



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 34 OF 2014

ERICK OMONDI OTIENOAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Erick Omondi Otieno is charged with the murder of **Reuben Oduor Oyero**. The offence is said to have been committed on 8th day of October, 2013 at **Mwiki area Kasarani District** within **Nairobi County**. He was arraigned in court on 28th April 2014 when he pleaded not guilty and was remanded in custody.

On 13th June 2014 he filed the instant application seeking to be released on bail pending trial. He states in the application that he has a constitutional right to bail; that he will attend trial; that there were no compelling reasons not to be admitted to bail; that he is a Kenyan citizen who resides at Mwirithia, Mwiki; that he is married with a family residing in Kisumu County; that he works at the quarry at Mwiki Sublocation and, that one Joshua Okumu can stand surety for him.

The State has opposed bail through through the replying affidavit of **No. 54774 Corporal Peter Mutiso** who is the investigating officer in the case. In the lengthy affidavit the investigating officer avers that the accused lured the deceased to his death by calling him and upon meeting him by the road side, entered his (deceased's) car, stabbed him thrice on the chest and abdomen and robbed him of his mobile phone and unknown amount of money; and that the accused thereafter escaped to Uganda through Malaba border point and was arrested six months later; that the release of the accused may cause eye witnesses to fear to testify; that the evidence against the accused was likely to lead to a conviction; and, that the accused may abscond trial to avoid the conviction and sentence.

The application was urged before me on 9th July 2014. I heard submissions from **Mr. Wamwayi** for the accused/applicant and **Mr.Konga** for the respondent. **Mr. Wamwayi** underscored the accused's right to bail under **Article 49(i) h of the Constitution** stating that the accused would avail himself for trial, was a Kenyan citizen, and resided at Mwiki where he would be found if necessary. **Mr. Wamwayi** dismissed the averments in the replying affidavit of **Corporal Peter Mutiso** stating that all that the court should consider is whether or not the accused will attend trial.

Mr. Okeyo on the other hand urged the court to consider the time lapse between the commission of the offence on 8th October 2013 and the time of the arrest of the accused on 13th April 2014 stating that the accused had disappeared to Uganda and was only arrested in Bondo upon his return to Kenya. On the issue of interference with witnesses, **Mr. Okeyo** submitted that the key prosecution witnesses formerly worked with the accused at the quarry and were employees of the deceased and that there was a possibility of the accused interfering with such witnesses. **Mr. Okeyo** urged the court to exercise

discretion to deny the accused bail as allowed by **Article 49(i) h of the Constitution.**

In this application, it is apparent that the applicant’s constitutional right to bail is not contested. The respondent acknowledges this right under **Article 49 (i) h.** It is obvious from the constitutional provision that the only fetter to the applicant’s right to bail is the existence of a compelling reason. The issue then in this application is whether there is any such reason why the applicant cannot be granted bail.

From the rival affidavits and submissions, it is apparent that the State opposes this application on the grounds that the applicant may not attend his trial, and may interfere with prosecution witnesses. It is the prosecution’s fear that the applicant will abscond if granted bail. I take the view that where the State opposes bail on account of any of the commonly known fears, including but not limited to the likelihood of the applicant absconding, and likelihood of interference with witnesses, the State must make the court appreciate the basis of such fears. It must provide persuasive argument backed by facts and experiences which demonstrate the real likelihood that the applicant will abscond or interfere with witnesses. As stated in **Jaffer V. Republic, 1973 E.A. 39,** the court cannot be called upon to speculate; **See Republic Vs Patius Gichobi Njagi Nairobi Criminal Case No. 45 of 2012(UR)**

After my careful consideration of the rival affidavits and submissions as well as pre-bail report in this application, I am of the view that the applicant is a flight risk. Firstly, the record supports the prosecution counsel’s submissions that the applicant went underground after the commission of the offence. The alleged offence was committed on 8th October, 2013 and the applicant was arrested on 13th April 2014, almost 7 months later. The alleged murder took place in Mwiki, Nairobi while the applicant was arrested in Bondo. This is an antecedent that demonstrates the possibility of the accused absconding trial. It is to be remembered that the primary consideration in granting bail is whether or not the applicant will attend his trial.

In the circumstances of this case, I am not persuaded that the applicant will attend his trial. The application dated 13th June 2014 is dismissed. The applicant shall remain in custody pending trial.

Ruling delivered and signed at Nairobi this 7th day of **August, 2014**

R.LAGAT-KORIR

JUDGE

In the presence of:

.....Court clerk

.....:Accused/Applicant

..... :Counsel for the Accused/Applicant

.....Counsel for the Respondent