



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL CASE NO. 80 OF 2012

REPUBLIC APPLICANT

-VERSUS-

EVANS AWITI MASAIRESPONDENT

RULING

1. The Accused, who has been charged with murder contrary to section 204 of the Penal Code, seeks an order for his release on bail pending the hearing of the case. By an application dated 8th August 2012, the accused alleges that he is sick and in need of specialized treatment which is not available at the G. K Prison dispensary and that his father, whose title deed to parcel of land Kanyamwa/Kayambo/Kwamo/2744 measuring 1.88ha is attached, is ready to stand surety for the Accused's attendance to court at the hearing. The accused laments the unavailability of near hearing date which is likely to delay the case and pledges to abide by any terms that the court may impose upon grant of bail.
2. The application is opposed by the Director of Public Prosecution for whom a Replying Affidavit of 10th April 2013 by the investigating officer has been filed. It is contended that there are compelling reasons against the release of the accused on bail in that:-
 - a. *The Prosecution has very good case, which has been certified by the Director of Public Prosecution after due consideration of the evidence, and which may result in a conviction of the accused as the main suspect.*
 - b. *There is a high probability that the applicant would be in contact with the witness and therefore might interfere with evidence to be tendered against him leading to miscarriage of justice.*
3. The right to bail is entrenched in the Article 49 (1) (h) of the Constitution for every arrested person:

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

It is, in my view, the duty of the Prosecution to demonstrate such compelling reasons for refusal of bail unless these are obvious from the nature of the charge and the circumstances of the Accused or arrested person.

4. That the Prosecution has a good case that may lead to a conviction, even for capital offence, is not a compelling reason. It is expected that the Prosecution will only commence prosecution of a case when it has sufficient evidence capable of proving the charge against the accused. It may be that the seriousness of the charge or the penalty upon conviction may be a factor in increasing the flight risk that the Accused will abscond. That is, however, not a consideration for the refusal of bail; it could only affect the terms of bond/bail to ensure that the accused attends his trial. Indeed, Article 49 rights do not discriminate between accused persons who face serious, capital charges from those facing lesser charges. The right to bail is available to all arrested/accused persons.
5. Similarly, the likelihood of an accused interfering with witnesses is, in my respectful view, not a compelling reason to warrant the curtailment of the constitutional right to bail. Accused persons and the witnesses, for and against, live in the same society and if the chances that the accused might get into contact with the potential witnesses were to be a ground for refusal of bail, very few, if any, accused persons would ever make bail. Moreover, the Penal Code has elaborate provisions against such conduct which interferes with the due administration of justice under section 121 (1) (f) in these terms:-

“121(1) Any person who –

(f) attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after the hearing given evidence, in connexion with such evidence is guilty of an offence and is liable to imprisonment for three years.”

In addition, the Law of Contempt of Court provides further remedial measure where a person who interferes with witnesses may be charged with contempt of court. See Borrie and Lowe’s Law of Contempt, (1983) 2nd Edition pp 206-210. Furthermore, in extreme cases, there is the Witness Protection Programme under the Witness Protection Act cap 79 of the Laws of Kenya, which came into force on 1st September 2008, and which may be called into aid.

6. I agree with **Bosire, J** (as he then was) in ***Mwaura –vs- Republic (1986) KLR 600*** that the primary consideration as to whether to grant bail is whether the accused will turn up for his trial. I consider, however, that the Constitution of Kenya 2010 has taken away the need to show circumstances personal to the Accused which would outweigh the risk of him absconding before a court may admit him to bail in cases of capital charge where there is a great risk of accused absconding, as held by the learned Judge.
7. Accordingly, for the reasons set out above, I make the following orders on the Accused’s application for bail dated 8th August 2012:-
 - a. **The accused will be released on bail pending trial on the following terms:-**
 - i. **Personal bond of kshs. 200,000/=.**
 - ii. **1 Surety of similar amount (kshs. 200,000/=).**
 - iii. **Accused to report to the Investigation Officer every 14 days.**
 - iv. **Accused not to leave the jurisdiction of the court without permission of the court.**
 - b. **Mention on 29th April, 2013 for further directions on the hearing of the case.**

Dated and delivered this 15th day of APRIL 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

Mr. Edwin Mongare Court Clerk