



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE (MURDER) NO.99 OF 2010

REPUBLIC PROSECUTOR

VERSUS

ERICK MICHIRA BISIERI ACCUSED

RULING

1. The accused herein, Erick Michira Bisieri has moved this court for an order releasing him on bail/bond pending the hearing and determination of his case. He has brought the application under the provisions of **Article 49(1) (h)** of the **Constitution** which provide that every arrested person has the right to be released on bond or bail, on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released.
2. Briefly, the accused was arraigned before this court on 1st November 2010 on one count of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It is alleged that he committed the offence on the 15th day of October 2010 at Kegochi Sub location in Nyamache District within Kisii County jointly with others not before the court by murdering John Abuga Onwonga. He denied the charge and his case is fixed for hearing on 22th May 2014.
3. The application which was made informally is not opposed by the State. Number 83640 Corporal Olivia Ledonyo of Ogembo police station swore an affidavit dated 24th February 2014 and at paragraph 3 thereof, she avers:-

“THAT I do not have any compelling reasons to have the accused

person denied bail which is his right as provided under the Constitution of Kenya.”

4. A reading of **Article 49 (1) (h)** of the **Constitution** clearly shows that the burden of demonstrating to the court that there are compelling reasons to warrant refusal of an application for bond/bail lies squarely at the feet and on the shoulders of the State. This position is a reflection of the great paradigm shift in the law on bond/bail in force before the promulgation of the Constitution 2010. Under the provisions regime, it was the duty of an accused person to show why he had to be released on bond/bail. Under the same old constitutional dispensation, persons charged with capital offences had no right to bond or bail, **Article 49 (1) (h)** is therefore a much celebrated provision of the law. In the final analysis however, whether or not to grant bond/bail is still a matter for the discretion of the court after carefully considering such factors as:-
 - *the seriousness of the offence although this carried greater weight under the old constitutional dispensation;*
 - *the weight of the evidence so far adduced if the case is partly heard;*
 - *the possibility of the accused interfering with witnesses;*

- *the safety and protection of the accused once he/she is released on bail/bond;*
 - *whether the accused will turn up for trial;*
 - *Whether the release of the accused will jeopardize the security of the community.*
5. In addition to the affidavit by Corporal Ledonyo, the court has also been furnished with a bail Assessment Report dated 24th September 2014. From the report, the accused is 38 years old, a husband and a father of 4 children. He suffers from TB, is frail and also abuses alcohol. From the report, the victim's family are not amenable to the idea of the accused being released on bond, though the accused's own family, as would be expected are more than ready to have the accused released on bond and have already found people with land title deeds who are willing to stand surety for the accused should the court find it fit to order his release. The accused's family however appreciates that the accused sometimes abuses alcohol so much that he forgets his family responsibilities.
 6. It is one of the cardinal principles in matters of bond application that the suffering of the family of the accused is not a factor to be considered by the court. It is therefore not enough in this case to say that because the accused's young family is suffering because of the incarceration of the accused, then the court should release the accused on bond.
 7. I have noted a veiled threat to the safety of the accused by the victim's family. Although the State is under a duty to protect all the citizens of this county, the court takes judicial notice of the fact that in this region, a number of suspects of capital offences who are released on bond/bail end up being victims of subsequent murders. It may therefore mean that once the accused is released, his prime concern will be his personal safety which may mean going into hiding to avoid the hand of wrath from the victim's family. If such an eventuality occurs, there are high chances that the accused may not attend court for the hearing of his case. It is not lost to the court that the main purpose of granting bond is to allow an accused person to attend court for the hearing of his case, for without the attendance of an accused person during the hearing of his case, there would be no trial.
 8. In the circumstances and for the reasons above stated, the application for bond is refused. The accused shall remain in custody pending hearing of his case on 22nd May 2014.
 9. Orders accordingly.

Dated and delivered at Kisii this 20th day of March, 2014

R.N. SITATI

JUDGE

In the presence of:

Mr. Shabola (present) for State

Mr. O.M. Otieno for Mr. Ochwangi for Accused

M/s Gladys Nyabonyi - Court Clerk