



REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CR. CASE NO. 10 OF 2015

REPUBLIC PROSECUTOR

V E R S U S

1. JULIANA MWIKALI KITEME

2. GRACE MUMBI MUE

3. JOSEPH NGUMBAO MUTISYA

4. AGNES MUTHONI MUTISYA ACCUSED/APPLICANTS

RULING

Before me is a Notice of Motion dated 21st April 2016 filed by Ms. Nyasani Company Advocates for the applicants, the four accused's persons herein. The application was brought under Article 20(3)(4), Article 21(1), Article 22(3)(4), Article 49(1)(h), Article 50(2) of the Constitution of Kenya 2010, as well as Section 124 of the Criminal Procedure Code Cap 75. The substantive prayer is one, is as follows:-

“That the honourable court be pleased to grant bond terms with an alternative of cash bail pending hearing, conclusion, and determination of this matter”.

Though the application was said to have been filed with a supporting affidavit from each of the four accused persons herein, the supporting affidavits annexed to the application were that of two of them Joseph Ngumbao Mutisya, and Agnes Muthoni Mutisya. Juliana Mwikali Kiteme and Grace Mumbi Mue did not file supporting affidavits to the application.

When the application came up in court for hearing Mr. Nyasani for the accused asked for bond for the 3rd and 4th accuseds respectively, Joseph Ngumbao Mutisya and Agnes Muthoni Mutisya. Counsel stated that Juliana Kiteme and Grace Mue were yet to give him requisite information.

He relied on the ground on the face of the application and the respective affidavits sworn by the two. He emphasized that the two were not a flight risk and that they were ready to appear before court as and when required as they were Kenyan Citizens Residing in Ndale village in Mwingi. Counsel emphasized that the 4th accused Agnes Mutisya was a mother and the grant of bail or bond would enable her go home and take care of her family. According to counsel the 3rd accused Joseph Mutisya was a mason and a son of the 4th accused. Counsel argued that both should be presumed innocent as per the provisions of the Constitution.

Learned Prosecuting counsel Mr. Okemwa submitted that the accused had a right to bail under the Constitution of Kenya 2010, but such right was neither absolute nor automatic. According to counsel, the

right to bail was limited by the provisions of Article 24 of the Constitution. Counsel submitted that courts had held that the prosecution had the burden of establishing the compellable reasons why an accused should not be granted bail, and stated that he had talked to Inspector Simon Kiai the OCS of Kyuso Police Station, who had informed him that it was unlikely that the accused persons would interfere with witnesses. Counsel thus submitted that the State did not oppose the application for bail or bond, but urged the court to determine appropriate terms for their release.

This is an application for bail or bond pending trial. The accused herein stand charged with the offence of murder. Since the promulgation of the Constitution of Kenya 2010, bail or bond was made available to all accused persons, even if the offence charged is a capital offence like murder. Article 49(1)(h) of the Constitution is relevant on this, and provides 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 so released.

(2) a person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”

It is clear from the above provisions of the constitution that where the sentence for an offence is merely a fine or imprisonment for not more than six months the right to bail or bond is absolute and automatic. The Constitution prohibits the holding in custody of a person whose alleged offence is punishable by fine only or by imprisonment for not more than six months.

As for all other offences there is a right to Constitutional bail or bond on reasonable conditions, which can only be denied where there are compelling reasons.

In deed courts have held that the prosecution has the burden of providing the compelling reasons which would move the court to deny an accused the right to bail or bond. However, in my view even if the prosecution does not provide the said compelling reasons, if such compelling reasons have come to the attention of the court and they relate to the protection of the community, the witnesses, the victims, the accused himself or herself, then the court should exercise its discretion and deny bail or bond in the interest of justice.

Section 124 of the Criminal Procedure Code (cap.75) which has been relied upon by the counsel for the accused persons imposes an obligation on the person who is released on bail or bond to attend at the time and place mentioned, as directed by the court or police officer releasing him or her on bail or bond.

In the present case the accused stand charged with murder. It is a serious offence, a capital offence but bailable. The prosecution has stated that the OCS at Kyuso Police Station I P Simon Kiai has indicated that the accused are neither a flight risk nor are they likely to interfere with witnesses. They thus do not oppose the application. I myself have found no other compelling reasons which would make this court not grant the requested bail or bond.

Though Mr. Nyasani has submitted that he is only arguing the application for two of the accused persons, I note that he is the advocate for all the four accused herein. In addition he filed the application in the names of all the four accused persons. The application has not been amended, nor has any request been made for its amendment.

All the accused herein are by virtue of the Constitution entitled to bond or bail, and the state has not said that there are compelling reasons to deny any of them bail or bond. I take it that though only the affidavits of Agnes Muthoni Mutisya and Joseph Ngumbao Mutisya were filed in support of the application, the application covers all the four accused persons herein. In considering bail or bond terms therefore, this court will take the four of them to be within the same or similar circumstances.

I will thus allow the application in respect of the four accused and order as follows:-

1. Each of the four accused herein will be released on signing his/her own bond of Kshs 800,000/= with one surety of similar amount.
2. In the alternative, each of the four accused may be released on paying a cash bail of Kshs 500,000/-.
3. Each of the four accused persons will attend court for mentions and the hearing as and when required to do so until the determination of this case.
4. Each of the four accused persons will not interfere with prosecution witnesses.

Dated and delivered at Garissa on 31st May 2016.

GEORGE DULU

JUDGE