



REPUBLIC OF KENYA

Cases in Magistrate Courts

Criminal Case 14 of 2012

REPUBLIC.....PROSECUTOR

VERSUS

HILARY HENCE NYAINDA & ANOTHER.....ACCUSED.

RULING

The 3 accused persons are charged with Murder C/Sec 203 as read with Sec 204 of the penal code. The particulars are that on 27.1.2010 in the waters of Lake Victoria between Nyachebe and Koguna Beach, Gembe West Location, Mbita Division within Mbita District murdered Daniel Ooko Okech.

They all pleaded not guilty to the information and were remanded at the G.K. Prison Kisii pending the trial. The 1st accused has since passed away.

The 2nd and 3rd accused applied for bond on 12.3.2012 and 10.1.2012 respective. They did so formally by notice of motion filed at the Kisii High Court before the case was transferred to Homa Bay High Court.

In the grounds on the face of his application as well as in his supporting affidavit, the 2nd accused states that he was arrested on 27.1.2010 and arraigned on 9.2.2010. That his trial has never taken off and is likely to take long due to the heavy workload at the court. He has undertaken to attend court always if given bail and to comply with such other terms as the court may decree. He also expresses his willingness to furnish reasonable and sufficient sureties if ordered to do so.

The 3rd accused's grounds are that he is the sole breadwinner and his being locked up will greatly affect the wellbeing of his family. He too laments that the trial has taken long to commence. He undertakes to furnish reasonable and sufficient sureties and undertakes not to abscond. He points out that the 1st accused has died in custody due to deplorable conditions.

The applications were canvassed before me on 12.3.2013 with Mr. Ongoso appearing for accused 3 and also holding brief for the Advocate for the 2nd accused. He urged me to release the accused persons on bail as they are breadwinners of their families. That the matter has not proceeded since 2010 and even

the 1st accused has passed on. That the 2nd accused is on medication and is afraid that he may not see the end of the trial. He submitted that the accused persons have reconciled with the community and there is no likelihood of it turning hostile. He also submitted that the accused persons are willing to furnish sureties if ordered to do so.

State counsel – Miss Valery – opposed the application. She submitted first, that the accused persons are charged with murder of a fellow fisherman and hence likely to interfere with witnesses. Secondly, that there is a lot of hostility in the community. Thirdly, that there is no evidence of reconciliation. Fourth, that there is nothing to demonstrate that the accused persons shall attend the trial. Fifth, that it is no excuse that the 2nd accused is of ill health, sixth, that the court should consider that the accused persons are likely to abscond. She urged the court to reject the application.

In response Mr. Ongoso submitted that bail is a constitutional right and that the submission that it should be denied cannot stand. He contended that accused persons shall not interfere with witnesses and that there is no animosity between the accused persons and the community. He urged this court to free them on terms which they can adequately meet.

I have carefully considered the applications by the accused persons and the rival submissions on record and find as follows:

First, that under Art 49(1)(h) of the constitution, the accused persons are entitled to bond/bail unless there are compelling reasons not to be released.

Second, that the onus to prove compelling reasons lies with the prosecution and it is wrong to shift that onus to the accused persons as the state counsel has done.

Thirdly, that although the main consideration in granting bail ought to be whether the accused person shall turn up at the trial the health of the accused person cannot wholly be ruled to be irrelevant.

Fourth, that the court also considers the nature and circumstances of the offence, the risk to the accused if released on bond and the antecedents of the applicant.

Also the likelihood that the accused shall interfere with witnesses.

In the instant case, I am not satisfied that it has been proved that the accused persons are likely to abscond. Indeed no reason has been advanced that is so weighty as to warrant this court to deny the accused persons bond. Accordingly their applications are granted on the following terms:-

- a) ***That they execute a bond of Kshs.3 (three) million each with 2 sureties of like amount.***
- b) ***The DR to examine/approve the sureties.***
- c) ***That the accused attend court once every month until their case is finally heard and determined.***
- d) ***Hearing on 25.4.2013.***

Signed, dated and delivered at Homa Bay this 28th day of March .2013

E. N. MAINA
JUDGE

In the presence of:
Miss Valery for state
Mr. Ongoso for accused
Eudice Okombo Dholuo interpreter

Both accused persons.