



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 33 OF 2015

COSMAS MUTUTA MUVIU.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The accused person through his counsel has applied for bail pending trial on charge of murder contrary to section 204 as read with 203 of the Penal Code (Cap 63) Laws of Kenya. His application is expressed as being brought under the provisions of Article 49 (h) of the 2010 Constitution of Kenya and under all other enabling provisions of the law.

The state does not oppose his application.

The application is supported by the accused's supporting affidavit dated 18th January, 2016. According to his affidavit, the accused has stated that he is not a flight risk as he does not hold a passport. He has further stated that he is the sole breadwinner of his family, which includes his two minor children aged 11 months and 8 years. Their mother is unemployed. Furthermore, he has stated that the 8 year child is epileptic and needs his constant support most of the times. He has also stated that if he is not released on bail, his minor children will be exposed to unnecessary suffering. Again, he has continued to state that if he is released on bail/bond, he will not interfere with witnesses. He also states that his continued stay in the remand custody is having a negative effect on him in respect of his employment, family and is causing him depression. Finally, the accused has stated that he will diligently and religiously attend court if he is released on bail/bond terms and that it is in the interest of justice that he be granted bail/bond.

The Applicable Law

According to the 2010 Constitution in Article 49 (1) (h) a person who has been arrested has a right to be released on bail or bond on reasonable conditions pending a charge or trial unless there are compelling reasons against the release of such person.

It is clear that the right to be released on bail is a constitutionally guaranteed right. It is also clear that all offences are bailable under the 2010 Constitution of Kenya. The Constitution requires that persons who are arrested are released on bail unless there are compelling reasons that militate against their release.

The reasons for this constitutional provision is that every person, who is charged with an offence in court is constitutionally presumed to be innocent in terms of Article 50 (2) (a) of the 2010 Constitution. It follows from this presumption of innocence that such a person should not lightly lose his freedom.

In considering whether or not a person should be released on bail or bond a court is required to exercise

its discretion judicially. A major consideration in matters of bail is whether or not accused will attend his trial if he is released on bail or bond. Once it is shown that an accused is likely to attend his trial if released on bail, he should be released on bail or bond unless there are conditions that militate against his release.

Once such militating factor is interference with witnesses. It has long been recognized that an accused who interferes with witnesses cannot qualify to be granted bail. In *Panju v R (1973) E.A. 282* the High Court held that where an allegation of interference with witnesses is used as a ground of opposing release on bail, the prosecution must produce evidence. This was the practice under the independence Constitution of 1963. The requirement to produce evidence to support an allegation of interference with witnesses is in principle good law. The reason being that a decision of a court must be based on evidence.

In *R v Joktan Mayende & 4 Others the High Court (at Bungoma) in Criminal Case No. 55 of 2007* the accused person therein was denied bail on the ground of interference with witnesses. That decision was based upon the provisions of Article 49 (1) (b) of the 2010 Constitution.

Furthermore, in terms of section 123 (2) of the Criminal Procedure Code (Cap 75) of the Laws of Kenya, “*the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.*”

Evaluation of The Affidavit Evidence Findings and The Law

I have considered the affidavit evidence of the accused. I believe and find that the accused earns Kshs 6,000/- per month from his occupation as a grounds man (shamba boy). I also believe and find that he is a married person with two children, one of whom suffers from **epilepsy** and the second one being a minor of 11 months. Furthermore, I believe his evidence that the mother of the children is not employed and that they all depend on him for their upkeep. In other words, he is the sole breadwinner of the family. Finally, I find that the accused is a person of moderate means in terms of his earning capacity and family status. After considering the circumstances of this case, together with the offence charged, I find that this is a proper case for the release of the accused person on bail pending his trial on a charge of murder. I also find that there are no factors that militate against his release on bail.

In the light of the constitutional provisions and the principles set out in the foregoing cases, I find that the accused has met the Constitutional threshold for release on bail pending his trial on a charge of murder. The accused is hereby granted bail in the sum of Kshs 150,000/- with a surety of a similar amount.

The application of the accused on bail pending the hearing and determination of his trial is hereby granted.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **27th** day of **JANUARY .2016**

In the presence of Mr. Onjoro for State

in the absence of counsel for the accused.

Accused present.

Court clerk Mr. Njue

J.M BWONWONGA

JUDGE

27.01.16