



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAJIADO

CRIMINAL DIVISION

CRIMINAL CASE NO.5 OF 2017

LAWRENCE SIAMETO MOKOOISO.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING OF THE COURT

1. The accused person herein **LAWRENCE SIAMETO MOKOOISO** is charged with one count of murder contrary to Section 203 as a read with Section 204 of the Penal code. The particulars of the offence are that:-

“Between the night of 28th April, 2017 and the wee hours of the morning of 29th April, 2017 at Ngong Township within Kajiado Sub-County within Kajiado County, murdered **DENNIS GIBSON LIVEHA**.

2. The accused was arraigned in court on the 18th May, 2017 and he returned a plea of not guilty.

3. By a Notice of Motion dated 18/05/2017, the accused seeks to be released on bail or bond on such reasonable terms as the court may determine pending the trial. The Application has been brought under Article 49(1) ((h) of the Constitution and the inherent powers of the Court and all other enabling provisions of the applicable law. The application is premised on four grounds namely:-

a. That the Applicant has been in custody since 29th April, 2017 having been detained by the police in respect to the charge.

b. That the Applicant was detained further by an order of this Honourable Court on 2/05/2017 for a further 14 days to allow the police to conclude their investigations for a mental health check to confirm that he is fit to stand trial.

c. That the accused continues to languish in jail despite the fact that it is his Constitutional right to be granted bail.

d. That it is in the interest of justice that the Applicant be admitted to bail.

The application is further grounded on a supporting affidavit sworn by the accused’s learned Counsel on even date whose gist is that there are no compelling reasons to deny accused bond that the accused is willing to abide by any directions given by court in regard to bail and that the accused is a resident of

Ngong and is not a flight risk.

4. The Respondent through Mr. Akula learned counsel for the state, opposed the Application and relied on replying affidavits by the investigating officer Corporal Agnes Chepkosgei and one **Pamela Vugutsa Imbuka**, mother of the deceased herein Denis Gibosn Liveha. The basis of the objection to release of accused on bond is firstly that the family of the deceased and deceased's fellow colleagues are still in grief and yet to come to terms with the death of the deceased and thus the release of accused is likely to disturb public order, secondly that some witnesses have declined to record statements against the accused, thirdly that accused is a flight risk as he has no known fixed place of abode, fourthly that accused is an unlicensed firearm holder and he is likely to be charged with related offences and lastly that it is in the interest of the accused not be released on bond for his own safety.

5. Learned Counsels presented brief oral submissions. Mr. Steve Kimathi learned Counsel for the accused submitted that by dint of Article 49(1) (h) of the Constitution, the accused should be released on bond as there are no compelling reasons advanced by the Respondent to the contrary. Counsel further urged this Court to consider the pre-bail report filed herein that shows accused is not a flight risk. Counsel further submitted that the witness protection agency would be at hand to take care of safety of witnesses. It was finally submitted for the accused that he has a fixed place of abode and he is ready to abide by conditions to be imposed by the court.

6. Mr. Akula, learned Counsel for the Respondent, submitted that there are indeed compelling reasons for the denial of bond as a result of such factors as nature of the offence, strength of Prosecution's case, witness interference, safety of the accused, ability of accused to flee from the jurisdiction of the court. It was further submitted for the Respondent that the accused was not a licensed firearm holder and police are on his case regarding the same.

7. I have considered the Applicant's Application and the rival affidavits as well as submissions of learned counsels for the parties herein. The only issue for determination is whether or not there are compelling reasons to deny the release of accused on bail or bond pending trial.

8. To start with, Article 49(1) (h) of the Constitution allows an arrested person to be released on bond or bail pending a charge or trial unless there are compelling reasons not to be so released. This is so because an accused person is presumed innocent until proved guilty and hence Article 49(1) (h) is anchored on the principle of presumption of innocence until the guilt of an accused is proved by the state. The right to bail thus can be denied or limited if the state demonstrates that there are compelling reasons. The Respondent has presented a raft of reasons warranting a denial of bond such as nature of offence, strength of Prosecution's case, witness interference, ability of accused to flee from jurisdiction, safety of an accused if released and other likely offences to be preferred in regard to accused's status as a firearm holder.

