



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 11 OF 2016

REPUBLIC

VERSUS

FRANCIS KIRIMA M'IKUNYUA.....ACCUSED

RULING

0. The accused, who is facing a murder charge contrary to section 203 as read with section 204 of the Penal Code with particulars that on the 16th February 2016 at Mto Mawe area within Athi River Sub-county in Machakos County murdered Peter Mwanga, has applied for bail pending trial by Notice of Motion dated 7th March 2016. The applicant's case is that he is constitutionally entitled to bail; not a flight risk; there are no compelling reasons for refusal of bail and he undertakes to observe the terms of bail, if granted.
0. In his affidavit in support of the application, the accused highlights his good character and antecedents in that he is a Christian and Chairman of Church Development Committee of the Gospel News Christian Church Kasarani, and that after arrest on 16th February 2016 and before completion of investigations and arraignment in the High Court he had been on a Ksh.200,000/- bond from the Magistrate's Court and he had faithfully kept to the terms of the bail before the bail was withdrawn upon the decision to charge him with murder; that he had invested heavily in the country and was not a flight risk; and that he provides for his family of two wives and with eight children aged between 18 to 3 years and that he suffers ill-health for which he requires constant medical attention and special diet.
0. The application is opposed and by a Replying Affidavit of No. 46864 Cpl. Jackson Mbitu, the DPP at paragraphs 4, 5, 6, 7 and 8 thereof, relies on the factors of likelihood of witness interference, seriousness of the offence and severity of punishment as well as a balance of convenience test as follows:

"4. That I am apprehensive that if the applicant is released on bond he may interfere with the prosecution witness since he has been supplied with witness statements, he is therefore aware of who they are and their evidence against him.

5. That in the event of conviction being entered in this matter, the accused person will face the death penalty and this on its own is an incentive to abscond.

6. That though the offence of murder is now bailable, the grant of bail is not absolute but a matter of discretion on the part of the Court which should be handled on a case to case.

7. That considering the nature and seriousness of the offence, the severity of sentence provided in law, this Honourable Court should find that there are compelling reasons as to why the applicant should not be released on bail.

8. That in order to strike a balance between competing interest of the public and that of the applicant/accused to be released on bond, which we vehemently oppose for reason afore-stated, this matter ought to be set down for speedy hearing and determination.”

0. Counsel for the parties – Mr. Kenyatta for the Accused and Mr. Machogu for the DPP - made oral submissions on the respective cases of the parties set out in the affidavits, and ruling was reserved.

The right to bail and factors to be considered

0. The right to bail is entrenched in the Constitution of Kenya 2010 as follows:

“49. (1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, **unless there are compelling reasons not to be released.**”

0. The Criminal Procedure Code provides for consideration to be had by the Court in exercise of the power to grant bail as follows:

“123A (1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.”

0. The accused has a further right to the evidence to be presented against him under Article 50 (2) of the Constitution as follows:

“50. (2) Every accused person has the right to a fair trial, which includes the right —

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”

0. The Court is enjoined under Article 20 (3) of the Constitution to act such as to give effect to the constitutional rights in the Bill of Rights as follows:

“20. (3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

0. As I have held in *R v. Peter Muia Mawia*, Machakos High Court Criminal Case NO. 48 of 2015 –

“The grant of the witness statements pursuant to the constitutional right cannot, in my view, be used as a ground to deny bail by suggesting likely interference with witnesses because the accused now knows who the person to testify against him are. If the supply of witness statements were coupled with a likelihood, as a result, to interfere with the witnesses were accepted as a compelling criteria for refusal of bail, no accused person who had taken his constitutional benefit to the Prosecution’s evidence would ever make bail. This would subvert the Bill of Rights provision for the supply of prosecution’s evidence ahead of the trial, in contravention of the Court’s constitutional duty under Article 20 to give effect to rights. For the ground of likelihood to interfere with witnesses to amount to a compelling reasons, there must be such evidence to support a real likelihood of interference in the nature of relationship or circumstances between the accused and the said witnesses as would indicate possibility of that accused exerting influence, direction or control over the said witnesses so as to demonstrate a real danger of interference and thereby affecting the DPP’s capability to successfully prosecute the offence charged.”

