



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CRIMINAL CASE NO 50 OF 2019

REPUBLIC.....DPP

VERSUS

VICTOR MUSOMI MOGAKA.....ACCUSED

RULING

1. In this case **Victor Musomi Mogaka** is charged with the offence of Murder for which he pleaded not guilty. His trial has not commenced and he has presented an application by Notice of Motion dated 14th July 2020 for consideration. He seeks by that application he be admitted to bond/bail pending determination of this case.

2. The salient points the Accused brought before court by his affidavit, dated 14th July 2020, in support of the application are that he is a law abiding citizen and he has no intentions of “running from the jurisdiction of this Honourable Court”; and he has co-operated with the police and the prosecution.

3. The application is opposed by prosecution through the affidavit of P.C. Peter Kaibiru, one of the investigating officers of this case. He deposed in that affidavit that the Accused, after the commission of the alleged offence, fled from Witeithie in Kiambu County to Kisii County where he was arrested; that most of the witnesses in this case are known to the Accused and if the Accused is released on bail he may interfere with those with those witnesses; and that the Accused life will be in danger because the deceased’s family are still bitter and have “not healed from losing their loved one.”

ANALYSIS AND DETERMINATION

4. Article 49(1) (h) of the Constitution provides that an arrested/accused person has a right to be released on bond or bail on reasonable terms unless there are compelling reasons not to be released.

5. Prosecution in opposing the application for bail pending trial alluded to the fact that the Accused, did flee out of Kiambu County, where the offence occurred, to Kisii County where he was arrested and produced before court to be charged with the present offence. Section 123 of the Criminal Procedure Code gives circumstances that should be considered when considering a bail application. The pertinent parameters set out in that Section relevant to the application are that bail may be denied where an Accused is likely to fail to surrender to custody and may also be denied and Accused can be kept in custody for his own protection.

6. The Accused did not deny that he was arrested in Kisii County having left Kiambu County. He however was of the view that his life is not in danger from the deceased family.

7. Having considered the facts placed before me I do find that there are indeed no compelling reasons to deny the Accused bail pending trial it is however a concern of this court there is evidence of propensity of Accused taking flight before the conclusion of this case, having done the same as stated before. It also cannot escape this court’s attention that the Accused herein is facing a charge of a serious offence which can lead, on conviction, to maximum sentence of death. That consideration was referred to in the case **Republic -v- Robert Zippor Nzilu (2018) e KLR** as follows:

“Mbogholi Msagha, J in Criminal Application No. 319 of 2002 Priscilla Jemutai Kolonge vs. Republic (unreported) at page 3, wherein he held as follows:

“However, the nature of the charge or offence and the seriousness of the punishment if the applicant is found guilty must be considered in applications of this nature. I subscribe to the observation that 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.”

8. It is with all the above in mind that I grant the following orders:

(a) The Accused shall be released on bond of KShs.2million with two sureties of similar amount.

(b) The Accused is released as stated above on condition that he will reside outside Kiambu County during the pendency of this case and shall not interfere with the prosecution's witnesses.

SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY 2021.

MARY KASANGO

JUDGE

11th February 2021

Before Justice Mary Kasango

C/A - Kevin

Accused – Victor Musomi Mogaka - Present

For the Accused – No appearance

For DPP - Miss Kathambi

COURT

Ruling virtually delivered in their presence.

MARY KASANGO

JUDGE