



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION (MILIMANI)

CRIMINAL CASE NO. 89 OF 2014

DANIEL NJUGUNA MWICIGI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. Daniel Njuguna Mwicigi, the applicant, has brought this application through his advocates Musyoki Mogaka & Company Advocates seeking to be admitted to bail pending the hearing and determination of his case. He is charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that he murdered Joseph Njoroge Kanini on 21st September 2014 at Matimbei area in Lari District within Kiambu County.
2. The application is dated 5th November 2014. It is supported by an affidavit sworn by the applicant on 30th September 2014. The grounds in support of the application are found on the face of the application and on the supporting affidavit. Counsel representing the applicant, Mr. Omari made submissions in court in support of the application.
3. In summary the applicant is saying that he is aware of the offence he is facing and is familiar with the events giving rise to this case; that since his arrest he has cooperated with the police and has never attempted to flee; that he resides at Matiembei area of Lari in Kiambu County where he operates business and farms; that he has lived in this area all his life and enjoys cordial relationship with neighbours; that he has never been charged with a criminal offence before; that he is a family man with two children; that he has a good defence and is confident of the same, hence he is not afraid of the outcome of this case and that he is presumed innocent until the contrary is proved.
4. In his oral submissions in court, Mr. Omari for the applicant stated that the applicant is the sole bread winner and the education of his children depends on his being released on bail/bond and that he suffers diabetes.
5. In reply the respondent through the prosecuting counsel opposed bail. Ms Magoma submitted that the right to bail is not absolute but can be denied where compelling reasons exist. Counsel further submitted that the evidence on record is strong and puts the applicant at the scene of the crime; that the applicant is likely to interfere with witnesses because he lives in the same area as the witnesses; that the offence is serious attracting a death penalty and this may tempt the applicant to abscond and therefore it is in the interest of justice to deny the applicant bail/bond.

6. Mr. Omari in a brief rejoinder submitted that the applicant is innocent at this stage and that the evidence remains mere allegations until it is tested in court; that the respondent has not advanced any compelling reasons to persuade the court to deny the applicant bail; that the mere fact that the applicant knows the witnesses and may interfere with them is not supported by evidence. Mr. Omari asked the court to balance the competing interests between the rights of the applicant and those of the victim and grant the applicant bail/bond on reasonable terms.

7. The right to be released on bail under Article 49 (1) (h) of the Constitution is limited under the constitution if there are compelling reasons. This court is alive to the fact that the family of the deceased is crying for justice. For them to get this justice, the case must be subjected to fair trial to determine who killed their relative. The law treats the applicant as an innocent man and he enjoys the right to be presumed innocent until the contrary is proved (**see Article 50 (2) (a) of the Constitution**). The family of the deceased will not get justice by having the applicant detained in remand prison pending his trial. They will get it by having all the relevant evidence presented and tested in court to determine if it is the applicant or another person who murdered their kin and having that person convicted and sentenced as by law provided.

8. Are there compelling reasons in this case to persuade this court to deny bail to the applicant? The respondent has advanced the following as compelling reasons: strong evidence; likely interference with witnesses; seriousness of the offence and likely death sentence which may tempt the applicant to abscond. Are these reasons forceful, cogent and convincing as to make the court feel strongly that the applicant should not be released on bail?

9. The issue on strong evidence is not helping the respondent much because this evidence is yet to be presented and tested in court. The seriousness of the offence and the eventual death penalty is a fact that even the applicant must know. However, the citizens of this country passed into law the Constitution and in effect allowed murder suspects to be released on bond. To some extent this cannot be a compelling reason without evidence that the applicant is likely to abscond.

10. Interference with witnesses is a serious matter. It amounts to subversion of justice with the result that the victim, his or her family is denied justice. There must be evidence to support the allegation that the applicant has or is likely to interfere with witnesses. The court will not rely on flimsy allegations that the applicant is likely to interfere with witnesses (see **Republic v. Joktan Mayende & 3 Others [2012] eKLR** and **Republic v. Kokonya Muhssin [2013] eKLR**).

11. I have considered the applicant and rival submissions. I am alive to the fact that each case must be treated differently due to the unique circumstances of each case. I am also alive to the paramount consideration in a bail application that an accused person is required to attend his trial whenever required to do so until the case is finalized. I do not have any evidence that the applicant before me is likely to interfere with witnesses or is likely to abscond. I have considered that he has a fixed abode at Matimbei in Lari Kiambu County where he has lived for all his life and that he is a family man with businesses and farming at the same area. It is my belief that he knows that it is in his best interests that he abides by the terms and conditions to be set by this court if he is released on bail/bond.

12. The respondent has failed, in my view, to discharge its burden of proving compelling reasons to persuade this court to deny the applicant bail. For this reason I will and do hereby allow the application on the following terms:

(i) The applicant shall execute a bond of Kenya Shillings one million (Kshs 1,000,000) with one surety of similar amount.

(ii) In the alternative the applicant shall deposit cash bail of Kenya Shillings five hundred thousand (Kshs 500,000) with the Chief Registrar of the Judiciary.

13. It is so ordered.

Dated, signed and delivered this 9th day of December 2014.

S.N. MUTUKU

JUDGE