



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 60 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

PAUL ODHIAMBO OGUNDE.....ACCUSED

RULING

The accused, Paul Odhiambo Ogunde, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 8th and 9th June 2015 at Buruburu Phase V Estate within Nairobi County he murdered Agnes Mwikali Mutua. He denied committing this offence. He has now moved this court through his counsel Mr. Nyaberi instructed by Omwoyo, Momanyi Gichuki & Co. Advocates seeking to be admitted to bail pending the hearing and determination of this case.

The accused has filed a Notice of Motion under Article 49 (1) (h) of the Constitution of Kenya 2010 dated 14th July 2015 under certificate of urgency. The application is supported by the grounds found on the face of it and in the supporting affidavit sworn by the accused on the same date.

The accused has deposed that he is not a flight risk and is willing to deposit his passport number A792063 with the court; that he is the sole bread winner of his two families; that he surrendered to the police and has cooperated with investigations; that investigations in this case are complete; that he will abide by the terms and conditions of bail that his court will set and that he suffers from serious ailments that cannot be managed in a prison setting. He has attached a report from Nairobi Remand Health Centre dated 27th September 2015 and a letter from Dr. M. Njuguna of Kenyatta National Hospital on his health condition.

Mr. Nyaberi for the accused argued that bail is a constitutional right unless there are compelling reasons not to grant bail; that the prosecution has not presented to the court any compelling reasons to deny the accused bail save for expressing fear that the accused may interfere with witnesses.

The application is opposed by the prosecution. Through the replying affidavit of CPL Charles Muthomi, the prosecution states that the right to bail is not absolute; that there is evidence pointing to the accused as the only person who could have committed this offence; that the accused is likely to interfere with witnesses especially the house girl of the deceased and the watchman; that the accused is likely to abscond due to the seriousness of the offence and the likely sentence of death if found guilty.

Prosecution counsel submitted that the accused's health condition can be managed in hospital while still in custody and that some witnesses have gone into hiding for fear of the accused.

I have considered the application and the opposition. Bail is a right under Article 49 (1) (h) of the

Constitution 2010. It is not an absolute right and can be limited where there are compelling reasons. To grant or not to grant bail is the discretion of the court upon consideration of the issues presented before it. The opposing party in a bail application normally cites various reasons to the court to persuade it to decline the application. These reasons include the seriousness of the offence, the strong evidence against the accused, the likelihood of interfering with witnesses and the likelihood of absconding. The paramount consideration in granting or declining an application for bail still remains whether the accused will attend court during the hearing of his case until the same is determined. This does not mean that the courts downplay other considerations. Whether the prosecution has presented compelling reasons will depend on whether in the view of the court the reasons advanced are convincing to the court on a balance of probabilities.

I have noted the reasons advanced in this application. I agree with Mr. Nyaberi that the issue that some of the witnesses have gone into hiding because of fear of the accused came from the bar. This is a matter that would have required some sworn evidence in the form of an affidavit.

On the issue of available strong evidence, this court is yet to receive the evidence in support of the prosecution case and determine the same. There is nothing in the court file in form of statements by witnesses to enable this court to gauge the evidence the prosecution intends to present during this trial.

While interference with witnesses is a serious matter that amounts to the subversion of justice, this court holds the view that mere fear alone without substantive proof of the basis of that fear is not enough.

After carefully considering both the application and the grounds in opposition I find that the prosecution has not offered compelling reasons on a balance of probabilities to persuade me to decline this application. Consequently, I allow the application and admit the accused to bail pending the hearing and final determination of this case. I set the following conditions:

- i. The accused shall execute a bond of one million Kenya shillings (Kshs 1,000,000) with one surety of similar amount.
- ii. The accused is at liberty to deposit with the Registrar of this court cash bail of five hundred thousand Kenya shillings (Kshs 500,000) in the alternative to condition (i).
- iii. The accused shall deposit his passport Number A792063 with the court for custody until this case is finalized or until further orders of this court.
- iv. The accused shall not contact or interfere with any prosecution witness during the pendency of this trial.
- v. The accused is cautioned against breaching any of these conditions.

Orders shall issue accordingly.

Dated, signed and delivered this 8th December 2015.

S N. MUTUKU

JUDGE

In the presence of:

Ms Magoma for the prosecution

Mr. Nyaberi for the accused

Mr. Paul Odhiambo Ogunde, the accused

Mr. Daniel Ngumbi, court clerk