



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL MISC APPLICATION NO. 5 OF 2016**

**DANIEL KIMANI KARIUKI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

By his chamber summons dated 9th February, the accused person through his counsel has applied for bail pending his trial on charge of stealing a motor cycle contrary to section 278A of the Penal Code (Cap 63) Laws of Kenya. The application is brought under the provisions of Article 49 (h) and under section 123 of the Criminal Procedure Code(Cap 75) Laws of Kenya.

The state has opposed his application.

The application is supported by the supporting affidavit of the mother dated 10th February 2016. According to the accused, he is presumed innocent until proved guilty (paragraph 12). He has also stated his two co-accused were admitted to bail while he was denied bail on the strength of the affidavit of Chief Inspector of Police Richard Mathenge. Furthermore, the accused has stated that he has a right to bail in terms of Article 49 (h) of the 2010 Constitution and that the affidavit relied upon in denying him bail does not disclose compelling reasons that he will not attend his trial if released on bail. He also has stated that it was equally wrong for a magistrate to deny bail without considering the application but simply refusing to hear such an application on grounds that the magistrate who took the plea refused to grant bail. The accused went further to state that the reasons for denial of bail are speculative and unverified as the law is that an accused is innocent until proven guilty and not otherwise. And finally the accused says that applications for bail or review can be made as many times as possible and the court will always entertain them but not to refuse to hear them as it happened in this case.

Counsel for the accused submitted that the circumstances had changed, since his client has been in remand since 11th January 2016. Counsel also attacked the affidavit of Chief Inspector of Police Mathenge on the ground that he was not the investigating officer in this case. The fact that he was in charge of criminal investigations (being DCIO) did not make him competent to swear such an affidavit. Counsel further submitted that the fact that the accused had another pending case for hearing was still innocent until proven guilty. He also submitted that the affidavit did not disclose that the accused had failed to attend court. He also submitted that the belief of the police that the accused was involved in a series of other motor cycle thefts amounted to speculation and an opinion. He continued to submit that Chief Inspector of Police Mathenge should have sworn an affidavit to show the outcome of his investigations in respect his belief that the accused will continue to commit further offences if released.

MS Mbae for state opposed the application of the accused. According to her there is an on going case of robbery with violence against the accused (being Criminal Case No 78 of 2013) which carries a death

penalty. It is her further submission that when the accused was on bail/bond in criminal Case No. 78 of 2013, he committed the current offence in regard to which bail is sought. She also submitted that on 2nd February 2016 while the investigations were ongoing, the accused was charged in criminal case number 69 of 2016 with the offence of stealing a motorcycle contrary to section 278A of the Penal Code (Cap 63) Laws of Kenya. It is also her further submission that the accused is a suspect in a burglary case vide OB No. 8/2/1/2016 in respect of the offence of burglary and stealing.

Furthermore, she submitted that the accused is likely to interfere with the ongoing investigations and is also likely to commit other offences if released on bail. She also submitted that the accused should not be released on bail for his own safety. She says that the boda boda riders are baying for his blood because they believe he has committed these offences.

In response to the submission that it is only the investigating officer who is competent to swear an affidavit, Ms Mbae submitted that there is no legal requirement that only an investigating officer is competent to swear an affidavit. According to her, Chief Inspector of Police Mathenge is in charge of criminal investigations in Mbeere North and by virtue of his office he was competent to swear the disputed affidavit which is annexed to the affidavit of the accused. She also submitted that the accused is a flight risk, because he is implicated in a number of robberies and is likely to abscond. This in her view do constitute compelling reasons in addition to those contained in the affidavit of Chief Inspector of Police Mathenge that militate against his release on bail.

In his final reply, Mr Muraguri pointed out that Ms Mbae for the state had not filed a replying affidavit. All that she did was to hand in a number of documents being two police charge sheets filed in the magisterial court at Siakago and an O.B extract in respect of burglary and stealing signed by Corporal Taveya in which it is alleged that the accused is a suspect. It is important to point out that his name does not appear as a suspect in the O.B extract report of burglary and stealing. He further pointed out that in criminal case No. 178 of 2013, the accused was granted bail and had not failed to attend court. He also pointed out that in criminal case No 69 of 2016, the accused is not among the accuseds. He finally submitted that this should be disregarded because they are irrelevant.

In respect of the allegation that boda boda riders are likely to kill the accused because they believe he is involved in these offences, Mr Muraguri submits that this is just an allegation. For all those reasons, he urged the court to release the accused on bail.

### **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.

### **Evaluation Of The Affidavit Evidence Findings And The Law**

I have considered the affidavit evidence of the mother of the accused. I find from that evidence that the accused was denied bail while his co-accused were granted bail. I also find that he was denied bail because while he was out on bond the accused jointly with others at large stole a motor cycle registration number KMDF 914A, the property of Zachary Mutembei (see para. 3 (b)) of annex MM 2 of the supporting affidavit of the applicant). Annex MM 2 is the affidavit evidence of Chief Inspector of Police Mathenge which has not been challenged by any other evidence. Mr. Muraguri submitted that Chief Inspector Mathenge was not the investigating officer. The answer to this submission is in paragraph 1 of Chief Inspector Mathenge's affidavit in which he has stated that he is charged with investigations related to the subject matter in this case. I believe his evidence. I find as fact that he is a competent person who properly swore an affidavit in this matter. In view of this finding I find that it is not necessary to address the other issues raised by Mr. Muraguri.

The denial of bail in respect of this accused cannot be said to be discriminatory within the meaning of Article 27 (1) (4) and (5) of the 2010 Constitution of Kenya. This was also the legal practice under the Independence Constitution of 1963 and had been judicially approved in *George Kamau Nganga v R, Misc Criminal Application 61 of 198*, High Court, Nairobi, unreported. In denying bail to a co-accused in that case the High Court held that the application for each accused had to be considered on its own facts and circumstances. I find that this is a proper case for denying bail to the accused pending his trial on a charge of stealing a motor cycle and robbery with violence.

In the light of the constitutional provisions and the principles set out in the foregoing cases, I find that the commission of an offence by the accused while he was on bail is a compelling reason to deny him bail.

The upshot of the above is that the accused person is hereby denied bail pending the hearing and determination of his trial.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **23<sup>rd</sup>** day of **FEBRUARY 2016**

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

Court clerk Njue

**J.M BWONWONGA**

**JUDGE**

**23.02.16**