



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 90 OF 2013

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

ABDULAHI NOOR MOHAMED ALIAS ARAB.....ACCUSED

RULING

1. The applicant, **ABDULAHI NOOR ALIAS ARAB** is charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

2. By a Notice of Motion dated 5th November 2014, the accused seeks:

That this Honourable Court be pleased to grant and/or admit ABDULAHI NOOR ALIAS ARAB the Applicant to bail (on such terms as maybe reasonable and fair) pending hearing and determination of the trial herein.

3. The grounds for the application are set on the face of the application as follows:

a) That the applicant was arrested on or about August, 2013 and arraigned in court where he pleaded not guilty to the charge of murder contrary to Section 203 as read with Section 204 of the Penal Code (Cap. 63), Laws of Kenya.

b) That the Applicant is now remanded in custody till 6th November, 2014 when the case is coming up for mention.

c) That the offence is bailable under the Constitution of Kenya and the Applicant has a Constitutional right to bail on reasonable conditions and terms pending trial and determination of the case.

d) That the Applicant is ready and willing to abide with any and all bail terms and conditions the Honourable Court will grant with an alternative of cash bail.

e) That the Applicant is ready and willing to attend court, police station, criminal investigation department, or any other place and comply with any requirement or conditions that this Honourable Court may impose or give.

f) That the Applicant is a very young person and his entire life may be messed up if he continues being in custody.

g) That the Applicant is a law abiding citizen and a permanent resident of Eastleigh Estate in Nairobi in the Republic of Kenya.

h) That the Applicant will not abscond trial since he has a permanent place of abode with known family members.

i) That the Applicant is not a flight risk.

j) That there is no compelling reasons why the Applicant should not be admitted to bail to enjoy his liberty as he awaits trial as opposed to unnecessary and needless incarceration.

k) That the Applicant will not in any way interfere with investigations, witnesses or the prosecution of this trial if released on bond or bail.

l) That the Applicant cannot jump bail.

m) That it is only fair and just for the Applicant to be admitted to bail.

4. The application is supported by an affidavit sworn by the accused person. In brief he deposes he is a young man with many years to live and that his entire life may be messed up by his continued detention in prison.

5. The accused deposes that he has permanent residence in Eastleigh, Nairobi and is a law abiding citizen and that he will not abscond trial, is not a flight risk and will not interfere with the investigations, witnesses or prosecution case.

6. The application is opposed. The prosecution through the investigating officer CPL Steven Owour has filed a replying affidavit dated 24th November 2014.

7. The gist of the replying affidavit is that the case has hearing dates and that the prosecution intends to proceed with the case expeditiously. The officer deposes that the accused stabbed the deceased who was well known to him as the deceased tried to prevent his friend from being mugged.

8. The officer deposes that the accused has already shown he is a violent man and that those violent tendencies may be repeated.

9. The officer maintains that the accused should not be released as he has deposed he will return to live in Eastleigh where the witnesses also reside and may interfere with them. He deposes that accused life may be in danger due to community anger for the offence.

10. The officer is concerned that the accused has not shown how he will sustain himself or the sources of his income or the place of residence. The officer deposes that since accused has not shown any economic or family links that would prevent him from absconding if released on bail, his application should be declined.

11. Mr. Mutwiri urged the application on behalf of the accused. Counsel relied on two annexures to the supporting affidavit. The first annexure is a letter from City Council of Nairobi dated 4th April 2014 stating that in 2010, the accused dropped out of class 6 (Std 6) from New Eastleigh Primary School.

12. The second annexure is a letter from Assistant Chief Maina Wanjigi sub-location Eastleigh stating that accused is a resident of that area.

13. Ms. Gichuhi for the State reiterated what CPL Owour stated in his replying affidavit. Counsel

submitted that the accused status and what he does for a living have not been disclosed nor has he indicated his family, economic or community links that would prevent him from absconding.

14. Ms. Gichuhi urged that the accused was not a Kenyan national and if released, tracking him would be difficult and that he was a flight risk.

15. I have considered the application for bail by the accused person, the affidavits in support and in reply to the Notice of Motion and submissions by Mr. Mutwiri for the accused and Ms. Gichuhi for the prosecution.

16. The Constitution under Article 49(1)(h) makes it a right of an accused person to be granted bail pending trial unless there are compelling reasons not to. That in essence means that the right to bail is not absolute and therefore the court, in exercise of its discretion whether or not to grant bail must consider whether there are compelling reasons to decline the application for bail.

17. In principle the accused is considered innocent unless proven guilty and for that reason he should benefit from that presumption. In order to make a proper consideration of the application, the court must be guided by several factors.

18. In **Ng'ang'a vs. Rep [1985] KLR 451** Chesoni, J, as he then was set out the grounds upon which bail may be refused as follows:

(a) In principle, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:

(i) The accused will fail to turn up at his trial or to surrender to custody;;

(ii) The accused may commit further offences; or

(iii) He will obstruct the course of justice.

(b)The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider:

(i) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;

(ii) The strength of the prosecution case;

(iii) The character and antecedents of the accused;

(iv) The likelihood of the accused interfering with prosecution witnesses.

19. In this case the prosecution has deposed that the accused is a young man, who is not a Kenyan National and who has no fixed abode and that he was a flight risk.

20. The defence has not controverted any of these depositions. That means the accused admits that he is not a Kenyan National. The State having raised concerns about the ability of the accused to fend for himself or to be supported; together with issues of his place of abode being mysterious or unknown, it was the duty of the accused to address all these issues in order to array any fears that the State has. As it stands, the accused place of abode and proof of any family or economic ties that could be a firm support to enable him attend court when required; and enforce his adherence to bond terms are all unanswered. I find that the accused is a flight risk and that the likelihood of him absconding are both real and very high.

21. There were concerns raised about the likelihood of the accused interfering with the key witness as he has given an indication that he intends to go back to Eastleigh where he intends to reside once released on bail. The likelihood of the key witness meeting with the accused and the accused interfering with him is very real and a serious threat.

22. Having considered this application I find that there are compelling reasons to decline the accused bail for reasons advanced by the prosecution. I find that the accused application should be declined, which I hereby do. The application for bail is accordingly dismissed.

DATED AT NAIROBI, THIS 19TH DAY OF DECEMBER, 2014

LESIIT, J.

JUDGE