



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

Criminal Case No. 48 of 2013

LESIT, J.

REPUBLIC.....PROSECUTOR

VERSUS

MAMUSH HIRBO FAJA.....ACCUSED

RULING

1. The Accused faces one count of murder contrary to section 203 as read with Section 204 of the Penal Code. It is alleged that:

“On the 7th day of April, 2013 at Huruma Kiamaiko Estate within Nairobi County, murdered one TEGIS MOHAMMED ABDI.”

2. The accused through his Advocates Ms. Betty Rashid & Co. Advocates filed a Notice of Motion application dated 18th November 2014, seeking to be admitted to bond/bail pending trial. The Application is brought under the Articles 49(1)(h), 10, 20, 21, 22, 25, 29 and 50(6) of the Constitution of Kenya.

3. The application is premised on thirteen grounds namely:

- a. **Bail is a Constitutional right.**
- b. **The offence is bailable by dint of Article 49(1)(h).**
- c. **There are no compelling reasons why the applicant should not be released pending the hearing and determination of this case.**
- d. **The applicant is ready and willing to abide by any conditions imposed by the court and to attend court when required to do so.**
- e. **The letter and spirit of the Constitution contemplates that all suspects are entitled to bail unless there are exceptional compelling reasons to warrant the court to exercise discretion in favour of denial.**
- f. **The Constitution reflects the hopes and aspirations of all Kenyans including**

those facing various charges.

g. It is the duty of the court to protect, promote, preserve and bring into reality the values and principles that inform this Constitution.

h. The Constitution that does not protect, promote and preserve the rights of accused persons might lose respect of the people with devastating consequences.

i. Under Article 27(1) the Constitution accords equal protection and benefit of the law to all persons.

j. The accused has gone through inhuman and degrading treatment contrary to Article 29(d)(f) of the Constitution which negates the values and principles that inform this Constitution.

k. The accused's right to a fair trial as contemplated by Article 50(2)(a)(e)(p) has been infringed.

l. The accused's rights under the Bill of Rights has been violated under Article 51(1) of the Constitution; the accused has not enjoyed any of the rights.

m. It is in the best interest of justice that this application is allowed.

4. The application is supported by an affidavit sworn by the accused. The gist of the application is that the accused has a right to bail under the Constitution and that the court is bound to give effect to it. The accused deposes that he will abide by the terms of bond the court will impose.

5. The State has sworn a replying affidavit through the Investigating Officer, **P.C. Musamusi** in which the application for bail is opposed. The gist of the affidavit is that the witnesses in this case are all relatives of the deceased who are well known to the accused. He deposes that the brothers of the accused have threatened the relatives of the deceased with dire consequences if they testify in the case.

6. In her submissions, Mrs. Rashid counsel for the accused urged that the accused person has been in custody for over a year; that he was not a flight risk as alleged by the prosecution and further that he had not threatened any of the Prosecution witnesses as alleged. She argued that there was no cogent evidence to prove the alleged threats. In view of this, she argued that the applicant was ready and willing to abide by any conditions that the court would impose in granting bail as there were no compelling reasons why he should not be released on bail or granted bond.

7. Ms. Magoma for the State opposed this application on behalf of the State. In her submissions Ms. Magoma asked the court to note that the accused's earlier application for bail had been declined in April 2014, for reasons that the accused person was indeed a threat to the two eye witnesses in this case who happened to be close relatives of the deceased. Ms. Magoma urged that the State had since applied for witness protection for these two witnesses. Counsel submitted that the threats had been recorded in the Occurrence book a copy of which she gave the court.

8. Mrs. Rashid for the accused however argued that the said extracts of the threats from the Occurrence book lacked specifics for instance the details of the one who issued the alleged threats and disclosure of the phone number that was used. These she contended could have originated from anyone who did not wish to have the accused released on bond. Counsel urged the court to ignore the alleged threats.

9. There is on record a Pre-Bail Report dated 19th January 2015 which was filed on 20th January 2015. In that report the Probation Officer P. Alambo gives a brief family background of the accused. That background shows that the accused is the third born in a family of nine children and is of

Ethiopian descent. Upon completing class eight, he ventured into the business of selling meat and mutton. He married the deceased who had 2 issues out of a previous relationship in 2013. The accused's family was willing to deposit a log book for a motor vehicle that belonged to the family in an effort to meet the anticipated terms of bond.

10. The probation report further sets out the attitude of the community towards the accused. The Parents and former neighbors of the accused who had been interviewed expressed reservations on the prospects of the accused being released on bond. The accused's close relatives have continuously threatened the deceased relatives with dire consequences if they appeared in court to testify against the accused person. These threats eventually led some of them to relocate to different places.

11. I have considered the application by the Accused. I note that this is a second application for bail by the accused person. The first application was declined on 7th April, 2014. In the court's ruling the judge concluded by directing that the application for release of the accused on bail/bond should only be considered after the two witnesses in the case had testified.

12. The Constitution 2010 gives an accused person a right to be released on bond/bail pending his trial. The only condition given under the Constitution why bail should be denied are compelling reasons. Compelling reasons have not been defined under the Constitution.

13. In the case of **Republic –vs- Dorine Aoko – Nkr HCCRC Case No.36 of 2010 (UR)** (unreported) Emukule J stated the following:-

“--- to my mind again, those compelling reasons are the very same ones spelt out in section 72 (5) of the repealed Constitution, and elaborated in section 323 of the Criminal Procedure Code, namely that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity (taking away another person's life, disloyalty to the state of one's nationality or grievous assault and injury to another person or his property) are offences which are by their reprehensiveness not condoned by society in general. It would thus hurt not merely society's sense of fairness and justice, and more so, the kin or kith of the victim to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk to the street on bond or bail pending his trial. A charge of murder, treason robbery with violence, (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail ----.”

14. Further, in the case of **Republic –vs- Danson Ngunya& another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then it (State) must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

15. The accused has made this application before the conditions set by the judge for a review were met. It is therefore an incompetent application in the very worst or premature in the very least. To make it worse there was non-disclosure of the fact the application was a second one by the accused in the same case. There was also non-disclosure of the fact the court had set certain conditions which had to be fulfilled before a review or renewal of the application for the bond could be made.

16. Despite the prematurity of the application I will still consider the merit of it at this stage. The court considered a similar application by the accused and dismissed it. The reasons for the dismissal of the application are set out in the ruling of my sister judge dated 7th April, 2014. Among the conditions set by the learned judge include the finding that because the prosecution had proved that there was imminent danger to their witnesses and constant threats and interference with them, the accused should not be considered for bond until at least the two key witnesses have

testified.

17. The learned judge's ruling has not been set aside or reviewed. The conditions set when bond by the accused can be considered still stand. Conversely this case has not been heard since the learned judge's ruling. The grounds which dictated the denial of the bond still persist and I have not been informed that there has been any change of circumstances in this case. The application is premature, incompetent and an abuse of the court process.

18. Having carefully considered the law and the circumstances surrounding this case, I find that the application for bail/bond pending trial should not be allowed and is consequently dismissed.

DATED AT NAIROBI THIS 13TH DAY OF MARCH, 2015.

LESIT, J.

JUDGE