



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL CASE NO. 67 OF 2012

REPUBLIC PROSECUTOR

VERSUS

JAMES KIPROTICH BORE ACCUSED

RULING

The application for determination is the Notice of Motion dated 25th June, 2013 filed by the accused. He prays for bond pending trial. The application is supported by his own affidavit sworn on the same date. He says that he is an employee of Kenya Forest Service, Forest Ranger No. 02130. That since he was charged, he has been transferred from Elgeyo Forest at Tinderet Forest Station, Nandi South Zone with effect from 5th November, 2012. That Tinderet Forest Station is over 300 Km from Kapchemutwo Location where the offence was committed. That he has peptic ulcers for which he has undergone an operation and his health continues to deteriorate while in custody. That investigations have been completed and he has no intentions of interfering with witnesses. That the tension between the warring parties has ceased and there is no good reason why bail should not be granted.

The application is opposed vide a Replying Affidavit sworn by one Kenneth Kigen, a brother of the deceased on 15th July, 2013. He depones as follows: that the tension between the family of the accused and that of the deceased is still high, the latter being bitter at the death of its kin. That if accused is released on bond, tension between the forest rangers and the community will keep recurring. That the tension between the families has only eased because the accused is in remand. That the accused can access treatment at the remand.

In rejoinder, the Applicant filed a Further Affidavit sworn by himself on 17th July, 2013. He reiterates the averments contained in the supporting affidavits and adds that it is his right to be released on bond. He states that the medication given at the prison dispensary is not sufficient and that better treatment can only be found in hospitals outside the prison. That he has a right to apply for bond before this court for as many times as he wishes since these proceedings have not been stayed. That in any event, upon his arrest, he was given a free bond by the police whereupon he remained outside custody for 18 days during which period no one threatened his life.

The application was canvassed before me on 17th July, 2013. Mr. Tororey, Mr. Maritim and Mr. Mokuia advocates appeared for the accused, with Mr. Tororey being the lead Counsel, while prosecution counsel Mr. Wainaina appeared for the State. The respective Counsel made oral submissions which I have carefully considered.

In addition, Mr. Tororey relied on the following case law;

1. REPUBLIC-VS- DANSON MGUNYA & ANOTHER (2010) e KLR

2. REPUBLIC -VS- ALI MCHENI ALI (2011) e KLR

which I will make reference to hereafter .

Under Article 49 (1) (h), every arrested person has a right to be released on bond or bail unless there are compelling reasons not to be released. I would consider some of the compelling reasons to be;

(a) the likelihood of the accused interfering with the witnesses

(b) the likelihood of the accused absconding from the trial. This may be precipitated by the nature of the penalty likely to be handed against him in the event of a conviction

(c) the security of the accused and that of the witnesses.

(d) the weight of evidence against the accused.

In the instant case, the following issues have been raised which this court must consider:-

1. The security of the accused.
2. Tension between the accused's and the deceased's families.
3. Interference with witnesses.
4. Accused's health.

SECURITY OF THE ACCUSED

It must be noted that this is the third time the accused is making an application for bond before this court. The first ruling was made on 1st November, 2012 by Hon. Justice Mshila who declined to grant the accused bail. She made a ruling in the words "**Ruling on application for admission to bail disallowed. Applicant granted fourteen (14) days Right of Appeal.**" The prosecuting counsel, Mr. Wainaina had argued before the Judge that the accused was likely to abscond from trial. He also submitted that there was very bad tension between the family of the accused and that of the deceased and that the deceased's family was still very bitter with the accused. Thus, releasing the accused would endanger his life as the deceased family was likely to turn against him.

The second request for bail was made before me on 12th March, 2013. Mr. Mokuwa who appeared for the accused submitted that the tension had since eased and accordingly produced a probation officer's report in this respect.

In opposing the application, Mr. Wainaina on the other hand submitted that defence should have appealed against the ruling of Hon. Justice Mshila disallowing the bail. He however urged the court to look at the Probation Officer's report and make an objective finding.

I delivered the ruling on 19th March, 2013. I noted that since the accused had been transferred from his place of work the tension would slowly fade away and left the accused to renew his application for bond when need arises.

In the case of **REPUBLIC -VS- DANSON MGUNYA AND ANOTHER (2010) e KLR**, the Judge referred to a Nigerian authority - **AL HAJI MUIJAHID DUKUBO - ASAVI -VS- FEDERAL REPUBLIC OF NIGERIA S. C. 20A/2006**. In the latter case, the court enunciated the criteria to be used in considering an application for bail, one of which is detention for the

protection of the accused.

