



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 48 OF 2013

REPUBLIC.....PROSECUTOR

-VERSUS -

MAMUSH HIRBO FAJA.....ACCUSED

RULING

The applicant Mamush Hirbo Faja in his notice of motion dated 11th February 2013 seeks for orders of release on bail or bond pending the determination of his case. The application was argued by his advocate Mrs. Rashid.

The grounds set out in the face of the application and in the supporting affidavit were mainly provisions of the law. An affidavit should contain facts which the accused in his own knowledge is able to prove. In an application of this nature the accused ought to swear to facts in his affidavit which would tell something about himself, his family background, occupation, place of abode and his undertaking to comply with any conditions that the court may impose upon the application being successful. After hearing the application the court was at a loss as to any personal information about the applicant. For this reason, this court directed that a pre-bail report be filed. The report was filed on 27th March 2014 by the Nairobi Milimani Court Probation Officer.

Mrs. Rashid in her submission brought out some of the facts which the accused should have deponed in his affidavit concerning his place abode, family responsibilities and about his character. I do not wish to dwell in matters not in the affidavit of the applicant but will only focus on matters which the counsel may have been instructed on in the course of this case.

The counsel argued that the State has not shown any compelling reasons to justify denying the applicant bail. The allegation of interfering with witnesses has not been proved since no affidavit was sworn by the witness. **Article 50(2)** of the **Constitution** presumes an accused person innocent until proven guilty.

The State opposed the application relying on the affidavit of Manava Musamusi the investigating officer in this case. He depones that the State has strong evidence against the accused likely to end in a conviction. Further that the seriousness of the offence and severity of sentence may lead to the temptation of absconding if the applicant is released on bond. The accused has threatened one witness namely Amina Mohamed with dire consequences if she testifies in this case. The threats were made through his two brothers whose names are given as Mursal and Abdo Meriko. Lastly, it was argued that if released on bail, the applicant is likely to interfere with witnesses who are his own relatives.

Article 49(1) (h) provides that an accused person is entitled to be released on bond/bail unless the prosecution has compelling reasons to the contrary. The right to bail is therefore not absolute and it is at the discretion of the court.

The right to bail does not depend on whether or not the prosecution have strong evidence against the accused. The relevant constitutional provision does not classify offences that are bailable or not – Bail is open to all offences including capital offences. The basis of this right has a bearing on the presumption of innocence until proven guilty as provided for by **Article 50(2)(a)**. The seriousness of the offence and the strength of the evidence is therefore, not a basis of denying the accused person bail.

On the interference of witnesses, the allegation is contained in the affidavit of the investigating officer. It was not denied on oath by the accused although the counsel said the information is not correct even as it relates to the names of the brothers of the applicant. Other witnesses are said to be close relatives of the accused person and that there is a likelihood of interfering with them. This was disputed by the defence who said most witnesses are relatives of the deceased who stay in Eastleigh and not in Huruma where the accused stays.

The pre-bail report states that there has been an attempt to settle this murder case out of court by the brothers of the accused persons. The mother of the deceased Habiba Mohamed was offered cash by the brothers of the accused and when she refused to take it, one of the brothers Ado Hirbo threatened to kill her the same way her daughter was killed. The witness said she has been threatened twice and reported to the police the first time. On the second occasion, she sought help of Women Rights Awareness Programme (WRAP) who evacuated her from Huruma Estate to a safe area in Nairobi.

The probation officer interviewed both the family of the deceased and that of the accused. The information on threat of the witness is verifiable and confirms the facts contained in the replying affidavit. If the Women right non-governmental organization found it necessary to evacuate the witness, then there was a real threat that instilled great fear in the witness. The brothers of the accused must have been acting as agents of their brother given the extent of offering cash for settlement.

I find that the prosecution has established that there is imminent threat to its witnesses. It does not matter whether they are living in Huruma where the family of accused lives or in any other part of Nairobi. The interference with witnesses has already taken place as regards to Habiba Mohamed. I find this a compelling reason to deny the accused bond.

I therefore decline to allow this application. The accused will remain in custody until all the key witnesses have testified. Thereafter, the bail application may be reviewed.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered on the 7th day of **April, 2014** in the presence of the applicant, defence counsel Mrs. Rashid and the State counsel Ms. Onunga.

F. N. MUCHEMI

JUDGE