



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI CRIMINAL DIVISION, MILIMANI**  
**CRIMINAL CASE NO.69 OF 2014**

**ANDREW NJENDU GIKERA.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Background**

1. Andrew Njendu Gikera, the applicant, has moved this court through his defence counsel Mr. Ngugi Kariuki seeking to be admitted to bail pending the hearing and determination of this case. He is facing a murder charge contrary to section 203 as read with section 204 of the Penal Code.

**The application**

2. The application is brought by way of a Notice of Motion dated 6<sup>th</sup> August 2014 anchored on Article 49 (1) (h) of the Constitution, Section 123 of the Criminal Procedure Code and any other enabling provisions of the law . It is supported by grounds on the face of it and those contained in the supporting affidavit sworn by the applicant.

3. In brief the applicant is saying that the offence is bailable; that he has been and will continue cooperating with the police; that he is not a flight risk; that he has a fixed abode at Nairobi West and will not remove himself from this court's jurisdiction; that he needs to be free so as to take care of his six year old boy being the only parent alive and that he is law abiding.

**Applicant's Submissions**

4. Counsel for the applicant submitted that admitting an applicant to bail is discretionary; that it is upon the State to provide compelling reasons capable of persuading the court to deny an applicant bail; that severity of the sentence is not a compelling reason as stated in **Republic v. William Mwangi Wa Mwangi 2014 eKLR**; that the paramount consideration in granting bail is whether the applicant will avail himself to stand trial and that the applicant informed police through his relatives where to find him to be arrested and that he is keen to clear his name.

5. Counsel further submitted that the applicant is not a flight risk and that holding a passport is not proof that he will flee; that the applicant did not escape after the offence but was admitted at Thika Level 5 Hospital seriously ill and that he has no interest in interfering with witnesses or investigations.

## Respondent's Submissions

6. The respondent opposed the application. Through its prosecuting counsel Miss Ikol and by a Replying Affidavit sworn by Sergeant Paul Waweru the respondent submitted that the right to bail is not absolute but discretionary; that due to the seriousness of the offence, the strong prosecution evidence and the likely death sentence if found guilty, there is likelihood that the applicant may abscond; that the applicant disappeared after committing the offence; that the witnesses may sympathize with him and decide not to testify; that he may interfere with witnesses and may flee the jurisdiction of this court since his parents live in the UK.

## Determination

7. Let me repeat the obvious: the offence of murder is bailable thanks to the Constitution 2010. It is one of the rights of an accused person. However, the right is not absolute and can be denied. For the court to exercise this discretion and deny an applicant bail there must be proof of existence of compelling reasons. The burden lies with the prosecution to advance convincing compelling reasons.

8. Over time, the courts have considered various factors in determining whether or not to grant bail. Among the factors considered include:

- i. Presumption of innocence of the accused.
- ii. Whether the accused will turn up for his trial until it is concluded.
- iii. Whether he has a fixed abode.
- iv. Nature of the offence (seriousness), the sentence likely to be imposed and the length of time it might take to conclude the trial.
- v. Likelihood of the accused to obstruct cause of justice by either interfering with witnesses or investigations.
- vi. Applicant's personal security.

9. It is now settled that the paramount consideration is whether the accused will turn up for his trial when required to do so until the matter is concluded (see Watoro v. R (1991) eKLR). This is for good reason. One must face the consequences of his/her criminal actions and whether he/she is culpable or not cannot be determined until the accused is available in court to be subjected to the due process.

10. I have carefully applied my mind to the rival arguments in this application. I am persuaded by the definition of the phrase "compelling reasons" adopted by the court in Republic v. Joktan Mayende & 3 others [2012] eKLR that:

**".....the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the Constitution."**

11. Applying my mind to this definition and in view of the argument against granting bail, it is my finding that the prosecution has not advanced compelling reasons why it thinks the applicant will abscond. Having relatives outside Kenya or possessing a travel document does not prove that an accused will abscond unless it has been demonstrated that he has attempted to do so. I have considered that the applicant was admitted in hospital prior to his arrest. I have no evidence that he was attempting to flee arrest.

12. On obstruction of justice, I have noted that all the witnesses have recorded their statements. The fact

that the applicant is related to some of the witnesses does not translate to the fact that he will swing them towards supporting his case. If indeed this were to happen, they can still do so even when the applicant is in custody. I am also not able to understand how he could interfere with investigations. I have no such evidence.

13. I noted that the applicant used the fact that the mother of the boy said to be his son is now dead and therefore he is the only surviving parent who ought to be with the boy. This is here nor there especially when there is evidence that the boy was not living with him. Besides this is not a child custody case much as this court takes into account the legal principle that the paramount consideration in respect to children matters is the interest of that child.

14. On the issue of his own safety, this again is not a compelling reason in the absence of proof that his life would be in danger if released on bond.

15. I think I have said enough to demonstrate that the reasons advanced by the respondent to oppose the application for bail are not compelling. I also take into account that this court in granting bail will set conditions that would make it possible for cancellation of the bail/bond if this court is satisfied that the applicant has failed to abide by the conditions. With that said, it is my view that I have no reason to deny the applicant bail. I do hereby allow the application to admit the applicant on bail on the following conditions:

- a. That the applicant is to execute a bond of one million shillings (Kshs. 1,000,000) with two sureties of similar amount.
- b. In the alternative he will deposit cash bail of three hundred thousand shillings (Kshs 300,000) with the Chief Registrar of the Judiciary.
- c. The applicant shall, during the pendency of this case or until further orders of this court, attend court before the Deputy Registrar of the Criminal Division for the mention of his case every 30 days.

16. It is so ordered.

**Dated, signed and delivered this 21<sup>st</sup> day of October 2014.**

**S.N.MUTUKU**

**JUDGE**