



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MURDER CASE NO.76 OF 2013

REPUBLIC PROSECUTOR

VERSUS

STEPHEN ROBI MARWA 1ST ACCUSED

DANIEL MARWA BOKE 2ND ACCUSED

RULING

1. Stephen Robi Marwa and Daniel Marwa Boke alias Rimo hereinafter referred to as the applicants made an oral application to be released on bail pending the hearing of this case. The application was expressed to be anchored on **Article 49 (1) (h)** of the **Constitution**.
2. The above application was opposed vide an affidavit dated 6th August 2013 sworn by No.91253 PC Simon Pasha, the investigating officer in this case on grounds inter alia that the applicants are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**; that if the applicants are released on bail, their own lives will be in danger since the situation on the ground is so volatile that one of the suspects in the case was lynched to death by members of the public while another suspect is still at large.
3. Furthermore, the deponent averred that as the applicants live in Kurutiange village in Migori County which is just a few kilometers away from the Kenya-Tanzania border, there is a high likelihood that they might cross over into Tanzania and abscond and that considering the nature of the offence, the court ought to find that there are compelling reasons as to why the applicants should not be released on bail.
4. The applicants on their part filed Replying affidavits through the firm of Sonye Ondari & Co. Advocates contesting the truth of the affidavit in opposition to their application for bond. It is their contention that there is absolutely no danger against their lives if they are released on bond. They also aver that they have no intention whatsoever to flee to Tanzania and that allegations by the State that they are a flight risk are mere suspicion and unfounded speculation.
5. The applicants also contend that the State's contention that one of the suspects in this case was lynched and therefore making it unsafe for them to be released on bail/bond has no basis; and this being the case, they have urged the court not to deny them their constitutional right to be released on bail/bond.
6. Apart from the affidavits for and against the application, this court asked for bail Assessment Reports on the applicants. The reports were filed with the Court on 25th October 2014. It is indicated in the reports that both applicants abuse alcohol and further that both applicants have been associating with people of questionable character. The reports also show that though the situation on the ground has now settled down, it was quite volatile initially.
7. From the reports also, it is revealed that the deceased was a brother in-law to both applicants. Finally, while the second applicant, Daniel Marwa Boke alias Rimo is recommended for bail/bond

- pending trial, Stephen Robi Marwa is found not to be suitable for bail/bond, though incidentally, this final recommendation is against the grain of the contents of the body of the report.
8. Perhaps at this juncture a brief history leading to the instant application would be in order. The State charged both applicants with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It was alleged that on the 12th day of June 2013 at Kurutiange market, Kuria West District within Migori County in the Republic of Kenya jointly with others not before court, the applicants murdered one Solomon Adams Mwita. When arraigned before this court on 12th November 2010 on the information, they entered a plea of not guilty.
 9. Prior to the promulgation of the constitution of the 27th August 2010, the law then prohibited the grant of bail/bond to accused persons facing capital charges. That was provided for in **Section 75 (5)** of the repealed constitution as well as **Section 123** of the **Criminal Procedure Code**. All this however changed with the coming into force of the new constitution. After the effective date of the Constitution, **Article 49 (1) (h)** thereof permits the release of any arrested person including persons charged with a capital offence on bail/bond pending trial, unless there are compelling reasons not to do so. Thus those charged with capital offences are now on similar footing with those charged with non-capital offences when it comes to bail. They are now entitled to bail as a matter of right and that right can only be restricted or taken away by court if there are compelling reasons.
 10. In the case of **Republic –vs- David Nyasora Nyamongo – Criminal Case No.90 of 2010** (unreported) in the High Court sitting at Kisii, Makhandia J (as he then was) stated:-

“At the end of the day however whether or not an accused should be admitted to bail, is largely a matter of discretion of the court to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again, the court must bear in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to be released on bail.”

11. The issue in this application then is whether there are compelling reasons why the applicants should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons.
12. In the case of **Republic –vs- Danson Ngunya & another [2010] e KLR**, the Court adopting the reasoning in the **M. Lunguzi –vs- Republic CMSCA Appeal NO.4 of 1995** the learned judge stated:-

“... In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. That is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order”

13. I entirely agree with the above propositions and hold that it is the duty of the state to satisfy me as to the compelling reasons why the applicants herein should not be released on bail/bond pending trial.
14. In the instant case, the state has given as compelling reasons the gravity of the offence, the possibility of the applicants taking flight once they are released on bond and the likelihood that

they will not attend the trial of their case. The State has also said that the safety of the applicants cannot be guaranteed because of the volatile situation on the ground.

15. From the Bail Assessment Reports, there is evidence that there has been considerable anxiety on the ground from the applicants' relatives concerning their safety. There is also evidence that the applicants are known to associate with people of questionable character. These two reasons, coupled with the fact that the applicants are a possible flight risk because of their proximity to the Kenya-Tanzania border, I am satisfied that the State has placed sufficient reasons before me to demonstrate that in the circumstances, the applicants' right to liberty ought to be curtailed. It is trite law that the principal purpose for granting bail is to ensure that an accused person avails himself during the trial. It is highly unlikely in the present case that the applicants will avail themselves for trial.

16. In the premises and for the reasons above stated, the application for bond be and is hereby dismissed.

17. It is so ordered.

Dated, signed and delivered at Kisii this 27th day of February, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Sonye Ondari (present) for Applicants

Mr. P.O. Ochieng (present) for Respondent

Mr. Bibu - Court Clerk