



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CRIMINAL CASE NO. 1 OF 2016

REPUBLICPROSECUTION

VERSUS

ERICK MUKUNDI NJERU.....1st ACCUSED

VEJESIO MUGENDI NJIRU.....2nd ACCUSED

RULING

By their notice of motion dated 22nd February 2016 the accused persons through their counsel have applied for bail pending their trial on charge of murder contrary to section 204 as read with 203 of the Penal Code (Cap 63) Laws of Kenya. They have brought their application under the provisions of Article 49 (1) (b) of the 2010 Constitution of Kenya and under all enabling provisions of the law.

The state does not oppose their application.

Their application is supported by the supporting affidavit of the first accused dated 22nd February 2016 sworn in his own behalf and on behalf of the second accused. The first accused has stated that he is a resident of Embu County and is not a flight risk. He also states that he is a casual labourer and that he supports his elderly mother. Additionally he says that there is no one else to cater for her mother. Furthermore, he has stated that his life will not be in danger if he is released on bail/bond. He also says that he will not interfere with witnesses.

According to him the second accused is a minor orphan who dropped out of school in form 1 in 2014. Finally he has stated that the second accused has the sole responsibility of taking care of his young brother, who is in class one.

The first accused in support of his application for bail has stated that he is a shamba boy and that he makes between Kshs.500/- and Kshs 600/- per month. The first accused says that he married with three children. He also says that his wife is a farmer growing beans and maize.

The second accused has stated that he is a casual labourer aged nineteen years old. As a casual labourer he says he makes Kshs 300/- per month. He is unmarried and that he is an orphan. The second accused has finally stated that he has sureties who are ready to stand for him if bail/bond is granted.

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 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 lose his freedom lightly.

In considering whether or not a person should be released on bail or bond the court is required to exercise its discretion judicially. A major consideration in matters of bail is whether or not the accused will attend his trial if he is released. Once it is shown that an accused is likely to attend his trial if released on bail, he should be released, 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 does not 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 first accused. I believe and find that the first accused makes between 500/- and 600/- shillings per month from his occupation as a casual labourer. I also believe and find that he is a married person with three children. 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 first accused person on bail pending his trial on a charge of murder. I also find that there are no factors militating against his release on bail.

I have also considered the affidavit evidence of the second accused. I believe and find that the second accused as a shamba boy earns Kshs 300/- per month. I also believe and find that he is an orphan and is unmarried. Finally, I find that the accused is a poor orphan and that he takes care of his younger brother. 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 first accused person on bail pending his trial on a charge of murder. I also find that there are no factors militating against his release on bail.

In the light of the constitutional provisions and the principles set out in the foregoing cases, I find that both the accused persons have met the constitutional threshold for release on bail pending their trial on a charge of murder.

The upshot of the above is that each accused person is hereby granted bail/bond in the sum of Kshs 200,000/- with a surety of a similar amount.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 25th day of **FEBRUARY 2016**

In the presence of the Ms Mbae for the state
and Mr Andande for the accused persons.

Court clerk Njue

J.M BWONWONGA

JUDGE

25.02.16