



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL CASE NO.29 OF 2014

REPUBLICPROSECUTOR

VERSUS

NASOR SULEIMAN MBARUKACCUSED

R U L I N G

1. Nasoro Suleiman Mbaruk (the Accused) faces two charges. Count 1 is that of Murder contrary to Section 203 as read with Section 204 of The Penal Code. The particulars being that on the night of 11th and 12th November 2014 at Koteko area along Malaba–Bungoma Highway in Teso North District within Busia County he murdered Police Constable Benson Moracha Monari. In Count 2 it is alleged that he attempted to murder Police Constable Stephen Omondi Malele contrary to Section 220 (a) of The Penal Code. That incident is said to have happened on the same day and place as the murder in Count 1.
2. Plea herein was taken on 26th November 2014 where the Accused denied both charges. At that time and on the basis of a formal application by way of a Notice of Motion dated 25th November 2014, Counsel for the accused sought for his release on Bond or Bail pending trial. On that day the State Counsel informed Court that the State was not opposed to the grant of bail save that a condition that the Accused Person deposits his passport with the Court be attached to his release. At that juncture Mr. Ashioya appearing for the State told Court that although the Accused Person was a Kenyan he did not hold any passport and that he uses Temporary Permits to visit neighbouring countries. His current Temporary Permit was produced to Court as proof. This Permit features later in this Decision. It then became imperative for the State to verify whether or not the Accused person was a Passport holder. The State was given up to 3rd December 2014 to do so. On that day it pleaded for more time and indulgence was granted to 10th December 2014.
3. Come 10th December 2014, Mr Obiri State Counsel produced a letter dated 3rd December 2014 from the Assistant Director of Immigration services, Western region confirming that their records revealed that the Accused did not hold a Kenyan passport. But in a twist that must have surprised the Accused, the State Counsel told Court that owing to some developments, the State was now opposed to the release of the Accused on Bond/Bail. The basis was an affidavit of Cpl Joseph Chirchir sworn on 10th December 2014.
4. In the relevant portions of that short affidavit, Cpl Joseph Chirchir depones:-

THAT: we have intelligence information that the suspect plans to flee out of the country once he is released on bail.

THAT: we are still looking for his four drivers who are key witnesses and his release on bail may interfere with their freedom to volunteer information that they have and we rely to strengthen our case.

THAT: If the suspect is released on bail he is likely to interfere with the witnesses who have already volunteered information.

5. In arguing the Application for Bail, Mr. Ashioya reminded Court that the Right to Bail or Bond is guaranteed by Article 49 (1) (h) of The Constitution and that Right can only be tempered with if there are compelling reasons. That the affidavit of Cpl Chirchir does not advance any reasons leave alone compelling reasons, why the Accused should not be released on Bond. Counsel pointed out that the affidavit does not State the base of the allegation that the suspect may flee from the jurisdiction of the Court. As to the possibility of interference with witnesses, the Court was asked to disregard this as the Accused has been in custody for 3 weeks which should have been sufficient time for the Police to interview the witnesses. That in any event there was no allegation that the Accused has so far interfered with the witnesses. In seeking to persuade the Court to grant bail, the Accused has stated that he is willing to provide Kenyan sureties with real property.
6. In response, Mr Obiri for the State made the point that the Right to Bail or Bond is not absolute and that the affidavit of Cpl Chirchir revealed compelling reasons why this would not be the right occasion

to grant Bail. The Court was asked to find that given the nature of intelligence, it cannot always be substantiated or made tangible. The Court was however asked to impose stringent terms if it were to hold that bail or bond was to be deserved.

