



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 28 OF 2010

JAMES MAINA KIMANI alias JIMMY.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The accused **James Maina Kimani alias Jimmy** is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code. The particulars are that on the 17th day of May 2010 at about 6.30pm in Gitambaa village in Thika District within Central Province murdered **Samuel Gichimu Waruta**. He took plea on 28th May, 2010 when he denied the charges and was remanded in custody. The trial has since commenced and four witnesses have so far given their evidence.

On 5th November 2014 learned defence counsel **Ms. Celine Odembo** filed an application seeking that the accused be released on bail pending trial on the grounds that the offence is bailable under **Article 49(i) (h)** of the **Constitution**; that he has a right to be regarded innocent even if the offence is serious; that the applicant was ready and willing to attend court at any time; has a young family to look after; and was not a flight risk since he has no passport; that he comes from a humble background and has been hawking clothes for survival.

The application is opposed by the State through the Replying Affidavit of **No. 52763 P.C Josephat Wafula** who is the investigating officer in the case. In his affidavit sworn on 30th September, 2014 he opposes bail on the grounds that the matter is part-heard and that the witnesses have tendered strong evidence likely to cause the applicant to flee if released on bail; that the application is an afterthought and that the accused has no fixed abode. In submissions tendered before court, **Ms. Matiru** for the respondent elaborated on the averments of **PC Wafula**. She submitted that the applicant had no fixed abode since he was living in rental premises prior to his arrest and that the four prosecution witnesses who have so far testified have given strong testimony that might make the accused not return to court if released.

The Constitutional basis for the application is not contested. The accused is entitled to bail under **Article 49(i) h** of the **Constitution**. The only fetter to that right is the existence of compelling reasons. Any application for bail must therefore be considered against this Constitutional provision. Further, the court has discretion to deny or grant bail after taking into consideration the circumstances of each case.

In the present application, the prosecution has urged the court to deny bail on the ground that the matter is part-heard and that the testimony so far given by the witnesses is so strong that the accused may not return to court if released. This ground must be dismissed for the reason that bail can be granted at any stage of the proceedings. Secondly, the strength of the prosecution evidence so far presented can only be determined by the court after a careful analysis of the same and not the prosecution.

Yet another ground presented by the State is that the applicant may abscond trial as he has no fixed abode. In so stating however, the State has ignored the applicant's averment in the supplementary affidavit that he has a fixed abode in Ruiru. I must state as I have stated before that it would be discriminatory of the court to consider denying bail merely because an applicant cannot show that he has a permanent place of abode.

In considering this application however, I have taken into account the circumstances of this case. I note that the matter is part heard and has progressed well with only three witnesses remaining. I find that the interests of justice in this case would be better served in disallowing rather than allowing the application.

I dismiss the application and direct the prosecution to present all its witnesses at the next hearing to facilitate an expeditious conclusion of the trial.

Orders accordingly.

Ruling delivered, dated and signed at Nairobi this 27th day of **November, 2014**

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Accused

.....: For accused

.....: For the State