

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL APPLICATION NO. 446 OF 1986

ELIUD MWANGI MWAURA.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

This is an application for bail under section 123(3) of the Criminal Procedure Code made on behalf of Eliud Mwangi Mwaura, who was on December 9, 1985 taken before the senior resident magistrate, at Kiambu, with three others charged with two counts of murder contrary to section 204 of the Penal Code.

The affidavit in support of the application sworn to on October 13, 1986, by Mr Moses Masika Wetangula, counsel for the applicant, in economical terms sets out the facts about the applicant and the case in general. He deponed, that the applicant was arrested on November 23, 1985, in connection with the alleged offences; that he was taken to court on December 9, 1985, from which date he has been appearing in court for mentions at two weeks intervals; that for some reason unknown to him committal proceedings have not been finalized; that the offence of murder is bailable; that the applicant has assured him that he will be able to produce substantial and acceptable sureties should he be granted the orders sought; and that the applicant has promised that he will at all times appear in court whenever required to do so by the court.

The main thrust of submissions by Mr Wetangula was that there was no likelihood or danger of the applicant absconding if he is admitted to bail. He submitted that the applicant has no travel documents, presumably, which he would use to escape out of the country, they are retained by Kenyan courts. Also that the applicant being an assistant chief, he will be able to provide substantial sureties who will guarantee his appearance in court at all times he will be required to do so. He did not think that it was right for courts to consider the seriousness of the offence or offences or the penalties they carry, before a conviction is entered, because of the legal presumption of innocence until the contrary is proved.

The learned Assistant Deputy Public Prosecutor Mr Chunga, for the respondent, while conceding the applicant's contention that he had been in custody for an inordinately long period awaiting committal proceedings, and also that the offence is bailable, he nonetheless submitted that the interests of justice dictate that the applicant be not admitted to bail. The substance of his strong opposition to the application was that admitting the applicant to bail will expose him to the great temptation of absconding. He stated from the bar that committal documents have been received in the Attorney General's office for directions and he expected that all parties concerned will have received their respective copies within a fortnight from October 29, 1986.

It is not in dispute that bail is a constitutional right of an accused, and that the decision whether or not to grant bail to an accused person is in the discretion of the court to which an application for bail has been made; and subject to the discretion being exercised judicially each case has to be considered on its own peculiar facts. The factors to consider in granting or refusing bail are well settled in this country, as is clear from the authorities cited and relied upon by both counsel in support of their respective submissions. Those factors are summarized in the case of *George Kamau Nganga v Republic* H C CR Appl No 61 of 1981 in which Chesoni J (as he then was) restated the principles as set out in *Halsbury's Laws of England*, 3rd edition p 373 paragraph 678. The paragraph, in pertinent part, states:

“In exercising their discretion with regard to bail the justices must consider the nature of the offence, the

strength of the evidence, the character or behaviour of the accused and the seriousness of the punishment which may be awarded if the accused is found guilty.”

The underlying consideration is whether an accused will turn up at the appointed place and time for his trial for the offence charged. Hancox J (as he then was) re-echoed the same principles in the later decision of *Opinder Singh Naul v Republic* H C Misc Cr Appl No 178 of 1981, except that he seemed to say that the risk of an applicant absconding outweighs his quest for freedom.

The foregoing authorities concerned themselves with factors to be taken into account in applications for bail generally. However, the decision in the case of *Margaret Magiri Ngui v Republic* H C Cr Appl No 59 of 1985, deals specifically with offences which carry the mandatory death penalty. That was a decision of a constitutional court comprising a bench of three. The court had, in pertinent part, this to say:

“We wish to add however that following the practice in Kenya prior to November 10, 1978, and subject to the provisions of section 72 (5) of the constitution bail as a general rule should not be granted where the offence charged carries a mandatory death penalty, so great is the temptation to abscond or ‘jump bail’ in such cases. This is the practice also in England in cases of murder although the death penalty has been abolished.”

Mr Wetangula was of the view that the court in expressing that view was in effect putting the cart before the horse. With profound respect to him, the court did no more than restate one of the principal factors which a court must consider before deciding whether or not to admit an applicant to bail, viz, whether the applicant will appear during his trial for the offence charged. I wish however to state that in certain cases there may well exist exceptional or special circumstances personal to the applicant which when weighed against the risk of the applicant absconding if released on bail, the balance will tilt in favour of granting bail.

The issue which I must now grapple with is whether on the facts and circumstances of the applicant’s case there exists exceptional or special circumstances to compel me to exercise my judicial discretion in his favour. The applicant and his three co-accused persons stand charged with the murder of two men. The facts upon which the charges are based are as yet unknown. The applicant has been in custody for over eleven months. No explanation has been tendered as to the delay in finalizing the compilation of committal documents as to facilitate the holding of committal proceedings. Mr Chunga, stated from the bar that the committal documents are already in the Attorney General’s office awaiting perusal and directions and he hoped that the same would have been served on the applicant at the expiry of two weeks from October 29, 1986 to that Mr Wetangula replied that a similar undertaking had been given by the prosecution sometimes in January 1986, but to no avail. I do not consider that the whole period since the applicant and his co-accused were arrested to date has been reasonably necessary to finalize investigations of the case and the compilation of committal documents. It may become necessary to fix a time limit for the preparation of committal documents in a bid to ensure speedy finalization of committal proceedings.

I have given serious and anxious consideration to this application, and in my view, although delay with nothing more, if sufficiently prolonged, could in some cases compel a court to admit to bail an accused facing a capital charge, I consider that due to the great risk of the accused absconding circumstances personal to him need to be shown which will outweigh the risk of him absconding before a court may admit him to bail. I find none in the present case. Accordingly the application fails and is dismissed.

I however direct that the committal documents be compiled and be duly served on the applicant, and also his co-accused latest by November 30, 1986, failing which the applicant may renew his application. Orders accordingly.

Dated and Delivered in Nairobi this 5th day of November 1986.

S.E.O.BOSIRE

JUDGE