as they were before **article 49(1) (h)** came into being except that they must be considered in the light of this constitutional provision. They would, in my view, constitute what is now regarded as compelling reasons in **article 49(1)(h)** of the **Constitution** where bail is refused.

I am satisfied that the state has not given compelling reasons that would persuade this court not to grant bail to the applicant pending the hearing and determination of his case. I will allow the applicant's application but considering the gravity of the charge against him and the circumstances under which the deceased may have died I will admit the applicant to bail pending his trial on the following conditions:-

1. The applicant shall execute a bond of Two Million Kenya Shillings with two sureties of the like sum;
2. The applicant shall report to the deputy registrar of this court, at Nyeri, once every month until this case is concluded;
3. The applicant shall not leave the jurisdiction of this court without the court's prior permission.

It is so ordered.

Dated, signed and delivered in open court this 12th day of February, 2016

Ngaah Jairus

JUDGE