



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 53 OF 2015

REPUBLICPROSECUTOR

VERSUS

MARCUS MWENDWA MWOLOLO.....ACCUSED/APPLICANT

RULING OF THE COURT

1. The Notice of Motion application before the Court is dated and filed herein on 1st November, 2015 by the Accused person pursuant to **Article 49(1) (H)** of the **Constitution of Kenya**. The application seeks secure the following prayers;

(i) That the Accused/Applicant be granted bail/bond pending the hearing and determination of this case.

(ii) That the costs of the application be in the cause.

2. The application is premised on the grounds set out therein and is supported by the affidavit of the Applicant sworn on 4th November, 2015.

3. The applicant's case is that he has a permanent place of abode hence he is not a flight risk, that he has good antecedents and is of high moral standing. The Applicant is ready and wishing to abide by the terms set by the Court. The Applicant states that he is a law abiding citizen, and has pleaded not guilty to the charges preferred against him hence he is presumed innocent. The Applicant's case is that there are no compelling reasons not to admit the Applicant to bail, and that it is in the interest of justice to grant the orders sought. No prejudice shall be occasioned upon any party if the orders sought are granted. That Applicant's case is that he has a permanent place of abode at Kaseve-Mua Hills in Machakos, and that he does not live near the alleged victims of the alleged offence hence cannot interfere with witnesses when released on bail/bond, and that he will attend court whenever required to do so or when the need arises and will abide by all the conditions that this Court may order or impose on the bond. The grant of bond/bail will enable him to take care of his aged parents and his young family, and also help him to prepare adequately for his defence.

4. The application for bond is opposed by the State vide Replying Affidavit of **No. 92701 PC Dauglass Murathi**, sworn on 27th January, 2016 who states that he is a Police Officer and one of the Investigating Officers in this matter thus properly seized of the facts in this matter and therefore competent to swear this affidavit. The deponent states that the applicant is charged before this Court with the offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The accused person has been supplied with witness statements, and is therefore aware of the evidence against him as well as the weight of the prosecution. He is apprehensive that if the accused person is released on bond his life will

be in danger since, members of the society wanted to lynch him prior to his arrest. Further 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 for him to abscond. 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, and that considering the nature and seriousness of the offence, the severity of the sentence provided for in law, this Court should find that there are compelling reasons as to why the Applicant should not be released on bail.

5. With the leave of Court parties filed submissions. The Applicant submitted that he has two aged parents and a young family who depend on him and need his care and that he has a permanent place or home at Kaseve-Mua Hills, Machakos County. The Applicant further submitted that he does not live near the victims of the alleged offence and that he has no intention to interfere with investigation or with the witnesses when released on bail/bond and that he will attend Court when required.

6. On their part the Respondents are apprehensive that if the accused is released on bond his life would be in danger, and that he may interfere with witnesses or abscond, and that considering the severity of the sentence if found guilty the accused would most likely jump bail.

7. I have carefully considered the submissions and the authorities. The Applicant is charged with an offence of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. That is a very serious offence. The only issue I raise for determination is whether the applicant's constitutional rights to bail/bond can be denied on the grounds that if released, he would be lynched and that his life would be in danger or that he may interfere with prosecution's witnesses or that he may abscond from trial. These are reasoned submissions, which *prima facie* sound convincing. However, **Article 49(1) (h)** of the **Constitution** states that an arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

8. In my view, a right granted by the Constitution can only be denied under stringent circumstances. The prosecution, when it opposes an application for bail which is constitutionally guaranteed, must go out of its way to show that the accused person will jump bail by showing how that may happen. A mere allegation that the offence if proved attracts a severe penalty is not enough. If that were the sole consideration then persons under murder charge would never qualify for bond or bail. Secondly the allegation that the accused person would interfere with witnesses must also be shown to be real. The prosecutor has already finalized investigations. When the accused is released on bond, he has to go to his home, and there, in his ordinary interaction with life, he may meet some of his accusers. Whether he thereafter attempts to interfere with the witness will be a factual experience, and may be a ground to revoke bond. This Court cannot assume that the accused person will automatically interfere with witnesses. This submission by the State is highly subjective and hypothetical and cannot be used to deny a constitutional right.

9. Thirdly, it was submitted that the accused person's life may be in danger because upon release he would go back to his home where the villagers will probably lynch him. This is a submission which this Court cannot take lightly, since the court must protect the life of the accused. But then the alleged danger must be real, and not merely subjective. In order to put more flesh to this kind of allegation it is important to hear the views of the family members or the local community through their chief or sub chief. No such evidence has been adduced that the local community is hostile to the accused person. The issue of possible hostility is equally subjective and speculative. That notwithstanding the accused person, if released on bond and finds that his life is in danger, has the right to report the issue to the police who may take appropriate action and even by an application before this court have the bond revoked.

10. This Court finds that there is no evidence before the Court standing between the accused person and his constitutional right to bail or bond. To mitigate the possibility of absconding it is the responsibility of the Court to grant such bond/bail in terms which make it difficult for the accused person to jump bail, and which should he do that, attracts severest of sanctions.

11. Pursuant to the foregoing paragraphs of this ruling, the Applicant's application for bail/bond is herewith allowed in the following terms;

(i) The accused is hereby released on bond of Shs. 300,000= with two sureties.

(ii) Costs herein are in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF JULY, 2016

E.K.O. OGOLA

JUDGE

In the presence of;

Mr. Machogu for the State

Mr. Kyalo for the Accused

Court Assistant – Ms. Doreen