I wholly concur with the case law. I have said elsewhere that it goes against the spirit of the protection of the right to sanctity of life to release an accused where there is a likelihood that he may lose his life due to mob justice. When such a concern as to doubt the security of the accused when granted bail is brought to the attention of the court, the latter should act conscientiously in deciding whether or not to grant bail.

However, over the period the accused has been in remand, the circumstances on the ground have changed. First, I agree with the defence that tension was most high at the time the deceased died. The period succeeding the death of the deceased was followed by the accused's release on police personal bond. While he was out on the said bond, no one harmed him or threatened to kill him. The court has however treated this assertion with a lot of caution, noting that it was not properly demonstrated where the deceased stayed upon his released on police bond and before he was charged in court.

Second, the above fact notwithstanding, it is now factual that since 5th November, 2012, the accused has since been transferred from Elgeyo Forest to Tinderet Forest Station, Nandi South Zone. This is a Station far from where he worked by the time the offence was allegedly committed.

It is now more than one year since the accused was charged. Over time, it is expected that tempers have cooled down and the tension between the families eased.

May I add that this case is not an isolated one. In all murder cases, the family of the victim is the offended party which is left nursing very bitter psychological and emotional wounds at the loss of their loved ones. The bitterness cannot however be used to deny the accused his constitutional right. If the acrimony arising out of a criminal offence would be advanced as an excuse to commit an offence.

I am therefore persuaded that, with the passage of time, the tempers have cooled down and any person who uses the excuse of bitterness to commit an offence cannot be excused by the law. This is so because it is deemed that ignorance of the law is no defence and the same cannot be advanced as a defence if one is found on the wrong side of the law.

In **REPUBLIC -VS- DANSON MGUNYA & ANOTHER (Supra)**, the court found as not compelling reasons not to grant bail, the fact that the security of the accused was threatened. It said:-

“The allegations about their security and possibility of being harmed by the public is not supported by any evidence – in any case, the members of the public are deemed to know the law and the consequences of taking the law in their own hands ---”

Therefore, anyone who would attack the accused or his family would do so at his/her own risk. It is expected that the deceased's family should adhere to the rule of law, which is the reason the accused is in court facing this murder trial.

TENSION BETWEEN THE FAMILIES

In the same spirit, and bearing in mind that the accused has now been transferred miles from where he formerly worked, there can no longer be such bad blood between the family of the accused and that of the deceased.

Moreso, the Probation Officer's report dated 12th March, 2013 signed by F. K. Kirongeny of Elgeyo Marakwet County clearly demonstrates that the accused's family has worked towards a reconciliation with the deceased's family. The latter has been given one cow by the former which they have accepted as a sign of forgiveness.

In this respect, it is clear that the deceased's family has no intention of creating disharmony with the family of the accused.

INTERFERENCE WITH THE WITNESSES

The prosecution has not advanced one single reason as to why it feels or thinks that the accused would interfere with the witnesses. It has neither been demonstrated that he occasioned any delay of the trial. In the circumstances, I find this allegation to be one without basis.

ACCUSED HEALTH

Medical documents have been produced in prove that the accused suffers from peptic ulcers. Whereas, it is true that treatment is availed to the remands in prison, combined with my foregoing observations, it is in the public good that this court grants him bail so that he accesses better treatment.

Moreover, it must be borne in mind, that the accused person is presumed innocent until and/or unless he is proven guilty. The prosecution has defended its position in opposition to the application on assumption that the accused is already guilty of the offence. The presumption of innocence can only be dislodged upon the full trial when the court will make a finding accordingly.

Again, the burden of demonstrating that there exists compelling reasons as to why accused should not be granted bail squarely lies with the prosecution as was noted in **ALI MCHENI ALI ALIAS SHEE LAKO -VS- REPUBLIC (2011) e KLR**. It is my view in this regard, that the prosecution has not met this threshold. The court in return must safeguard the accused's right as enshrined under Article 49 (1) (h) of the Constitution which in itself comprises a part of the process of a fair trial. In this respect, an accused cannot be held in remand on mere allegations of apprehension that are not substantiated. In any case, these apprehensions have been dislodged by the accused providing evidence justifying why the court should grant him bail.

Finally, it is the accused's right to apply for bail before this court for as many times as he wishes. Filing an appeal before the Court of Appeal is also an option if the application for bail is disallowed. But the right to appeal does not preclude an accused from re-applying for bail as often as need arises.

In the end, I allow the application and admit the accused to a bond of Ksh. 1,000,000/= with one surety of a similar. The surety shall be assessed by the Deputy Registrar of this court.

DATED and DELIVERED at ELDORET this 9th day of October, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Tororey & Mr. Maritim for the Accused

Mr. Wainaina for the State