



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 78 OF 2010

DAVID MWITI NDATHOACCUSED

VERSUS

REPUBLIC.....PROSECUTOR

RULING

1. The accused has through counsel applied for bail pending his trial. The Application is based on five grounds namely:
 - (i) **The applicant is presently remanded at Meru G.K. prisons since the year 2010.**
 - (ii) **The Applicant is entitled to the constitutional fundamental rights of presumption of innocence.**
 - (iii) **The applicant believes in his innocence and is ready to stand trial to prove his innocence and will not therefore escape from the jurisdiction of this honourable court or skip bail.**
 - (iv) **The applicant is ready and willing to comply and is ready with all the requirements demanded of him by the honourable court if bond or bail is granted.**
2. The application is not supported by any affidavit.
3. The application is opposed. The learned State counsel, Mr. Moses Mungai filed a replying affidavit. The gist of the affidavit is that the accused is charged with the murder of a close relative committed at home in the sight of other family members. Mr. Mungai avers that the motive for the attack was a boundary dispute and was still unresolved.
4. In his submissions, Mr. Kaumbi urged that the accused has been in remand since 2010. Counsel urged that the accused was a person of good conduct and had not committed any offence except instant one.
5. Mr. Mungai in reply relied on his replying affidavit. He urged court to have regard to the circumstances of the offence and the relationship between the accused and deceased.
6. Article 49(i)(h) of the Constitution provides .

“49. (1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

7. In the celebrated case of **Ng'ang'a vs Republic 1985 KLR 451** where Hon. Chesoni J, as he then was held:

“1. The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should consider the following factors:

- (a) **In principle, because of the presumption that a person charged with a criminal offence is innocent until his guilt**

is proved, an accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:

- (i) The accused will fail to turn up at his trial or to surrender to custody;
- (ii) The accused may commit further offences; or
- (iii) He will obstruct the course of justice.

(b) The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;

- (i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;
- (ii) The strength of the prosecution case;
- (iii) The character and antecedents of the accused;

The likelihood of the accused interfering with prosecution witnesses.”

7. The accused is alleged to have murdered his uncle's wife, in the presence of his cousin and wife and others. I have considered that the accused eligible for bail pending trial under the Constitution. He is entitled to be considered innocent until proved guilty.

8. The circumstances of the offence as deciphered from witness statements are that the accused suddenly set upon the deceased with a panga, inflicting deep cuts on the head. It was out of those injuries that she died. The deceased was unarmed at the time. The facts of the case show that the attack was unprovoked. The number of cuts inflicted on the deceased were numerous and vicious.

9. I have considered the relationship between the accused, deceased and key witnesses in this case. There is no doubt granting the accused bail would create anxiety among family members. It could also be a cause for feelings of intimidation to witnesses and family members. It could also be a cause for feelings of intimidation to witnesses and family members (11). This case has a hearing date on 2/3/7/14. It will therefore be heard soon.

10. The vicious nature of the attack further dictates to declare of bond to the accused. I find that there are compelling reasons why the accused should not be granted bail. In the result the accused application is unmerited and is dismissed accordingly.

DATED SIGNED AND DELIVERED THIS 20TH DAY OF MARCH 2014

J. LESIIT

JUDGE.