



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUSIA**  
**CRIMINAL CASE NO. 29 OF 2014**

**REPUBLIC ..... PROSECUTOR**

**VS.**

**NASOR SULEIMAN MBARUK ..... ACCUSED**

**RULING**

[1]. The applicant filed the motion herein on 29<sup>th</sup> December 2014 under the high court vacation rules and under section 123 and 124 of the Criminal Procedure Code. He applied that the matter be certified urgent and be heard on priority basis during the vacation. He applies that this court do grant him bail/bond pending the hearing and determination of this trial. The applicant states that he is sickly and requires specialized treatment outside the confines of the prison. He states that in a previous bond application Tuiyot J denied him bail but gave him conditionalities for reviewing his bond application. He avers through his counsel Mr. Ashioya that he has complied with these conditions in that

1. He is a manager of Mombasa highway transport and that he has attached a letter from his employer.
2. He says he is married to a Kenyan wife who has attached her Kenyan passport and has a letter to that effect from the Imam.
3. . He attached birth certificates of his children.
4. That he also attached a letter from the chief Kisauni – Mombasa.
5. He also provided a letter from the Imam showing that he is a worshiper in the local mosque.
6. A letter from his brother and a neighbour.
7. That he has property in Kenya charged to Gulf bank.

[2]. He argues that the accused is suffering from a dislocated vertebrae disk sustained during his arrest and he needs to be checked and treated outside Busia since no services like those are available in the District Hospital there. Otherwise he states that there is a real risk of getting paralyzed. He argues that denying bond on the allegation of a possible flight to outside the jurisdiction of the court is unfair since that issue was dealt with by Tuiyot J, who found no basis on that issue and that therefore, that issue is *res judicata*. He told the court that he is willing to provide substantive sureties and that he is prepared to report to the office of the DCIO Nyali Mombasa as may be ordered by the court. Finally that he is willing not to travel outside the jurisdiction of the court. And that he will only do so with the courts permission.

[3]. Mr. Obiri learned state counsel opposed the application for bail. He relied on the affidavit of Grace Makuphe the DCIO North Teso District. Her major opposition to bail/bond being granted to the accused is the possibility of flight by the accused. This was also the reason alluded to by corporal Chirchir. She argued that a real possibility of flight by the accused to outside the courts jurisdiction exists. It was argued by the state counsel that since the charge herein is murder which is a capital offence, whose punishment is death and the possibility of flight is real. He argued that merely meeting the conditionalities set by Tuiyot J was not enough. He further argued that if the court is willing to give the accused bond/bail the conditions for bail must be very stringent. He suggested Kenyan sureties with proven worth of Kshs. 10 million, supported by real property and/or bank guarantees by Kenyan sureties of a similar amount. Finally that the accused should report tri-weekly in the office of the OCPD or the nearest police station. In this case identified as Nyali police station. That the accused should not leave the jurisdiction of the court during the pendency of this case and that if he does so, the prosecution should be allowed to move the court to cancel the bond application.

[4]. In dealing with the question of whether the accused was a flight risk, the Busia High court was not convinced that the accused was a flight risk. However it dealt at length with the fact that the accused is charged with murder. That the accused was a constant traveller to outside the courts jurisdiction, that he had no passport and uses temporary travel permit. The court stated that the accused therefore bears a responsibility to assure the court that he will not use his ability to travel outside the country to put himself beyond the reach of trial court. And that is how the conditionalities came about. He now states that he has met the conditionalities as set out by Tuiyot J.

[5]. The state counsel argues that conditionalities are not enough. That the court should put stiffer conditions this being a murder case. Having looked at the circumstances of the case, and taking into account that bail is the right of every accused person under the Constitution, and taking into account that the accused has no passport, that he frequently travels outside the country on temporary permits, coupled with the fact that he is charged with murder, I am persuaded that stringent conditions must be imposed on the accused to ensure he does not jump bail.

[6]. I therefore order that the accused herein will be released and be admitted to bail on the following terms;

(a). He shall be released on his own personal bond of Kshs. 10,000,000 million.

(b). He shall also have two Kenyan sureties of a similar amount each who shall prove that worth with OR, who will have bank guarantees of Kshs. 10 million each. (to secure the attendance of the accused over the period of the case).

(c). The accused shall not leave the jurisdiction of the court (i.e Republic of Kenya) at any time during the pendency of this case without leave of the court sought and obtained.

(d). The accused shall report to Nyali police station every two weeks save only the period he shall be hospitalized for his current complaints

(e). The prosecution shall have leave to apply for cancellation of these bond terms if any condition herein is breached.

IT IS SO ORDERED.

**S. MUKUNYA**

**JUDGE**

**6.1.15**