



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL CASE NO. 9 OF 2019

MUNIR MURAD SALIM.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING ON BAIL PENDING TRIAL

1. The accused person, Munir Murad Salim was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 4th January, 2019 at Barisheba area, Kisauni sub-county, murdered SA a female aged 8 years.
2. Ms Rajab for the accused person prayed for the release of the accused person on bail pending trial. She submitted that the accused has a right to be released on bond/bail pending trial under the provisions of Article 49(1)(h) of the Constitution of Kenya, on reasonable conditions unless there are compelling reasons not to release the said person.
3. She stated that the burden is on the prosecution to demonstrate that there are compelling reasons to deny the accused person bond/bail. Ms Rajab cited the provisions of Article 50(2)(a) of the Constitution which provide for the right of an accused person to fair hearing and the presumption of innocence unless the contrary is proved. In making reference to Section 123A(1) of the Criminal Procedure Code (CPC), it was submitted that the court is enjoined to look at the antecedents and community ties of the accused person. She submitted that the accused person herein is law abiding and is of good character.
4. With regard to forfeiture of the bond in Shanzu Senior Principal Magistrate's Court Criminal Case No. 638 of 2019, Ms Rajab explained that cash bail in the sum of Kshs. 10,000/= was forfeited to the State on 26th June, 2019 when the accused person failed to attend court.
5. His Counsel explained that by then, he was at Shimo-la-Tewa Prison where he had been remanded as a result of this murder case. It was stated that the accused person was not produced in court and that is the reason why his bond was forfeited to the State. She therefore submitted that under the provisions of Section 123A(2) of the CPC, this court has to be satisfied that since the accused person's bond was forfeited, he is not entitled to being released on bond/bail in this case.
6. She stated that the allegations contained in the affidavit of PC King'ori had not been substantiated. She made reference to paragraph 17 of the said affidavit which was filed in opposition of the release of her client. She stated that it indicates that the accused person has no fixed abode but the Probation Officer in the Pre-bail report stated that he has a place to stay. Ms Rajab submitted that the main purpose for seeking the release of the accused person on bond/bail is to secure his attendance in court. She therefore prayed for him to be released on reasonable bond/bail terms.
7. Ms Marindah, Prosecution Counsel, opposed the release of the accused person on bond/bail. She relied on the Pre-bail report filed by the Probation Officer and the affidavit sworn on 27th May, 2019 by PC Kong'ori. She also relied on the provisions of Section 123A of the CPC and Article 49(1)(h) of the Constitution, as well as the Judiciary of Kenya Bail and Bond Policy Guidelines.
8. She submitted that on the issue of threats being made to witnesses, the accused person was married to one of the witnesses in this case and that 2 reports of him having threatened some witnesses were made to Nyali Police Station vide OB No. 64/10/04/2019 and OB No. 39/5/1/2019. She added that the 2 reports of threats which were made before his arrest were awaiting investigations. Reference was made to paragraph 13 of the said affidavit which states that the accused person had been following some witnesses in this case.
9. Ms Marindah explained that the accused person had been released on Police cash bail in the sum of Kshs. 10,000/= which was forfeited to the State when he failed to attend court in Shanzu Senior Principal Magistrate's Court Criminal Case No. 1824 of 2018. She explained that the said case was withdrawn when the accused person failed to attend court on 10th December, 2018. After he was re-arrested a new case

No. 638 of 2019 was filed in Shanzu Senior Principal Magistrate's Court.

10. Counsel for the prosecution submitted that when the accused person was arrested for this case, he was found in possession of different identification cards which creates a doubt as to whether he is a man of good character. She also stated that the prosecution was waiting for analysis from the Cyber Crime Unit in regard to phone communication from the accused person's cell phone number. She concluded her arguments by stating that compelling reasons exist for this court to decline to release the accused person on bond/bail.

11. In responding to the respondent's submissions, Ms Rajab submitted that the report made to Nyali Police Station vide OB No. 39/5/1/2019 was made before the accused person was charged. She referred to the respondent's supporting affidavit which in her view, contained contradictions. She explained that the accused person was a student at Bandari College Dar-es Salaam thus his frequent visits to Tanzania. She submitted that no compelling reasons existed for denying the accused person bond/bail.

ANALYSIS AND DETERMINATION

12. The affidavit of PC King'ori was sworn on 27th May, 2019. I have read its contents alongside the provisions of Article 49(1)(h) of the Constitution and Section 123A(1) of the CPC. The antecedents of the accused person indicate that at one time he was released on a police bond and subsequently charged in Shanzu Senior Principal Magistrate's Court Criminal Case No. 1824 of 2018. He was required to attend court on 10th Decembers, 2018 but failed to do so. He was re-arrested 4 months later on 18th April, 2019. The Investigating Officer herein is apprehensive that the accused person will abscond court if he is released on bond/bail pending trial in this case.

13. Section 123(A)(1) of the CPC provides that one of the factors that this court needs to take into consideration is if the accused person has previously been released on bond/bail but failed to attend court and if that has happened in the past, it is a compelling reason to deny an accused person bond/bail. In this case, the fact that the accused person had previously jumped bail works to his detriment.

14. The reports that were made to Nyali Police Station to the effect that the accused person was issuing threats to witnesses and following them, have no bearing with this murder case as they allegedly happened before the accused person was arrested for this offence. The said allegations form the subject of the charge of offensive conduct against the accused person.

15. On the averment by PC King'ori that the accused person had no fixed abode, the latter is said to have been married to one of the witnesses who is lined up to testify for the prosecution. As such, he must have had a fixed abode when he was married to the said prosecution witness. The Pre-bail report indicates that he has a fixed abode in Senti Kumi village. It was reported by the Probation Officer that the accused person travels to Tanzania many times and he could be a flight risk.

16. The Investigating Officer in paragraph 15 of his affidavit deposes that the accused person was found in possession of different identification cards which he could not account for. The said deposition in my considered view is a matter of concern to this court. Although it was said by his counsel that his frequent travels to Tanzania were for purposes of pursuing education at Bandari College in Dar-es-salaam, it cannot be ruled out that if he released on bond/bail pending trial, the accused person can easily acquire a different identification card and take flight to Tanzania.

17. I find that compelling reasons do exist to deny the accused person bond/bail pending trial for having failed to attend court in Shanzu after being released on a Police bond and for having been found in possession of different identity cards at the time of his arrest.

18. His application for release on bond/bail pending trial is hereby dismissed. He shall remain in Shimo-la-Tewa Prison pending the hearing and determination of this case. He has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 24th day of July, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Rajab for the accused person

Accused person present

Mr. Kemo - Prosecution Counsel for the DPP

Mr. Mohamed Mohamud- Court Assistant