



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 4 OF 2016

REPUBLICRESPONDENT

VERSUS

AYALE MUSA ABDULA ACCUSED

RULING

1. The Applicant **AYALE MUSA ABDULA** is charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code the particulars of which were that on 1st January, 2016 within Eastleigh Estate 3rd Street Starehe Division within Nairobi County murdered **ABDI MOHAMMED DIRIYE**.
2. He pleaded not guilty to the said charges and by a Notice of Motion dated 25/2/2016 applied to be admitted to a free bond or bond on reasonable terms pending the hearing and determination of the case. The application was supported by an annexed affidavit sworn by the applicant in which it was deponed that the same is not a flight risk and will not interfere with investigations if released on bond.
3. In opposing the application the prosecution through a replying affidavit sworn by Cpl Steve Owuor deponed that the evidence against the applicant was very strong and irrefutable since there were allegedly five eye witnesses to the case. It was deponed further that the applicant and the deceased lived within the same community and that many people witnessed as the accused murdered the deceased in cold blood in broad daylight and the community is still bitter at the action of the applicant and were likely to revenge and attack him if released on bail.
4. At the hearing of the application Mr. Ochako appeared for the Applicant and submitted that the same was not a flight risk and further that the State did not provide the particulars of the witnesses likely to be interfered with. Miss Ikor for the State in opposition submitted that the accused originally came to Kenya through Kisimayu boarder with an intention to go to the United States of America and does not have documents allowing him to be in Kenya and therefore there was the possibility of the same absconding if released on bond.
5. It was further submitted that the accused was not truthful with the court since in his affidavit in support he states that he came to Kenya in December, 2015 a month before the commission of the offence whereas there was evidence that he together with his family had been in Kenya for six years.
6. In compliance with Victim Protection Act and the provisions of the Bond/Bail Policy Guidelines the court ordered for pre-bail report in which it was stated that the accused's mother and siblings lives in Eastleigh 3rd street while his father resides in Somalia. It was further stated that the accused and his family were not registered by the UNHCR and had no refugee status. The family of the deceased were not interviewed whereas the community had reservation to the accused being

released on bond.

DETERMINATION

7. Bond is a constitutional right of every accused person under Article 49(1)(h) but the same is not an absolute right as it can be limited where there are compelling reasons. These said compelling reasons must be proved by the prosecution on a balance of probability and as was stated by Justice M. Ibrahim as he then was in **REPUBLIC v DANSON MGUNYA & ANOTHER [2010] eKLR:-**

“Liberty is precious and no one’s liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted.....”

8. Granting bail as per the Court of Appeal decision in **GERALD MACHARIA GITHUKA v REPUBLIC CR. APPEAL NO. 119/04** require the striking of a balance of proportionality in considering the rights of the applicant who is presumed innocent at this point on one hand and the public on the other hand. In order to deny an applicant his Constitutional rights the courts have identified some of the following as compelling reasons:-

- a. Interference with prosecution witnesses See **REPUBLIC v JACKTON MAYENDA & 3 OTHERS BUNGOMA HC CR. CASE NO. 55/2009.**
- b. Whether the accused will fail to turn up at his trial or surrender to custody.
- c. The accused may commit further offences.
- d. The accused will obstruct the course of justice.
- e. The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty.
- f. The strength of the prosecution case.
- g. The character and antecedents of the accused. See **NGANGA v REPUBLIC [1985] eKLR.**

9. In the matter before the court the prosecution has submitted that the accused is a flight risk since the same has no proper legal status to be in Kenya and further that the accused conduct in that the same had not been truthful with the court in his affidavit in support which factors have been confirmed in the pre-bail report and further that the safety of the accused should he be released on bond may be compromised taking into account the attitude of the community.

10. From the aforesaid I find and hold that these are compelling reasons enough to enable me deny the accused his Constitutional Right to bond since it is not guaranteed that the accused if released on bond will avail himself for trial. I therefore decline to allow the application herein and order that the accused shall remain in remand custody during the period of his trial.

DATED, DELIVERED and SIGNED at Nairobi this 22nd day of June, 2016.

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J. WAKIAGA

JUDGE

In the presence of:-

Mr. Mwenda for the state

Mr. Ochako for the accused

Accused present

Tabitha court clerk