



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.109 OF 2009

EDWARD MURIUKI NYAGA APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Edward Muriuki Nyaga (hereinafter the applicant) is facing trial for the murder of one **Patrick Ndungu Kariuki**. The offence was allegedly committed on 26th/27th day of July 2009 at **Mwihoko Estate** in **Nairobi North District** within **Nairobi Province**. His trial began on 9th March 2011. Prior to that, he had on 28th February 2011 filed the instant notice of motion seeking to be released on bail pending trial.

The motion is supported by the applicant's affidavit sworn on 28th February 2011 which affidavit sets out *in extenso* the provisions of the Constitution on the Bill of Rights. In brief, his argument is that the Constitution provides the right to bail and that he will attend his trial.

The Replying Affidavit to the application was filed by the State on 22nd April 2013 pursuant to the directions of the court issued on 21st February 2013. From the affidavit, it is clear that the State opposes the application for the reason that ten out of a total of 14 prosecution witnesses have already testified and that the evidence so far shows that the applicant was one of the persons who kidnapped the deceased; and, that therefore the temptation to abscond if released was high.

At the hearing of the application on 26th June 2013, I heard submissions from **Mr. Mokaya** for the applicant and **Ms Ikol** for the respondent. **Mr. Mokaya** underscored **Article 49 (i) (h) of the Constitution** stating that the right provided therein cannot be restricted unless there are compelling reasons. He urged the court to grant the accused bail notwithstanding that the trial had substantially progressed. He submitted that bail can be granted at any stage of the trial. On this he relied on **Republic Vs. Danson Mgunya & Kassim Sheebwana Mohammed [2010] eKLR** where the court while granting bail stated:-

“It does not matter that we are at the end of the trial with 3 witnesses remaining and the case is about to end. Liberty is previous and no one's liberty should be denied without lawful reasons and in accordance with the law.”

In submissions for the respondent, **Ms Ikol** strongly opposed the application. She expounded on the averment at paragraph 6 of the Replying Affidavit that the temptation to abscond would be very high on account of the fact that the evidence of the 10 prosecution witnesses who have testified so far points to the guilt of accused. It was her further submission that one of the four witnesses who were yet to testify

was a student and as such may be intimidated by the applicant if released.

I have paid due consideration to the rival affidavits and submissions and the authorities relied on by counsel. From the outset, I observe that the Constitutional basis of the application is not contested. Both the applicant and the respondent acknowledge that the applicant has a constitutional right to bail and that such right can only be curtailed by the court where there are compelling reasons.

In this application the main reason the respondent is opposed to the release of the applicant is that the evidence already tendered is likely to lead to a finding of guilty and therefore the temptation to abscond would be higher. I cannot comment on the evidence at this stage. However, with the trial having progressed substantially, I am persuaded that the fears of the prosecution may not be unfounded.

While the position in law is that bail can be granted at any stage of the trial, I find it curious that the instant application though filed way back on 28th February 2011 prior to the trial which commenced on 9th March 2011 was not prosecuted till now when the case is nearing completion. In the Danson Mgunya case cited above, the court did observe that “Each case must be decided in its own circumstances, touch and context.” I couldn’t agree more. In the circumstances of this case, I am persuaded by the argument that the applicant may abscond and not attend trial if the evidence so far tendered point to a likely conviction. I consider that the ends of justice will be served better by not allowing the application but ensuring an expeditious conclusion of the trial.

The application is rejected.

Ruling delivered, dated and signed at Nairobi this 27th day of August, 2013

R. LAGAT - KORIR

JUDGE

In the presence of:

Mosinko : Court clerk
Edward Muriuki Nyaga : Applicant
Mokaya : For the accused/applicant
Konga holding brief for Ikol : For the State/respondent
Odembo holding watching brief
For deceased family