7. The two reasons why the State is opposed to the grant of bail is that the Accused person is a flight risk and/or is likely to interfere with witnesses. A real possibility that an accused person may avoid or evade a trial or that he may subvert the course of justice by interfering with witnesses would be compelling reason to deny Bail.
8. Let me first deal with the question as to whether the State has established that the Accused person likely is to interfere with witnesses. The Accused person was first brought to Court in connection with the charge he now faces on 18th November 2014. The allegation by the State is that the Police are still looking for four (4) persons being the Accused's drivers who are key witnesses and the release of the Accused could jeopardize that process. But this allegation has come up about 21 days after the Accused person was first brought to Court. All this while, the Accused person has been in custody. The Court is not told that the four drivers are avoiding the Police or that if they are, then it is at the instigation of the Accused person or his agents. It has not been demonstrated that the Accused person either by himself or through proxy has interfered with Police investigation or witnesses. This Court is not persuaded that the allegation that the accused is likely to interfere with witnesses has been established.
9. Is the Accused person a flight risk? It is said by the Investigating Officer that he has some intelligence information that the suspect plans to flee the country once he is released on Bail. The source or content of that information is not shared with the Court and the Court has no way of assessing its credibility. And if this were all to the matter then the Court would have quickly dispatched the States' opposition to Bail. But regard must be given to the nature of offences the Accused is facing.
10. It has to be remembered that the Accused Person faces serious offences that attract severe punishment. One attracts the Death sentence, while in the other an offender is liable to imprisonment for life. This Court takes the view that in instances like this, the Court requires some assurance that the Accused Person will not flee his Trial even when the allegation that he is a flight risk is weak. The following passage from the decision Ibrahim HJ (as he then was) in **Republic –vs- John Kahindi Karisa** [2010] e KLR endears itself to me,

“Murder is a serious offence and attracts the death penalty. Self preservation is a natural reaction or response of any human being. Whatever the Court will decided, the fear and anxiety exerting on at accuseds mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing a capital offence is real and cannot be wisked away.” (my emphasis)

The Learned Judge in declining to grant Bail went on to hold,

“Balancing and considering all the facts and circumstances of this case and bearing in mind the Applicant’ constitutional right to bail and their respective presumption of innocence, I am still not convinced that the two accused here have given the court sufficient comfort and assurance that they will be available and attend court from time to time and for the trial.

I think that an accused person should make some effort and show or give the court some reasons to dispel the apprehension that he would abscond. The present accused persons have not told court the following:

- a. **What they do for a living i.e. occupation**
- b. **Marital status**
- c. **Whether they have children**
- d. **Whether they are Kenyan citizens or not**
- e. **Any references from their Church, Mosque, Temple of Synagogue**
- f. **Any leadership or other position in society which makes them dependable ofcourse the court would release on bail on conditions or terms including sureties. However, in a serious case of murder, monetary or property security should not be the only consideration..**

11. This Court has been shown the original Temporary Permit issued to the Accused Person for the period of 18th December 2013 to 17th December 2014. One quickly notices that the Accused person frequently travels out of Kenya. The Court has noted that in the period between December 2013 and September 2014 (about 10 months) the Accused travelled out of the country on, at least, 6(six) occasions. While it would be to discriminate against an Accused Person to refuse him Bail merely because he frequently travels out of the country, I nevertheless take the position that when it is alleged that he is a flight risk, he bears some responsibility of assuring the Court that he will not use his ability to travel outside the country to put himself beyond the reach of the Trial Court. Looking at his affidavit, the Accused Person has averred that his true place of abode is Nyali Estate, Mombasa County. He has not demonstrated that he has business or social or family or such other interests in the country that are so deeply entrenched or cherished that he cannot be motivated or tempted by his ability and familiarity with outside travel to avoid the Murder Trial. For this reason, this Court is not sufficiently assured that the Accused Person is not a flight risk.

12. For now the Court finds that there is compelling reason for it not to grant Bail to the Accused Person. This Decision does not preclude the Accused Person from renewing his plea later in the course of Trial.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 17TH DAY OF DECEMBER 2014.

IN THE PRESENCE OF:-

KADENYICOURT CLERK

OBIRIFOR STATE

ONSONGO H/BRIEF FOR ASHIOYA.....FOR ACCUSED