**REPUBLIC OF KENYA**

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

**MISC. CR. CASE NO. 8 OF 2016**

**OSWALD GITONGA ..... APPLICANT/ACCUSED**

**V E R S U S**

**REPUBLIC ..... RESPONDENT/PROSECUTOR**

**RULING**

Before me is an application brought by way of Notice of Motion dated and filed on 6th May 2016. The application was brought under Article 49(1h) of the Constitution of Kenya 2010 as well as Section 123 (3) of the Criminal Procedure Code Cap 75. It has one prayer that the Honourable court be pleased to admit the applicant to bond/bail pending trial.

The application was filed with a supporting affidavit sworn by the applicant Oswald Gitonga on 6th May 2016. It is deponed in the said affidavit that the applicant was charged with defilement in Garissa Chief Magistrate Cr. Case No. 253 of 2016. That his Advocate Mr. Nyaga had applied for bail in the trial court but same was declined. It was further deponed that the applicant had been running a shop in Windsor area in Garissa Township for over six years and that he came from Meru, and was well known to his area Chief and Assistant Chief. He deponed also that his family had agreed to stand surety for him. He also stated that he was a husband and father of one child and that his family relied entirely on him for their livelihood.

At the hearing of the application Mr. Nyaga made oral submissions. Counsel stated that he had come to this court in its original jurisdiction though he had made an application before the Chief Magistrate's court on 14th March 2016 in which the Magistrate denied the applicant bail/bond stating that there were compelling reasons to justify such refusal. Counsel submitted that the magistrate found that due to the young age of the child victim it was possible that the applicant would intimidate her. The learned magistrate also found that the applicant would abscond as he came from Meru County.

Counsel submitted that the alleged compelling reasons were speculative and not substantiated. He relied on a case of ***R- vs- Mohamed Hagar 2012 eKLR*** decided by Mutuku J.

Counsel submitted that the alleged best interests for the child was not supported by facts. With regard to freedom of the child victim from intimidation, counsel submitted that the Advocate holding watching brief for the victim merely stated a principle but did not give facts to support that principle. Counsel submitted that the fact that the applicant came from Meru did not mean that he would abscond. He also stated that if indeed his client lived in Meru, it would not be possible for him to interfere with witnesses in Garissa.

Counsel emphasized that section 49(1h) of the Constitution availed bail or bond as a rule but made the exception where there were compelling reasons. Counsel submitted that the applicant had shown that he

had a permanent abode in Kenya in Meru South and had also given the names of his local administrators in his home area, and that he currently ran a green grocer business in Garissa which had come to a halt because of his being in custody. Counsel emphasized that the applicant's wife and child relied on him for subsistence, and relied on a case of ***R- vs- Aboud Rogo*** in which the Judge explained that the presumption of innocence was a factor to be taken into account in considering a bail or bond application. Counsel urged this court to allow the application.

Learned Prosecuting Counsel Mr. Okemwa opposed the application. Counsel argued that it was not proper for the applicant to invoke this court's jurisdiction through a fresh application since the trial court had made a decision a declining to grant bond or bail. Counsel submitted that the proper procedure was for the applicant to come to this court through an appeal from the ruling delivered in the trial court or to approach this court through the review procedure. Counsel submitted that in coming to court through this application, the applicant has avoided putting before this court the evidence on how the application for bail or bond in the trial court was declined.

Counsel submitted further that in any case the prosecution provided grounds or reasons for opposing the grant for bail as the applicant was likely to interfere with witnesses at Garissa. Secondly he came from Meru which was a distant place and was as such a flight risk.

Counsel also submitted that the prevalence of the offence was a factor to be taken into account together with the feelings of the public and the family, and emphasized that the right to bail was neither absolute nor automatic as provided under Article 49(1h) of the Constitution of Kenya 2010.

