



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 3 OF 2014

REPUBLIC.....PROSECUTOR

-VERSUS -

JOHN MWANGI CHEGE.....ACCUSED

RULING

This is a ruling on a bail application dated 21st January 2014 seeking for orders that the accused person/applicant be released on bail. The application is grounded on the affidavit of the applicant and on grounds on the face of the application.

Mr. Gongo argued the application for the applicant. He submitted that the accused is a young man aged 31 years with a wife and one child who are dependent on him. He has a fixed abode at Kayole and is not therefore a flight risk. He argues that having denied the charge, he is presumed innocent until proven guilty. The prosecution's allegations that the applicant absconded after commission of the crime is denied. The defence argues that the prosecution has not shown any compelling reasons for not releasing the applicant on bail.

In opposing the application, the prosecution relies on the replying affidavit of P.C. Antony Owino which sets out several grounds. It is argued that before he was arrested, the applicant tried to interfere with witnesses who have confirmed this fact in their statements. The prosecution therefore fears that there is a likelihood of the applicant repeating the same thing if released on bond. He was arrested at the scene of crime about a month later after he returned there to threaten the witnesses.

At the time of arrest, the accused was saved by police from the wrath of the public who wanted to beat him up. If he is released on bond the applicant's life will be in danger of violence by the public.

The prosecution fears that due to the seriousness of the offence and the severity of the sentence the accused is likely to abscond.

The right to bail is provided for by **Article 49(1)(h)** of the **Constitution**. The right is not absolute and is at the discretion of the court. Bail may be denied where the prosecution has given compelling reasons as to why the accused should not be released.

Under **Article 50(2)(a)** an accused person is presumed innocent until proven guilty. The strength of the prosecution's evidence against the accused is therefore not a bar to granting bail. Neither should bail be affected by the seriousness of the offence and the severity of the sentence. The reason for this statement is that the **Constitution** allows bail for all criminal offence which is a departure from the old regime of criminal law which outlawed bond for capital offenders.

In determining whether the applicant shall be released on bond, it is important that the applicant satisfies the court that he has a fixed abode. In his supporting affidavit, the accused only mentions that he is a resident of Kayole Estate but gives no particulars of his residence. In the likely event of absconding, the law enforcers would find particulars of residence very useful to trace an accused person. The applicant should have done better than he did to explain the location of his residence. Furthermore, the accused is not in permanent employment which would serve to satisfy the court that he can be located. He said he works as a tout on Route 17 Kayole.

As for the interference with prosecution witnesses the State argues that the accused remained at large for almost one month and later returned to the scene to threaten witnesses. The statements of D2 and D3 are eye witnesses confirm this allegation that when the applicant went to the butchery of D3, he said he would kill another person. This happened on the 24th December 2013 before the witnesses recorded their statements and while the accused was still at large. The accused was arrested the same the same day as he left the scene with the assistance of the members of public. The witnesses recorded their statements five (5) days later. I do agree with the defence that the two witnesses had not recorded statements and were therefore not witnesses of the prosecution. However, the applicant knew the two were potential witnesses since they were present at the time of the incident. When he threatened to kill yet another person, the intention must have been meant to scare the potential witnesses not to cooperate with the police.

The investigating officer refers to the applicant as a dangerous and careless person relying on the statements of the two witnesses. I would agree no more that a person who threatens to kill a person the same way he killed the deceased is indeed dangerous and has little or no regard to the law. He cannot be called a law-abiding citizen because the threat in itself is a criminal offence. The accused did not deny the averments of the investigating officer on oath. The fear of the prosecution that the accused is likely to interfere with witnesses or even cause harm to them is well founded.

On the issue of the security of the accused being in danger, I believe the accused would only have himself to blame if he was released on bond and returned to the scene or its surroundings. The prosecution should not worry about this and the security of the State should be guaranteed for all citizens whether or not one is facing a criminal charge. Emotions also cool with time and since the date of the incident, it is about four (4) months. I do not find this a good ground to oppose bond.

What is a "*compelling reason*" in the context of **Article 49(1)(h)**? The Concise Oxford English Dictionary defines as "*bring about by force or by pressure*". A compelling reason must be one that would powerfully evoke attention. The act of the applicant of returning to the scene of crime and threatening to kill someone the way he killed the deceased is in my considered opinion a compelling reason. The court is convinced that if the applicant is released on bail/bond before the prosecution witnesses have testified, he may make good his threat.

It is my finding that the prosecution has satisfied this court in regard to the probability of interference with witnesses by the applicant. For this reason, I find the application for bail/bond not merited and I decline to allow it.

F. N. MUCHEMI

JUDGE

Ruling delivered and dated this 13th day of May 2014 in the presence of:

1. Ms. Maari for State
2. Mr. Gongo for Mutitu for accused
3. Accused person

F. N. MUCHEMI

JUDGE