



REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CRIMINAL CASE NO. 4 OF 2015

REPUBLICPROSECUTOR

VERSUS

SALIM MOHAMEDACCUSED

RULING

The accused person is charged with the offence of Murder contrary to Section 203 as read with Section 204 of the Penal Code. Counsel for the accused applied for the release of the accused on bond but the State vehemently opposed the application.

Mr. Mouko for the accused submitted that bail is a constitutional right and can only be denied where there are compelling reasons. The alleged compelling reasons are that the accused is a flight risk and that he may be harmed by members of the public. Counsel maintains that his client never absconded duty. He is a police officer who was served with a notice for disciplinary proceedings. The proceedings were to take place at Mpeketoni Police Station on the 9th February, 2015. The accused raised objection and on the same day he was asked to report at Kizingitini Police Station. The accused reported at Kizingitini and worked up to 28th February, 2015 when he was given ten days off. Counsel maintains that police officers went to look for the accused at his Malindi home while knowing that he was off duty. The ten days off were to enable him attend medical treatment. According to the accused, the off were to lapse on the 9th March, 2015 as the dates of travelling from and to the station are not counted since the place is far.

Counsel for the accused contends that the accused voluntarily presented himself on the 12th March, 2015 at the Malindi Police Station in the presence of his advocate. The voluntary presentation of the accused was not out of pressure from anybody. The accused is a Kenyan and there is no indication that he will abscond. The accused's family lives in Malindi and there is no record to show that he has been threatened. Counsel relies on the case of **REPUBLIC –VS- AMOS OMONDI AREGO KISII CRIMINAL CASE NO. 68 OF 2011** and **CRIMINAL CASE NO.61 OF 2012 REPUBLIC –VS- DWIGHT SAGARA & 4 OTHERS (NAIROBI)**.

Mr. Monda appearing with Mr. Fedha for the State, strongly opposed the application. They relied on the affidavit of PC. Oliver Nabonwe sworn on the 13th March, 2015. Counsels maintained that the accused went underground after committing the offence. Between 23rd January, 2015 and 8th February, 2015 the accused absconded duty for seventeen (17) days. Signons were sent indicating the accused's absence from duty. Disciplinary proceedings were conducted in absentia as the accused had absconded. It is conceded that the accused was transferred to Kizingitini Police Station and he was given ten (10) days off. He was to report on the 8th February, 2015. A signon was sent on 9th March, 2015 by the OCS Kizingitini indicating that the accused had not reported back on duty. Efforts were made to trace the accused but all in vain. On the 3rd March, 2015 police went to his Malindi home but failed to get him.

Similarly on the 5th March, 2015 and 9th March, 2015 the police visited the accused's Malindi home but they only met his brother. The accused could not be traced. This shows that the accused is a flight risk and only presented himself at the Malindi Police Station due to the pressure by the police. The appearance before the Malindi Police Station was not voluntary but out of pressure. The accused only went to hospital on the 3rd March, 2015. He was aware the police were looking for him but decided to go into hiding.

Mr. Monda contends that the accused should not be released on bail as he can abscond. Should he be released on bail, then the terms should be stringent. There are compelling reasons not to release the accused on bail. Counsel relies on the case of **REPUBLIC –VS- MAHADI SWALEH – MOMBASA CRIMINAL CASE NO. 23 OF 2014.**

The record shows that the accused was charged with disciplinary proceedings for being absent from duty for 17 days. The proceedings went on ex-parte and he was punished. The accused was fined kshs. 2000/- and was to forfeit his salary for the days he was not on duty totalling to Kshs. 10,710/= . It is evident from the record that the 17 days the accused was not on duty ran between 23rd January, 2015 and 8th February, 2015. The record shows that the accused went back to his place of work on 9th February, 2015. He was transferred to Kizingitini Police Post on 10th February, 2015. It is also established that the accused was on duty at Kizingitini Police Post from 10th February, 2015 to 27th February, 2015. This is after the disciplinary proceedings had ended and the sentence passed. There is no complaint from the prosecution for the period between 10th February, 2015.

