



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO.13 OF 2014

DAVID MWAKI.....APPLICANT

VS

REPUBLIC.....RESPONDENT

RULING

By a Notice of Motion Application dated 4th December 2014 and brought pursuant to the provisions of Section 124 of the Criminal Procedure Code, the applicant has sought the following orders:

- 1. That this court be pleased to review, vary, vacate or set aside the orders of 5/6/2014 and admit the applicant to a reasonable bail pending the hearing and determination of this suit.**
- 2. That the courts do grant any other relief it deems just in the circumstances and in favour of the applicant herein.**

The said application is supported by a supporting affidavit sworn by the applicant, where he disposes that during the pendency of this case, he had been given a counsel by the State to represent him; that the said counsel applied for bail but the application was strongly opposed; that his counsel did not appraise him of the same so that he could give him information so as to respond adequately. He urges the court to revisit the issue of bail and grant him the request.

The brief background to this application is that the applicant herein had sought to be released on bail/bond on 21st March 2014, which application was dismissed by Lesiit J on 5th June 2014, the court having found that the chances of the applicant absconding once granted bail were high, the applicant having gone into hiding soon after committing the offence.

The court had asked for a pre- bail report. The same was filed in court on 6th March 2015. According to the pre-bail report, the deceased family members were related to the applicant and they bitterly denounced the relationship and opposed the application for bail alluding to an earlier incident where the applicant had allegedly gone into hiding after committing the offence and threatening witnesses while in remand. On this grounds, they were apprehensive that the applicant may abscond or interfere with witnesses if released on bail.

On the other hand, the applicant's family members were not opposed to the applicant being released on bail and they pleaded with the court to do so. I have carefully considered this application, the pre-bail report and the earlier ruling by my Learned Sister Lesiit J where the applicant was denied bail. In **Ng'ang'a vs. Republic 1985 KLR 451** Hon. Chesoni J, commented on the principles to be considered in applications for bond. They are that the accused will turn up for his trial and is not a flight risk; that

accused will not interfere with witnesses; the character and antecedents of the accused and the seriousness of the offence etc.

In the instant case, it is not in dispute that the applicant had sought to be admitted on bail, which application was rejected by Lesiit J on 5th June 2014. One of the reasons why the application was rejected was because the court found that he had gone into hiding soon after committing the offence.

Even though the applicant deposed in his supporting affidavit that he did not run away after committing the offence but instead reported to Meru police station, I find it hard to believe the applicant's version because if indeed he did, he would have been arrested immediately. Similarly, I find it hard to believe the applicant's assertions that the three weeks soon after the incident, he was at home and that it is the deceased's family who had not made up their mind whether to have him prosecuted or not. It is not the prerogative of the deceased's family to decide whether or not to charge the applicant since that is the sole mandate of the office of Director of Public Prosecutions. In any event J. Lesiit already made a finding on the fact that accused went into hiding which this court cannot re open.

I also note that when the initial application for bail was made on behalf of the applicant by his then advocate, he did not oppose the prosecution's contention that the applicant had gone into hiding for a period of almost one month after commission of the offence. I find it hard to believe the applicant's assertion that he was not properly appraised of the matter by his then advocate on record on such a serious fundamental issue that goes to the root of the application.

It was also alleged in the pre-bail report that the applicant was said to be threatening witnesses while in remand a fact which was not explicitly denied by the applicant. I noted from the replying affidavit sworn by PC Justus Mosoti, in opposing an earlier application for bail before Lesiit J where the said officer, at paragraph 10 thereof, deposed that during the time of his hiding (the applicant) he constantly threatened the family of the deceased and a report on the said threats was booked in OB on 24th March 2014. This assertion remains uncontroverted to date since the applicant has not controverted the same in the instant application nor did he in the earlier one before Lesiit J; consequently, I do hold and find the same to be truthful and credible that indeed the applicant has threatened the deceased's family before even while in custody. J Lesiit declined to grant bond to the accused because the court was satisfied that the accused went into hiding after commission of the offence. That fact cannot change. He was found to be a flight risk. This court cannot therefore review the courts order declining to grant him bond because the facts cannot change. He could only appeal against the said order.

Having found that the applicant is a flight risk, and is likely to interfere with witnesses, I am satisfied that there are compelling reasons not to admit the applicant to bail/bond.

In the result, I decline to grant the applicant bail. The applicant will remain in remand pending the hearing of the case.

DATED, SIGNED AND DELIVERED AT MERU THIS 28TH DAY OF MAY 2015.

R. P. V. WENDOH

JUDGE.

In the presence of;

Mrs Kaume for accused

Mr. Mungai for State

Mwenda - Court Assistant

Accused.

