



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL CASE NO. 12 OF 2013

TIMOTHY MWATI MWANGIAPPLICANT

versus

REPUBLICRESPONDENT

RULING

1. The issue before this court is a notice of motion application filed on the 8th November 2013 by the 2nd accused Timothy Mwati Mwangi in the matter who is jointly charged with Simon Gacheru Mbeu for murder under section 203 read with section 204 of the Penal code. The applicant seeks for bail pending trial.
2. The application is based on stated grounds that it is the applicants constitutional right to be granted bail pending trial and that he needs to have an opportunity to take care of his aging parents. The application is further supported by the annexed affidavit of the applicant where he avers that he will be attending court without fail whenever required to and that chances of acquittal are high.
3. When the application came for mention the 4th December 2013, the matter was filed for hearing of the bond application filed. The state counsel M/s Kitoto was not objecting to grant of bail pending hearing. He assisted the court in arriving at an appropriate decision on the application before it. The court order for a pre-bail report which has now been filed which I have the advantage of reading.
4. The new constitution 2010 provides at Article 49(1)(h)

an arrested person has the right - (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.

5. In the decided case of REPUBLIC vs LUCY NJERI WAWERU & 3 OTHERS. (2013)eKLR, the principles for grant of bail were restated as:

a) Whether the accused is likely to turn up for trial should be granted bail.

b) Whether the accused persons are likely to interfere with the witnesses;

c) The nature of the charges.

d) The severity of the sentence.

e) The security of the accused if released on bond.

f) In case of illness of the accused, the severity of the illness.

g. Whether the accused person has a fixed abode within the jurisdiction of the court.

6. The constitution has left it to the court to decide when bail can be granted and to determine what amounts to compelling reasons. The accused has opined that he will be safe if released on bond and mingle with the community well and go on with his life. This must be looked at against the feeling of the members of society and the family of the victim which must also be taken into account by the court before the grant of bail in capital offences.
7. The court should be seen to be doing justice to the accused and the family of the victim. In the decided case of REPUBLIC vs JOSEPH WAMBUA MUTUNGA & 3 OTHERS (2010) eKLR, the court quoting in deciphering the meaning of Article 49(1)(h), it found that the words compelling reasons meant in short serving the interests of justice, as it is framed in the Malawi constitution which is close to ours, as was held in Malawi Supreme Court case of FADWECK MVAHE Vs REPUBLIC, MSCA CRIMINAL APPEAL 25 OF 2005.

“In considering the issue of the interests of justice the paramount issues the court will consider include the likelihood of the accused attending his trial, the risk that if he is released on bail the accused person may interfere with the prosecution witnesses or tamper with evidence, the likelihood of his committing another offence or other offences, and also the risk to the accused person, if granted bail and he returns to his village where the deceased's relations may harm him. In considering these issues the court may take into account, among other things, such factors as the gravity of the offence, the punishment likely to be imposed and, indeed, as was conceded by the court in the LUNGUZI CASE that the accused is a sickly person”

8. From this case the conditions for grant of bail are restated. So the compelling reasons to be considered before grant of bail are still the set conditions for consideration. The court in the same case went ahead to analyse the trend where the accused persons would deposit fake documents for security, and it was said to be so possible in cases where the accused is charged in a capital offence whose sentence is severe.
9. The other issue that is so paramount is the safety of the accused from the victims family and general public. If the society from where the accused comes from sees him as threat to their security they might lynch him just to eliminate him and hence the protection he needs from the state is eroded by grant of bail. This was the case that followed the granting of bail in the case of ABOUD ROGO MOHMED & ANOTHER V REPUBLIC (2011) eKLR where the court granted the accused bail in charges related to being a member of Allahabad group and or engaging in terrorism activities in 2nd February 2012, and in August 27th 2012 the accused was shot dead by unknown persons.
10. The possibility of hostility from the victims kin who do not expect to see the accused back on their streets before justice is done to them cannot be overlooked. They have in fact stated that they will not be comfortable with it at all, even though they have stated that they fer him jumping bail. The court cannot purport not to know the society's means of taming dangerous persons is by placing them in secured places like prisons for their own security.
11. In assessing the accused persons probity to abscond, in the Zimbabwean case of AITKEN & ANOTHER V ATTORNEY GENERAL 1992 (1)ZLR 249 (S), it was held that in deciding whether an accused person would abscond if released on bail the following factors constituted a useful guide:

a) The nature of the charge and the severity of the punishment likely to be imposed on the accused upon conviction.

b) The apparent strength or weakness of the state case.

c) The accused's ability to reach another country and the absence of extradition facilities from that country.

d) The accused's previous behaviour when previously released on bail; and

e) the credibility of the accused's own assurance of his intention and motivation to remain and stand trial. See also S v. JONGWE 2002 (2) ZLR 209 (S)

12. The court is still called to balance between denial of the human rights of an individual and offending the accused's right to be presumed innocent until proven guilty under article 50(2) () of our constitution. The caution was well stated in the case of UGANDA (DPP) vs COL RTD KIIZA BESINGYE..

“the applicant should not be deprived of his freedom unreasonably and bail should not be merely refused merely as a punishment, as this would conflict with the presumption of innocence. The court must consider and give the applicant the full benefit of his constitutional rights and freedoms by exercising its discretion judicially.”

13. Having considered all the facts and the case of REPUBLIC Vs OBY TYLENE OYUGI & 11 OTHERS (NYERI) H.C. CR. CASE NO. 38 OF 2010, the court's main issue of consideration, when determining an application for bail pending trial is whether or not the accused person will voluntarily and readily present himself to the trial court. In this instance case there is balancing between attendance to court when called to do so, and security of the applicant determine what reasonable bail can be, as courts can be tempted to impose bail which the accused will never raise, as a means to keep him in prison anyway. In the OBY TYLENE case supra, none of the accused persons has ever absconded though they are all out on bail in a murder charge.

14. Since denial or grant of bail is depended on the strength of opposition by the state which is charged with the duty to ensure security of both the applicant and the members of the public and applicants society specifically with the state not opposing the application, it would be unfair to deny bail. In that line the applicant is granted bail pending hearing of the suit on the following conditions:

1. ***The applicant do execute a bond of Ksh. 500,000/- and one surety of the same value.***
2. ***The applicant do report to the Sub-chief of Kibutio sub location every Thursday of the week.***

3 The applicant should not leave the sub location without seeking permission from Kibutio sub-chief and nearest police station OCS.

4 During the pendency of the suit the accused to attend mention before the Deputy Registrar once after every 30 days at a date to be set by the said Deputy Registrar at the time of approving bail terms.

Dated, signed and delivered at Nyeri this 16th day of May 2014.

J. WAKIAGA

JUDGE

16/5/2014

Before Justice J. Wakiaga

Court clerk - Ndungu

Mr. Kingori for Miss Nderitu for the accused.

Mr. Njue for the state.

Court: Ruling read in open court in the presence of the above named. Deputy Registrar to give mention dates.

J. WAKIAGA

JUDGE

16/5/2014