



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 15 OF 2013

REPUBLIC.....PROSECUTOR

-VERSUS -

PROSPER MUTUA NZILANI.....ACCUSED

RULING

The accused/applicant faces a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The plea was taken on 5th February 2013 whereas he pleaded not guilty to the charge.

In his notice of motion dated 26th June 2013, the applicant seeks for orders that he be released on bail/bond pending the determination of the case. The applicant's affidavit supports the application. He states that he was arrested on 28th January 2013 and arraigned in court on 5th February 2013 whereas he has been in custody awaiting hearing of his case which was fixed in October 2013. Due to the congestion of the court's diary the applicant feels that his case may take long to be disposed of which factor justifies his release on bond. He is ready and willing to abide by any terms the court may impose in granting bail. The applicant depones that he is sickly and the conditions in prison are not conducive to his health. He hails from a family of 5 siblings and he engages in certain jobs to provide support to his mother. Being a student at Masii High School, he has been forced to abandon his studies due to having been remanded in custody.

Mr. Gomba for the applicant argued that no compelling reasons have been shown not to release the applicant. He relied on the provisions of **Article 49(1)(h)** and **50(2)(a)** of the **Constitution** and also on two decided cases.

The prosecution opposed the application relying on the affidavit of I.P. Gichuhi the investigating officer who expresses the fear that the applicant if released on bond may interfere with witnesses who are residents of Eastleigh Section III where the applicant also resides. The State argues that the medical care the applicant needs can be accessed in prison. Further that the seriousness of the offence and the severity of the sentence may tempt the applicant to abscond.

The provisions of **Article 49(1)(h)** makes bail a constitutional right at the discretion of the court based on whether or not the prosecution demonstrates compelling reasons. The law does not qualify bail in terms of the nature of the offence or the gravity of the sentence. All offences including capital offences are bailable under **Article 49(1)(h)**. The principle of presumption of innocence is based on **Article 50(2)(a)** of the **Constitution**. The strength of the evidence in a criminal case does not affect granting of bail.

The prosecution's fear of interference with witnesses based on the fact that the applicant and the witnesses reside in Easleigh Section III is not sufficient. The size of the estate, the population and proximity of the residences of the people in question ought to have been explained. For interference with witnesses, the prosecution should not only make a general presumption but must adduce evidence of the likelihood of such an act by the applicant.

The principle laid down in the cases of **Danson Mgunya vs. Republic criminal case no. 26 of 2008** High Court Mombasa was that the primary consideration in granting bail is whether the accused person will turn up for trial. The burden is on the prosecution to show the existence compelling reasons. He who alleges the existence of any fact bears the burden of proof. The prosecution fear that the applicant may be tempted to abscond is mere speculation because it is not supported by any evidence. In my considered opinion the prosecution have failed to prove any compelling reasons.

This court called for a pre-bail report which was filed on 13th May 2014. The report gives details of the accused's home and family background. However, a good part of it deals with the relations between the applicant and the deceased's family which is said to have been cordial but deteriorated after the incident which led to the death of the deceased. The probation officer says that the deceased's family living in Easleigh still harbours very bitter feelings against the accused persons and that his security cannot be guaranteed if he is released on bail. I do not find this argument convincing in that the security of every Kenyan citizen is in the good hands of the State. The court will be acting outside its mandate by holding an accused person in custody in order to shield him from likely hostile or violent acts.

I find no compelling reason not to release the accused person on bail. I therefore allow this application on the following conditions:

1. That the applicant may be released on bond of KShs.1,000,000/= with two sureties of a like amount;
2. That he will not leave the jurisdiction of this court without the permission of the court;
3. That he will attend monthly mentions in court pending disposal of this case;
4. That he will not interfere or have any contact with the witnesses.

F. N. MUCHEMI

JUDGE

Ruling dated and delivered in open court at **Nairobi** this **18th** day of **June 2014** in the presence of:

1. The accused
2. Defence counsel Mr. Gomba
3. The State counsel Ms. Maari for Gichohi

F. N. MUCHEMI

JUDGE