



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MURDER NO. 6 OF 2012**

**REPUBLIC .....PROSECUTOR**

**-VERSUS-**

**WILLIAM MWANGI WA MWANGI .....ACCUSED**

**RULING**

1. The accused in this case **William Mwangi Wa Mwangi** was arraigned before the High Court in Embu with a charge of Murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence alleged that on the 4th day of April 2012 at Difathas village within Kirinyaga County, the accused murdered **Esther Muthoni Karimi**. On 2nd May 2012, the accused pleaded not guilty to the charges and was remanded in custody pending his trial.
2. By a Notice of Motion dated 19th February 2014, the accused through his counsel **Mr Gitonga** has applied for bond /bail pending his trial on reasonable terms and conditions that the court may deem fit and just in the circumstances of this case.
3. The application is premised on three grounds namely:-
  - a. That the accused has a right to be admitted to bail and no compelling reasons exists to deny him bail pending trial.
  - b. That the accused has a right to presumption of innocence before being proved guilty and further detention in custody would be punitive and an abrogation of one of his fundamental rights enshrined in the bill of rights.
4. The application is supported by an affidavit sworn by the accused in which he deponed that he has a constitutional right to bail unless compelling reasons are shown to exist and that none exists in this case, that he is ready and willing to abide by any terms or conditions of bond imposed by this court and that he will at all times attend the court whenever required. he also pledged not to interfere with witnesses if his application was allowed.
5. Though the application was served on the Director of Public prosecution, no response was filed by the state in opposition thereto. However when the application came up for hearing, the prosecuting Counsel **Mr Sitati** opposed the application submitting that the accused was a flight risk allegedly because his place of abode was unknown, that bond should be denied for the accused's own safety as the threat of mob justice which made him surrender to the police at Muthaiga police station still subsists and that given the nature of the offence and severity of sentence on conviction, the accused if released on bond may be tempted to abscond.

In the alternative, counsel invited the court to impose strict bond terms in the event that it was inclined to allow the application

6. **Mr Gitonga** on his part reiterated on his submissions the depositions made by the accused in his supporting affidavit. He in addition submitted that the accused has been in remand custody since April 2012 and he should not be allowed to continue suffering due to delays in his trial caused by shoddy investigations conducted by the state.

In response to the state's submissions **Mr Gitonga** submitted that there is evidence that accused's place of residence was well known to the state and that the defence was not aware of any threat to his life if he were to be released on bond.

7. I have considered the rival submissions made by both counsels in this matter.

The application is anchored on **Article 49(1) (h)** of the **Constitution** which provides that 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"

8. From the above provision, it is clear that though every accused person has a **Constitutional** right to be released on bail, that right was not absolute. This right is limited only by the existence of compelling reasons which justify denial of that right.

The **Constitution** does not however define what amounts to "compelling reasons".

In the circumstances therefore, the courts are given discretion to determine what amounts to compelling reasons to warrant denial of bail depending on the merits and circumstances of each case.

9. It is now settled that in the event that the state is opposed to the grant of bail to an accused person it has the onus to demonstrate that compelling reasons exist to justify denial of the **Constitutional** right to bail -See

**R VS Danson Maonya and another High Court of Kenya Mombasa Criminal Case No. 26 of 2008. Republic VS Thomas Muthus Nzii (Nrb) Misc. Cr. Appn No. 13 of 2010 , Republic VS Daniel Musyoka Munya and two others High Court Criminal Case No. 42 of 2009(Mombasa ).**

In this case, the only reason given by the state in opposing bail is that the accused is flight risk because his place of residence was unknown and that his safety would be at risk if released on bond.

That state did not however back this claims by any evidence since no replying affidavit was sworn by the investigating officer to substantiate the allegations.

**Mr Sitati's** submissions in this regard amounted to statements from the bar which had no factual basis.

The results is that the state failed to demonstrate that if released on bail, the accused is likely to abscond.

10. It is trite that the cardinal principle which the court should consider is deciding whether or not to grant bail is whether the accused will turn up for his trial and whether there are substantial grounds to believe that he is likely to abscond if released on bail.

Other established principles include but are not limited to the following :-

- i. Whether the accused is likely to obstruct justice by interfering or intimidating witnesses.
- ii. Whether the accused has a fixed abode within the jurisdiction

of the court.

- iii. The nature of the offence and whether the accused's trial is likely to be finalized within a reasonable time.
- iv. The security of the accused person if released on bail.

11. It is not disputed that the accused person was arrested in this case after he surrendered to the police. This undisputed fact in itself is proof that the accused is not predisposed to avoiding his trial and is therefore not likely to abscond because if this were so knowing that he was suspected to have committed a serious offence, he would have chosen to go underground or escape the court's jurisdiction instead of surrendering himself to the police.

12. I also find no merit in the state's claim that accused would be at risk if he is released on bail just because this claim is not backed by any evidence and secondly because it is the state's duty and responsibility to provide security to all citizens of this country including the accused person in this case.

Though admittedly murder is a serious offence which attracts the ultimate penalty of a mandatory death sentence upon conviction, it cannot be validly argued that the severity of sentence upon conviction will motivate an accused person charged with the offence to abscond because if that reasoning was to be upheld, then accused persons charged with capital would never enjoy their constitutional right to bail.

This in my view does not constitute sufficient reason to warrant denial of bail. The new **Constitutional** dispensation guarantees all accused persons the right to bail and the right to be presumed innocent until proved guilty and this includes persons charged with the offence of murder and other capital offences.

The court would therefore be going against the letter and spirit of the **Constitutional** Provisions that guarantee rights and privileges to arrested and accused persons. If it were to deny bail just because the accused is charged with a serious offence which carries a mandatory death sentence.

Having said that I think it is important to mention that the nature of the offence and severity of sentence in the event of conviction is an important factor for the court to take into account when considering the terms of bail/bond to grant in any particular case.

13. In view of the foregoing reasons, it is my considered view that the state has in this failed to discharge its burden of demonstrating that compelling reasons exist to justify denial of bail to the accused herein. I therefore allow the application dated 19th February, 2014 on the following terms.

- i. The accused to be released upon executing bond of KShs 3,000,000 together with two sureties of similar amount.
- ii. The sureties to be approved by the Deputy Registrar of this court.
- iii. During the pendency of the case or until further orders of this court, the accused shall appear for mention of his case before the Deputy Registrar once every 30 days.
- iv. It is so ordered.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 29<sup>TH</sup> DAY OF**

**MAY 2014** in the presence of :-

The accused

Mr Gitonga for accused

Mr Sitati for state

Mbogo Court Clerk