9. Indeed the above factors presented by the Respondent could be regarded as compelling reasons. However there is need to consider the above factors as against the re-bail report filed by the County Probation Director Leah Kavali. The said pre-bail report is favourable for release of accused on bond on the ground that the local administration has nothing untoward against him and further there is an intention in the offing for families of accused and deceased initiating reconciliation meetings. The report further reveals that the accused has strong family and community ties and he is not a threat to himself and community as well as not being a flight risk as he has a fixed abode. As the Constitution has not clearly spelt out what exactly a compelling reason is, it is imperative for the Court to consider the reasons advanced by the state and find out if indeed they meet the threshold of "**compelling.**" The '**compelling**' must be something so strong, weighty, convincing or one which must be believed or given way. It is against this backdrop that I must consider the reasons advanced by the Respondent herein. Already the pre-bail report is favourable towards the release of the accused on bail or bond. The paramount issue for consideration by this court is whether the accused will avail himself for trial if admitted to bail. Looking at the reasons advanced by the Respondent, I find the same has not met the threshold of "**compelling reasons.**" For instance the ground that the nature and strength of the prosecution is not plausible looked at from the view that the Constitution has made all offences including this one of murderailable. Again

the issue for alleged interference of witnesses has not been properly advanced as no cogent evidence has been tendered to that effect. None of the witnesses has sworn an affidavit to the effect that he or she has been contacted or likely to be interfered by the accused. In any case should there be issues to do with security of witnesses, the same would be adequately catered for under the Witness Protection Agency. Most of the witnesses who recorded statements appear to be police officers who are unlikely to be said to be vulnerable in any way. As regards the claim that accused is likely to be a flight risk, the pre-bail report has presented a contrary view that he is a family man with a fixed place of abode and that the local administration knows him quite well as a law abiding citizen in the area and aren't opposed to his release on bond. As regards the claim that the safety of accused will be at risk if released, I find the same not a compelling reason. Even though the Respondent has indicated that both the deceased's relatives and colleagues are yet to come to terms with the death of the deceased, I am unable to believe that the deceased's colleagues who are Administration Police Officers would seek revenge by killing or endangering the accused. The said officers are understood to have taken an oath to protect life and property and it cannot be heard that they will allow themselves to descend into the arena of mob justice. Indeed mob justice is outlawed and that persons who have been alleged to have committed offences and have been arrested are entitled to be protected by having their security guaranteed by the state even as they go through the trial process. Hence it is improper for the Respondent to use safety as a ground for opposing release of accused on bond yet the Respondent is obligated to guarantee security to all citizens.

10. As regards the issue of likelihood of new charges relating to accused's status as a firearms holder, I find the Respondent is at liberty to conduct investigations about the same. However, it is noted that those related offences are bailable under the law and once preferred then the state may apply to Court to cancel bail for one reason or other and the court would of course consider the Application on merits.

11. Finally, as regards the Respondents assertion that the deceased's colleagues and family are yet to come to terms with the death of the deceased, I must point out that it is the right of deceased's colleagues and relatives to grieve over the demise of the deceased but then they are obliged to also allow the law take its course in regard to the trial of the accused herein. The pre-bail report filed herein is a pointer that if there were any tensions the same have simmered, to an extent that accused's release is not likely to polarize those tensions.

12. In the result, it is the finding of this Court that there are no compelling reasons to deny the accused from being released on bond. The Application for bail is merited and is allowed on the following terms and conditions namely:-

- 1. The accused is released on bond of Kshs. 2 million with two (2) sureties of similar amount.***
- 2. The accused upon release, shall report to the D.C.I.O Ngong Police Station once every Friday of every week until investigations are finalized or until further orders of the Court.***
- 3. The accused is ordered not to interfere with Prosecution witnesses and in the event of such interference the bond herein shall be cancelled.***
- 4. The matter be placed before the Deputy Registrar on the 5/06/2017 for purposes of fixing hearing or mention dates as agreed by parties for directions before the Judge.***

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **29th** day of **MAY** 2017.

D. K. KEMEI

JUDGE

In the presence of:

Kimathi for accused.....

Akula for Respondent

C/A: Kituva.....