



REPUBLIC OF KENYA

High Court at Eldoret

Criminal Case 44 of 2012

REPUBLIC PROSECUTOR/RESPONDENT

VERSUS

DAVID MININGWO ACCUSED/APPLICANT

RULING

By Notice of Motion dated 7th November, 2012 brought under Article 49 of the Constitution of Kenya (2010) and Sections 66 and 125 (1) of the Criminal Procedure Code, the Applicant who is also the accused herein prays that he be admitted to bond with an alternative of cash bail. It is premised on the following grounds:-

1. The accused person was charged with the offence of murder.
2. The accused person is in custody since 15/06/2012, when he was arrested on account of the subject offence.
3. The investigations in this matter have been duly completed.
4. The accused person is a Kenyan citizen, a resident of Kapchesir Village of Sibilo location in Baringo North District within Baringo County and has no intention whatsoever of leaving the jurisdiction of this Honourable Court as he is a parent and the sole breadwinner of his family.
5. The offence in question is bailable under Kenya criminal laws.
6. The accused person undertakes not at all to abscond Court and/or is not a flight risk.
7. The accused person is innocent until proven guilty.

It is also supported by the affidavit of the Applicant sworn on 7th November, 2012. All the averments are as contained in the grounds supporting the Notice of Motion.

The application is opposed vide a Replying Affidavit sworn by Wilson Sirikwo, the Investigating Officer in the case sworn on 28th November, 2012. He depones that the Applicant is alleged to have murdered his wife, Jeniffer Luwari and one of the prosecution witnesses is his daughter, Philister Jesere Kaino, a minor aged eight (8) years. That other prosecution witnesses are the Applicant's neighbours and that if he is released on bond/bail, is likely to interfere with the prosecution witnesses and probably commit more offences.

The investigating officer has also deponed that the Applicant is a person of violent nature with uncontrolled tempers and unruly character. That he has a history of battering his wife which led to his death. That further, his release on bail/bond might cause conflict between the deceased's family on one hand and that of the Applicant on the other.

During the hearing of this application, the Applicant preferred to argue the application on his own. Mr. Kabaka, the State Counsel appeared for the Respondent, the State. The Applicant only stated that he is a young man with a family. While supporting the averments contained in the Replying Affidavit, Mr. Kabaka submitted that the Applicant, being a person of uncontrolled temper is likely to commit more offences. He further submitted that one of the prosecution witnesses is the Applicant's daughter aged eight years and if he (Applicant) is released on bond/bail, is likely to commit more offences.

I have taken into account the submissions made before me, alongside the supporting and replying affidavits in support of and opposition to the application respectively.

The main provision under which the application is brought is Article 49 (1) (h) of the Constitution which reads:-

“(1) An arrested person has the right -

(h) to be released on bond or bail, or reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

This means that the right to bond/bail under the Constitution is not absolute. Court must take into account any compelling reasons that may bar it from granting this right to an accused. The Constitution has however not given any guidelines on principles to be followed in determining the compelling reasons that may bar the court from granting the bond/bail. It is left to the wisdom of the individual court to determine them given the circumstances of each case.

I would consider some of the factors that may negate the granting of bond/bail as follows:-

First, the nature of the offence with which an accused is charged. Second, the seriousness of the penalty likely to be handed to the offender in the event of a conviction. This factor may be considered alongside factor number 1 above. Third, the likelihood of the accused interfering with prosecution witnesses if he/she is granted the bail/bond. Fourth, the likelihood of the accused committing similar or other offences if granted bail. Fifth, the safety of the accused himself.

In this instance, it is submitted the Applicant allegedly murdered his wife and one of the prosecution witnesses line up to testify is his eight year-old daughter. It is further submitted that the Applicant is a person of uncontrolled temper. Thus, the likelihood of him, not only interfering the witness(es) and possibly eliminating them is very high.

It is deponed by the investigating officer that there is likely to erupt conflict between the family of the victim and that of the accused in the event the latter is granted bail. My take is that such a conflict may push one side on a revenge mission. The best way to forestal such an incident is to safely secure the accused in custody until the case is disposed of, notwithstanding that either an acquittal or conviction is the eminent result.

Whilst the court appreciates an accused's right to bail, and his presumption of innocence until proven guilty, it must also ensure he remains in a safe environment until the court pronounces its verdict. In the same measure, court must protect the lives of potential witnesses and where it is in doubt of their safety (the danger being posed by the accused), it is only fair that an accused remains in custody. It would not make sense or serve justice to release the accused on bail/bond when such release is likely to result in a damaged trial.

It is true the Applicant is a relatively young person, but the circumstances of the case and the factors

advanced herein above do not positively mitigate his plea for bail/bond. This is not a suitable case for which bail/bond should be granted. I accordingly dismiss the application.

DATED and **DELIVERED** at **ELDORET** this 19th day of March, 2013.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Accused in person

Miss Ruto for the Respondent/State