



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 8 OF 2013

REPUBLIC.....PROSECUTOR

-VERSUS -

THOMAS KISAKAACCUSED

RULING

In his Notice of Motion dated 10th December 2013, the applicant seeks for orders:

“That this Honourable court be pleased to admit the Accused/Applicant to reasonable bond and/or bail terms pending the trial.”

The applicant on the face of the application and in the supporting affidavit relies on a number of grounds. He depones that he resides at Kawangware Kabiru 46 with his wife and 5 children some of whom are schooling in Nairobi. His occupation is that of a business person doing sub-contracts in the name and style of T/A Spring contracts. The applicant gives the names of his close relatives who may be used as contact persons should the court allow his application. It is his submission that he is not a flight risk. In answer to the replying affidavit, the applicant filed a supplementary affidavit denying the issues raised by the prosecution. Mr. Wamwayi for the applicant submitted that no compelling reasons have been shown by the prosecution not to release the accused person on bond. The applicant denies the allegations that he is a flight risk and disputes the place and date of arrest as indicated in the replying affidavit.

The State relied on the replying affidavit of one CPL Henry Njuguna who is the investigating officer in this case. The State expresses the fear that if the accused is released on bond, he is likely to interfere with witnesses since they live in the same estate with the applicant. It is also alleged that the applicant escaped to his rural home for two days after the commission of the offence to avoid arrest. The State also argues that the seriousness of the offence and the severity of the sentence may lead the applicant to the temptation of absconding.

It is an established principle that the primary consideration by the court in granting bail is whether the accused is likely to turn up for the trial. This concern takes precedence over all other issues. **Article 49(1) (h)** grants the accused person the right to bail unless the prosecution demonstrated compelling reasons why the accused should not be released.

It was observed by Potter, J in the case of **Watoro vs. Republic (1991) KLR 220** at page 283:

“I think I have made it clear over a number of rulings in bail applications that I take the view on authority that the paramount consideration in a bail application is whether the accused will

turn up for his trial.”

This case was cited with approval in the case of **Republic vs. Danson Mgunya & Another 2010 eKLR** where the provisions of **Article 49(1)(h)** of the **Constitution** were examined by Ibrahim, J (*as he then was*). It was held in the **Mgunya** case that all other factors in a bail application must be considered with this central principle in mind.

The prosecution's main fear is that the applicant is likely to interfere with witnesses since they reside in the same estate with him at Kawangware. In his supplementary affidavit, the applicant explains that Kawangware is a vast estate and he lives at Kabiro which is far from Satellite where the witnesses live. The applicant argues that there is no likelihood that the applicant will have any contact with the witnesses. The prosecution has a duty to demonstrate evidence of actual or perceived interference with witnesses. It is not enough to just speculate that the applicant may interfere with witnesses for the simple reason that they reside in the same estate. No such evidence has been adduced in the replying affidavit. The applicant has however explained himself regarding the distances of the two estates.

It is also alleged by the prosecution that the applicant escaped after committing the offence only to be arrested on 9th December 2012. The offence was allegedly committed on 8th December 2012 and the prosecution states that the applicant was at large for two days.

In his supplementary affidavit, the applicant said he was arrested from his home on 9th January 2013 and not 9th December 2012 as alleged. The witness statements confirm as correct the date given by the applicant. However, the investigating officer does not say in his statement or in the replying affidavit that made any attempt to look for the accused in his house any time before arrest and could not trace him. This ground cannot therefore hold.

The issue of the seriousness of the offence and severity of the sentence does not in any way constitute a ground for consideration in granting bail since **Article 49(1)(h)** treats all offences whether minor or serious the same way in regard to bail. This ground which is merely speculative and cannot be a compelling reason.

The court called for a pre-bail report which describes the accused person as a responsible person with a wife and four children whom he supports. He is described as a man with sound social and family ties. His relatives who were interviewed are willing to assist him to get a surety if he is released on bond.

In conclusion, I find that the State has not demonstrated any compelling reasons to justify denial of bail to the accused. The court allows the application for bail on the following terms:

1. That the applicant may be released on bond of KShs.2,000,000/- with one suitable surety;
2. That he will attend routine monthly mentions of this case until it is finalized;
3. That he will not in any way interfere or keep contact with any of the prosecution witness;
4. That he will not leave the jurisdiction of this court without permission of this court.

I hereby so order.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered in open court on the **23rd** day of **June 2014** in the presence of:

1. Accused present
2. Mr. Konga for the State

3. Mr. Wamwayi for accused

F. N. MUCHEMI

JUDGE