0. It must also be accepted that in providing for bail in all cases including capital offences as the murder charge herein, the Constitution makers were fully aware of effect of the seriousness of the offence and severity of the penalty on accused’s propensity to abscond. In the circumstances, in my view, mere seriousness of offence and severity of sentence will not suffice as a compelling reason. There must be something more in relation to the two factors that makes the accused’s flight in the particular case more likely than not. This is consistent with the presumption of innocence, which places the accused in the position of an innocent man to whom no sentence no matter how severe would be imposed.
0. There is of course a public interest in the prosecution, conviction and punishment of offenders which must be balanced against the accused presumption of innocence and right to bail pending trial. For the balance to be tilted against the accused in the matter of bail, there must be evidence that the accused will or is highly likely to abscond, interfere with witnesses so that the prosecution is defeated or to interfere with on-going investigations while out on bail.
0. The other public interest consideration, which is not altogether unrelated to the interest in successful prosecution of criminal cases is that the accused should be detained for his protection [and to enable him stand trial] as set out in section 123A (2) (b) that the Accused “should be kept in custody for his own protection.”

On the merits of the case

0. In the circumstances of this case, It has not been shown by the Prosecution that there is a real likelihood of the Accused interfering with witnesses by way of any circumstances or relationship with the witnesses other than being ‘aware of who they are and their evidence against him’ or interfering with any ongoing investigations. I do not consider that the Prosecution has shown any compelling reasons for denial of bail.
0. I have considered that the circumstances of the Accused that he is obviously a wealthy man who

has business interests in real estate, printing, motor vehicle repair, housing co-operative and credit and savings co-operative business with vast real property interests in Nairobi and elsewhere; he is diabetic with high blood pressure requiring special diet, medication and constant monitoring by his Physician; and that he has vast interests in the area and in the country which mitigate any propensity to abscond.

0. I do not consider the Accused a flight risk and no compelling reason has been demonstrated by the prosecution for denial of bail.
0. However, in the Accused's own interest to his protection, and without making apologies for the State's duty to provide security for the person and property of all its people, the circumstances of the case as revealed by the Accused himself call for caution in the exercise of power to grant bail. There is reference in paragraph 23 of the Accused's affidavit to the fact that ***"the unfortunate events surrounding the death of the deceased occurred during an invasion into my home by a mob in spite of there being a court order in force restraining anyone from evicting me therefrom and after previous violent attacks on my workers and after I had on several occasions raised fears about my life and security with both the police and the office of the Director of Public Prosecutions."***
0. Such circumstances may engender vengeful attempts on the life of the Accused by persons who are sympathetic to the victim or to the situation in which his death occurred leading to the murder charge before the Court. It cannot be function of this Court to enforce an accused's constitutional right to bail only for the Accused to be lynched, despite protective measures by the State, by angry relations, friends or sympathisers of the victim.

Orders

0. Accordingly, while the Court uphold's the Accused right to bail in the circumstances of this case, the release on bail of the accused and the determination of the terms of bail is **deferred** to enable the preparation of a pre-bail report by the Probation Department to assist the court in determining the volatility levels of the situation on the ground for an assessment of whether or not the Accused requires to be held in custody for his own protection pursuant to section 123A (2) (b) of the Criminal Procedure Code, cap. 75 Laws of Kenya.
0. In the interests of an expeditious determination of the matter, the Probation Department, Machakos County is requested to make its report to Court within 7 days from today.
0. The matter will be mentioned for further orders/directions on **11th April 2016**.

DATED AND DELIVERED THIS 31st DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kenyatta for the Accused/Applicant

Ms. Moghoi for Mr. Machogu for the Republic/Respondent

Ms. Doreen- Court Assistant.