



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 23 OF 2016**

**ARMSTRONG OCHIENO ODIO.....ACCUSED/APPLICANT**

**VERSUS**

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

**R U L I N G**

1. The Applicant herein, Armstrong Ochieno Odio was arraigned before this Court on the count of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 28<sup>th</sup> May, 2015 at Sikoma Sub-Location in Busiwabo Location within Busia County he murdered Jacob Odio Bwaku. He pleaded not guilty to the charge and is awaiting trial. In the meantime, he prays that he may be released on bond on such terms and conditions as the Court may determine. During the hearing of the application, Mr. Nyegenye appearing for the Applicant submitted that the issue of bond is a constitutional right that can only be denied for compelling reasons. According to him an accused person's constitutional right to bail and the grounds raised in opposition to granting bond have to be balanced against each other. He further stated that there was a conspiracy to have the Applicant locked up for the benefit of others. It is the Applicant's case that he has two wives, and is willing to live away from home. He also states that he is ready to avail himself for trial.

2. In opposing the instant application, Mr. Owiti for the State filed an affidavit sworn by the investigating officer Corporal Januarius Abwao of Busia Police Station. The deponent in the affidavit states that there is a real threat of the Applicant interfering with the trial and intimidating the witnesses. It is the investigating officer's averment that the Applicant has already threaten witnesses, one of them being his brother Geoffrey Wandera Odiyo, who has already reported the threat to the police.

3. Secondly, the State contends that the Applicant is a flight risk because after committing the offence, he escaped to

HomaBay County where he was later traced and arrested after a long search.

4. Article 49(1)(h) of the Constitution provides 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.”** This Court is therefore under a duty to consider the reasons advanced for and against an application for bond pending trial before deciding whether to grant bond or not.

5. Even prior to the State filing an affidavit in opposition to the application for bond, this Court had requested for a pre-bail report from the Probation Service. A report dated 6<sup>th</sup> September, 2016 was subsequently filed in Court and it paints a negative picture of the Applicant. The author discloses that the Applicant is ill-spoken of at home and constantly threatens members of his family. It is recommended that for the safety of the Applicant he is better off remaining in custody as members of the community have threatened to lynch him if released on bond.

6. Bail being a constitutional right is not a right to be trifled with. The Constitution itself commands the right can only be denied where there are compelling reasons. The State having opposed the release of the Applicant on bond must provide the compelling reasons. Among the reasons for denying bond is when

an accused person is a flight risk or is likely to interfere with witnesses whether through intimidation or cajoling-see **Republic v Cyrus Mwangi Kimunyu [2016] eKLR** and **Republic v Richard Nyaega Mogaka [2013] eKLR**.

7. A threat to the life of an accused person by the community is not a good reason for denying bond. A right granted by the Constitution cannot be taken away just because some people are issuing threats. An accused is presumed innocent until proven guilty and nobody should be allowed to harass a person who has been lawfully released by the Court. In any case before an accused person applies for bond he/she must have assessed the risks that come with such an application.

8. The question to be answered by this Court is whether the reasons given by the State for denying the Applicant bond meet the constitutional threshold. Putting the pre-bail report aside, I note that the investigating officer has averred that the Applicant took off after the offence was committed and had to be traced to another county before being arrested. The investigating officer has also averred that the Applicant has threatened a witness and a report of the threat has been made to the police.

9. The Applicant has not disputed the averments by the investigating officer. In the circumstances of this case I am satisfied by the State that there are compelling reasons for rejecting the Applicant's application for bail. His application for bond is therefore dismissed. The Applicant will remain in custody pending trial.

**Dated, signed and delivered at Busia this 25<sup>th</sup> day of October, 2016**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**