Counsel also argued that infact the learned magistrate tried to protect the applicant by rejecting the bail or bond application while fixing an early hearing date so that he was not unduly prejudiced. In counsel's view, the trial court also in its ruling did not close the door for a review of the ruling depending on changed facts or circumstances. Counsel urged that this court would direct that the evidence of the mother and the complainant be heard before considering the grant of bail or bond to the applicant.

In response, Mr. Nyaga learned counsel for the applicant submitted that prevalence of an offence could not be a compelling reason since there was always a presumption of innocence in criminal cases. Counsel emphasized that no written law had provided that bond or bail should not be granted until after some witnesses had testified. According to counsel, there were no compelling reasons herein to justify the court refusing to grant bail. Counsel finally submitted that the case had not yet been fixed for hearing.

I have considered the application and the submissions on both sides. Under Article 49(1h) of the Constitution of Kenya 2010 bail or bond is available to every person who has been held in custody or charged in criminal case. The only exception is where there exist compelling reasons which will convince the court to deny the grant of bail or bond.

In the present case, the applicant has come to this court through a fresh application after making an application for bail before the trial court which was declined. Learned prosecuting counsel has faulted the approach of the applicant in coming to this court.

The applicant has come to this court under section 123 of the Criminal Procedure Code which states as follows:-

> ***"123. (1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail. Provided that the officer or court may, instead of taking bail from the person release him on executing a bond without sureties for his appearance as provided hereafter in this part.***
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> ***2. The amount of bail shall be fixed with due regard to the circumstances of the case, and shall***

***not be excessive.***

***3. The High Court may in any case direct that an accused person be admitted to bail or the bail required by a Subordinate Court or police officer be reduced."***

Though the applicant made an application for bail in the trial court which was declined he came to this court through a fresh application, not through an appeal. The Learned Prosecuting Counsel has submitted that the applicant has approached this court in the wrong manner.

Having considered the provisions of the law above, I am of the view that though it would have been preferable for the applicant to approach this court through an appeal or through a request for revision, the law does not bar him from coming to court through a fresh application, provided that he has acknowledged that indeed he filed the application in the trial court.

After that disclosure, it will be for the High Court then to call for the trial court file before considering and determining the application for bail. I have myself seen and perused the trial court ruling on the bail or bond application and in my view the application by the applicant for bail or bond herein is not fatally defective. He disclosed the previous application. It is a competent application before this court. I dismiss that objection.

Coming to the merits of the application, section 123 (1) of the Criminal Procedure Code, was amended by the provisions of the Constitution of Kenya 2010. There are thus no offences on which bail is not available.

The only rider to the grant of bail under Article 49 of the Constitution 2010, is that where there exist compelling reasons, then the court is entitled to refuse the grant of bail or bond. In all other cases, the court is required to grant bail on conditions to be set by the court which should not be punitive.

In the present case, the request for bail has already been declined by the trial court on various reasons. The reasons are first, the possibility that the applicant will intimidate the victim who is a child of about 5 years. Secondly that the applicant comes from Meru, and is thus a flight risk.

The applicant has not denied herein that he is a neighbour of the minor child. He has not stated that he is going to shift his residence from that neighborhood. In my view there is a high likelihood that the presence of the applicant in the locality where he claims to own and operate a shop, would intimidate the child victim. I find this to be a compelling reason to deny the applicant bail, unless and until the child has testified in court. I agree with the reasoning of the trial court on this aspect.

The reason of having come from Meru, in my view is not a compelling ground for denial of bail. Sufficient sureties can be an adequate guaranteed for his attendance in court. I am therefore of the view that the learned trial magistrate erred in refusing to grant bail on this ground.

In the circumstances of this case, I decline to grant bail or bond as requested by the applicant. The applicant will however be at liberty to make an application for review of the orders of the trial court with regard to denial of bail or bond, after the child victim has testified at the trial.

It is so ordered.

**Dated and delivered at Garissa this 20th day of July 2016.**

**GEORGE DULU**

**JUDGE**