



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 80 OF 2013

PATRICK MOMANYI MOKAYA APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Patrick Momanyi Mokaya is the accused in Criminal Case No. 80 of 2013. He is charged with the murder of **Peter Njoroge Ndungu**. The offence was allegedly committed on 26th day of June, 2013 at **High Point** in **Juja area** within **Kiambu County**. The accused was arraigned in court on 24th July 2013. He pleaded not guilty to the charges on 25th July 2013 and was remanded in custody pending trial which is yet to commence.

He now seeks to be released on bail. In his application dated 23rd April 2014 he states that the offence with which he is charged is bailable under the Constitution; that he is presumed innocent until proven otherwise; that he is ready and willing to abide by the bond terms that the court may grant; that he is not a flight risk; that there are no compelling reasons why he should not be enjoying his liberty pending the hearing and determination of his trial; that the court has unfettered discretionary powers to admit him to bail; that in granting bail the court should consider his economic plight having been previously employed as a butcher; and, that his family depended on him.

The application is opposed by the State through the replying affidavit of **No. 36175 PC Benard Kiplagat** who is the investigating officer in the case. He states that the applicant is not entitled to bail since the offence he is charged with is grave and in the event that he is found guilty he is likely to be sentenced to death; that the applicant may be a flight risk since he committed the offence in the broad view of the prosecution witnesses and therefore the temptation to abscond is real; that the prosecution is apprehensive that the accused person if released on bail may intimidate prosecution witnesses particularly D2 and D3 who are well known to him.

At the hearing of the application on 9th June 2014, **Mr. Muhia** for the applicant submitted that the applicant was not a flight risk and would not interfere with investigations or witnesses and further that he was from a humble background and therefore deserving of reasonable bail terms. He urged the court to exercise its discretion to grant bail. He dismissed the replying affidavit of **PC Benard Kiplagat** as a mere opinion. He took issue with the averment that the applicant would interfere with prosecution witnesses D2 and D3 stating that the two witnesses should have sworn their own affidavits.

Submitting for the respondent, **Mr. Konga** the prosecution counsel argued that the applicant committed the offence in full view of the prosecution witnesses. In particular, he strongly submitted that D2 and D3 who were eye witnesses and are well known to the accused having worked together at the same place,

would be fearful and feel intimidated if the accused was released. He urged the court to exercise its discretion not to grant the applicant bail stating that although the applicant is entitled to bail the right is not absolute but at the discretion of the court.

Article 49 (i) (h) of the Constitution on which the application is grounded provides that “*an arrested person has a rightto be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.....*” A reading of this Article shows that bail must in the first instance be granted as of right. However it is also my understanding that the right is not an absolute right and can be curtailed by the court where there are compelling reasons. Further, where the State opposes an accused person’s application for bail, it is its duty to demonstrate to the court any compelling reasons envisaged under **Article 49 (1) (h)**. Such reasons would arise in my view from any fact or circumstance that would be so compelling as to convince the court that the release of the accused would not serve the interests of justice in the particular case or the trial at hand. The court would therefore consider the circumstances of each case using commonly known criteria including but not limited to whether or not the accused will attend trial. See **Watoro V. Republic (1991) KLR 220**. See also **R. Vs Danson Mgunya and Kassim Sheebwana Mohamed, Mombasa Criminal Case No. 26 of 2008** where **Ibrahim J.** (as he then was) aptly discussed the duty of the prosecution to demonstrate compelling reasons.

In this particular application the prosecution has opposed bail for fear that the accused if granted bail may interfere with two key prosecution witnesses D2 and D3. They argue that the possibility of interfering is high given that the accused is well known to the two witnesses. They however do not demonstrate whether the witnesses stand in a vulnerable position to the accused and therefore can easily be influenced or intimidated. Neither do they demonstrate whether the witnesses have a close association with the applicant that would influence a flow of sympathy for him. The mere knowledge of a witness cannot in my view support the fear of intimidation. I am not persuaded that the two witnesses are likely to be so intimidated by the applicant if released. I will therefore admit the applicant to bail on the conditions that he shall:-

- i. Execute a personal bond of KShs.1 Million with two sureties of like amount.
- ii. Provide evidence of his expected place of permanent abode and address upon release.
- iii. Not leave the jurisdiction of this court without an order of the court.
- iv. Report to the Investigating Officer at Juja Police Station once every two weeks until further orders of the court.
- v. Attend the monthly mention of his case before the Deputy Registrar of the Court. The first such mention shall be on 23rd July, 2014

Ruling delivered, dated and signed at Nairobi this 23rd day of June, 2014

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....; Applicant

.....: For applicant

.....: For State

.....: For the State

