



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CRIMINAL MURDER 7 OF 2016

REPUBLICPROSECUTOR

VERSUS

JAMAA ALMED MUHUMED alias J

MOHAMED HALIL HASSAN

AHMED HILOBLE ALIEACCUSED

R U L I N G

This is a ruling in respect of a Notice of Motion application dated 6th October 2016 brought under Article 49 (1) (h) of the Constitution and section 124 of the Criminal Procedure Code.

In this application, the applicant seeks to have the bond terms reviewed including but not limited to deposit of surety's passport and the second surety to deposit such documents as benefit counsel on record and such further particulars as may be required here to.

He also seeks to have counsel on record, GEORGE EGUNZA to be his second surety both personally and professionally.

He further seeks to have this court issue any further orders in the interest of justice.

The application is based on the following ground;

(a) that the applicant has been in custody for the past eight (8) months thereby frustrating the actual function of grant of bail/Bond in the ongoing trial;

(b) that there is the natural justice presumption of innocence unless otherwise adjudged guilty which is not the case as relates the applicant herein as he continues to languish in custody;

(c) that the applicant and his family are peasant farmers who have now secured a single surety who does not possess a pass-port and due to mutual understanding and knowledge of the family, GEORGE EGUNZA, ADVOCATE has both personally and professionally undertaken to be his second surety

(d) that the applicant undertakes to abide by all terms and conditions set out by this court and attend court religiously without fail;

(e) that the court will not suffer any prejudice including but not limited to interference of witness as the trial has already began and the accused is not even aware of the said witnesses (under the Protection of witness Protection Agency).

These are the grounds deponed to by GEORGE EGUNZA, THE ADCOVATE who wishes to stand as a surety for the applicant in the supporting affidavit of 6th October, 2016.

Pursuant to this, Mr Egunza was cross examined by the learned state counsel, M/s Mutua. He said that the first surety has not availed a passport since he is a peasant farmer. He also said that they are awaiting his approval and that the court does away with his being required to deposit his passport. He undertook to ensure the accused attends court and confirmed that his passport No A576810 expired in 2014. Mr Egunza also stated that he has knowledge of where the applicants' family resides and that one of his cousins by the name Dashir is a neighbour in the building where their offices are situated, being SACCO BUILDING. He further said that the applicant is a resident of Garsen and he was taken to visit the place by his family where he confirmed that he has two wives and 8 children. And that relying on the information given by Mr Egunza's Senior Mr Omari they have known the applicant's cousin for about 3 years. Apart from his cousin, Mr Egunza said he knew the brother and uncle of the applicant.

In response to this, M/s Mutua , learned counsel for the state, stated that from her cross examination of Mr Egunza, advocate, it was clear that he did not know the family of the applicant very well as he did not even know where they specifically reside. She also pointed out that there is a copy of title deed attached to the supporting affidavit which this court has not been told whether it has been certified. She said that the application is mis-founded and urged the court to dismiss it.

In brief response, Mr Egunza stated that all the court needs is to confirm that the sureties satisfy court's conditions as set. He also said that the counsel from the state did not ask him for any names when she cross examined him. He confirmed that as an officer of this court, he is truthful, and honest over the much he knew about the applicant. And as for the title deed referred to, Mr Egunza said that it belongs to a person who has not been presented before this court.

I have given deep thought to what has been said by Mr George Egunze, advocate and M/s Mutua, counsel for the state, in consideration of the application before me. It is not disputed that Mr George Egunza is an advocate of the High court of Kenya, practicing under certificate No. P1056370106.

However, upon being cross examined by M/s Mutua, learned counsel for the state, it clearly came out, that apart from this claim that a cousin of the applicant is a neighbour of theirs in the building where their office is situated (being alarms Sacco Building), Mr Egunza did not appear to know his family very well. He did not provide this court with sufficient particulars of the applicant's residence or that of his close family. Even, the cousin who is says he knows, Mr Egunza only gave the court one name and or nothing more. That he is a neighbor at their place of business is not sufficient to satisfy this court that it is a guarantee that the applicant will be monitored and available because people vacate offices, business premises and houses any time and at will.

It was about Mr Egunza's evidence that he visited Garsen where he claims the applicant and his family of two wives and 8 children reside. But again, he did not give specific details of where in Garsen they reside and what they engage in to confirm permanent residence.

In his introduction to court, Mr Egunza informed court that he is a partner with M/s D N Omari and C. Advocate, which firm, represents the applicant in this case clearly, there arises conflict of interest in that one cannot act as an advocate for a client and also stand in as a surety for him or her. For if the applicant/accused was to abscond it would cause the advocate and the court embarrassment in executing subsequent orders.

As for reviewing of the said terms, the same were granted after the court considered the volatile conditions prevailing where the offence is alleged to have been committed and where the applicant is said to come from. I therefore find the Article 49 (1) (h) of the Constitution and section 124 of the Criminal

Procedure Code were complied with.

I therefore decline to grant the applicant the orders prayed for and dismiss the application accordingly.

Ruling, signed, dated and delivered this 26th day of October 2016.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/s Mutua for the state

Mr Egunze for Applicant - Present

C/clerk- Kiarie