



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

HIGH COURT CRIMINAL CASE NO. 9 OF 2013

HUSSEIN S. GALGALO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant is 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 night of 2nd and 3rd August, 2010 at Makutano market, 14 falls, in Thika East District, within Kiambu County, he murdered Joseph Mbugua Njoroge.

By a Notice of Motion dated 2nd December, 2013, brought to court under **Article 49(1) (h)** of the **Constitution**, the applicant has sought to be released on bail pending his trial. The motion was supported by his own affidavit sworn on 2nd December, 2013.

The state opposed this motion and filed a replying affidavit sworn by police constable Jonathan Musembi who described himself as a member of the team that investigated the murder of the deceased.

At the hearing of the motion, counsel for the applicant made brief submissions relying entirely on the applicant's supporting affidavit; he added in his submissions that the allegations in the replying affidavit opposing the motion were not substantiated.

In opposing the application Mr Njeru for the state said that the state was satisfied that there was sufficient evidence to sustain the charge against the applicant. In addition, the state counsel argued that going by the depositions in the affidavit of Jonathan Musembi, the applicant was a flight risk; the applicant is said to have disappeared for three years after he committed the offence and therefore there was a likelihood of him not showing up at the trial if he was released on bail. In those circumstances, so argued the state counsel, though it is the applicant's constitutional right to be released on bail pending trial, this right is not absolute and as he demonstrated, there were compelling reasons not to release him on bail.

Article 49(1) (h) of the **Constitution** which provides for bail pending trial and under which this application was made provides as follows:-

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.

The state has demonstrated that applicant is a flight risk; the states' contentions to this effect were not controverted. The applicant did not deny that he disappeared after the alleged murder in which he was a suspect; he did not deny that he was arrested when he resurfaced three years after the alleged murder of the deceased and that he was arrested by animated members of the public who threatened to lynch him. In the absence of any rebuttal from the applicant, I would accept the state's contentions as the truth as far as the determination of this application is concerned. I would go further and accept these contentions as the compelling reasons not to grant bail contemplated under **article 49 (1) (h)** of the **Constitution**.

Prior to the emergence of **article 49(1) (h)** of the **Constitution**, there were useful previous court decisions on this issue which, to a large extent, are relevant today as they were before the promulgation of the current constitution in which **article 49(1) (h)** is encapsulated. One of these decisions is found in the case of **Nganga versus Republic (1985) KLR 451**, where 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."

In my humble view, the factors that the learned judge outlined can now be properly considered in the context of what amounts to compelling reasons in the current legal regime. These factors remain a useful guide when considering whether bail should be granted and when it should not be granted subject, of course, to the relevant constitutional provisions. For example, the main purpose of bail which is to ensure the accused person attends trial and therefore if there is any reason to believe that he may not attend, the court will not grant him bail. The court is also enjoined to consider antecedent conduct of the applicant and also the nature of the offence for which he has been charged bearing in mind that the applicant is merely a suspect and he is innocent until he is proved guilty.

Considering all these factors and for the reasons I have given I am persuaded that the applicant's application dated 2nd December, 2013 has no merit and is hereby dismissed.

Dated, signed and delivered in open court this 10th day of March, 2014

Ngaah Jairus

JUDGE