The next period when the accused was not on duty is 28th February, 2015 up to 12th March, 2015 when he presented himself at the Malindi Police Station. It is agreed by both parties that the accused was given ten (10) days off. According to the OCS Kizingitini Police Station, the leave days were to end on 8th March, 2015 as the leave started on 27th February, 2015. No leave form was provided by either party. On his part, the accused states that he was given ten days off on 27th February, 2015. He was to report on 12th March, 2015 as two days are not counted. It is not clear whether the leave days started on 27th or 28th of February, 2015. It appears that the accused was at his place of work on 27th February, 2015 and was to travel on 28th February 2015. The 10 days were therefore to run from 1st to 10th March, 2015. He was to travel back to his station either on 9th or 10th March, 2015. The signon by the kizingitini OCS of 9th March, 2015 was therefore premature. There is no evidence that the OCS had contacted the accused and could not get him on his phone.

There is the period between 9th March and 12th March, 2015. According to the accused, as per his affidavit, he was to report back at Kizingitini on around 12th March 2015. This would have given him about one or two extra days. If he traveled on 28th February, 2015 and was to travel back on 11th March, 2015, he was to be at the station on 11th March, 2015. The travelling days according to him are not counted. There is no contrary averments from the prosecution.

The accused is facing a charge of murder. The sentence for the offence is stated under Section 204 of the Penal Code to be death. The parameters for granting of bail to accused persons are established. However, each case has to be determined according to its own conditions. In some instances, courts have considered the evidence against the accused. My view is that when bond is applied for during the taking of the plea, the court is not in a position to know the evidence against the accused. The evidence becomes relevant when the case is part heard and an application for bond is made. It would not be prudent for the trial court to call for witness statements to satisfy itself on the evidence against the accused before making a decision on whether to release the accused on bail or not.

In other instances the punishment for the offence has been considered. This is in line with the gravity of the offense. Section 123 (1) of the Criminal Procedure Code outlawed the granting of bail to those charged with Murder, treason, robbery with violence and attempted robbery with violence. This section has been rendered obsolete by the provisions of Article 49 of the 2010 Constitution. The only limitation is the existence of compelling reasons but bail is availed to any accused person irrespective of the nature of the charge.

The main reasons advanced by the prosecution is that the accused can be harmed and that he is a flight risk. With regard to the first issue, it is upon the state to provide security to its own citizens. It is true that some unruly people can attack an accused person who is released on bond. The circumstances of this case seems not to have created such an environment. The offence occurred at Mpeketoni and the accused lives in Malindi. Further anyone who is out to injure or harm the accused would be committing a criminal offence and ought to face the law. No one is entitled to take the law into his own hands.

The analysis on the days the accused was absent from duty does not show that the accused is a flight risk. When he was absent from 23rd January 2015 to 8th February, 2015, he went back to his place of work. The period 27th February 2015 to 12th March 2015 is subject to two different versions as to when the leave days were to end. The accused presented himself to the OCS, Malindi Police Station on 12th March 2015. He could have travelled on 10th or 11th March 2015 to Mpeketoni depending on how the leave days were computed. If the accused went into hiding, then that period cannot be more than four (4) days if we are to follow the computation by the prosecution. That is to say, the accused was to travel back to Kizingitini on 7th march 2015 and be on duty on 8th March 2015. This would have definitely reduced the 10 days leave period.

The police officers went to the accused's home on 3rd March, 5th March and 9th March 2015. These were the days the accused was supposed to be on leave. According to the Kizingitini OCS, the accused ought to have been on duty on 8th March 2015. I do find that even though the police failed to get the accused at his Malindi home, it is not clearly established that the accused was avoiding the police or he was hiding. It is true that the case was reported in the press and the police were looking for the accused. The explanation by the accused that he was on leave and ultimately presented himself to the OCS Malindi Police Station is reasonable.

One factor which ought to be considered in applications for bail is the long period taken by the prosecution to prosecute criminal cases. At times cases take years to finalize and in many cases the adjournments are not occasioned by the court or the defence. Prosecuting authorities ought to avail witnesses promptly so that the complainants and their accused can know the outcome of the cases within reasonable time.

In the end, I do find that there are no compelling reasons to deny the release of the accused on bail. The accused shall be released on bail on the following terms:

1. The accused to execute a personal bond of kshs. Two million (Kshs. 2,000,000)
2. The accused to provide two (2) sureties of kshs. Five million each of similar amount.
3. The accused to deposit his passport, if any, with the court.
4. The accused to report twice each month at the Malindi Police Station.
5. This case shall be mentioned once every month and the accused's presence shall be required.

DELIVERED and signed at Malindi this **26th** day of **March, 2015**

SAID J. CHITEMBWE

JUDGE