



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL MURDER NO.49 OF 2013

REPUBLIC PROSECUTOR

VERSUS

ERICK MASEGA ALIAS MADIABA ACCUSED

RULING

1. The accused person herein, Erick Masega alias Madiaba, is before this court on one count of murder contrary to **section 203** as read with **section 204** of the **Penal Code**, the particulars being that between the night of March 2013 and 28th March at unknown time at Gesoni Sub location in Kisii Central District within the Republic of Kenya, murdered Issack Mairura Mochoge. The accused has pleaded not guilty to the charge and is awaiting trial.
2. In the meantime, he prays that he may be released on bail/bond on such terms and conditions as the court may determine.
3. During the hearing of the application, Mr. Nyagwencha who appeared for the accused submitted that the constitution confers a right upon the accused herein to be released on bond/bail. **Article 49 (1) (h)** provides that an arrested person has the right **“to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”** Counsel also cited **Article 29** to the effect that the accused herein has the right to freedom and security of his person at the cost of the state. Reliance was also placed on the ruling by Muriithi J in **Kisii Cr. Case Nos.41, 53 and 44 of 2013 – Republic –vs- Benson Kibowa Oyugi & 3 others** (unreported), in which the learned judge, quoting from his own observation in **Republic –vs- Josephine Kwamboka Kinaro – Kisii HCCRC Case No.89 of 2012** said;

“Needless to say, the state is under an obligation to provide security for

all persons including those charged with various offences and released on bail, no matter how grievous the charge and how upset the community is with the alleged perpetrator. The state cannot therefore be heard to say that the accused is “safer in custody”. However the information of hostility amongst the community members as disclosed by the pre-bail report may be used to make arrangement for the safety of the accused and to put in place preventive measures as necessary.”

4. In opposing the instant application, the state filed a Replying Affidavit sworn by No.87583 Gilbert Koech of Rioma police station. The deponent says in the affidavit that though the offence of murder is bailable, the accused’s own life will be in danger if he is released on bond because the situation on the ground is volatile. In the view of the state, the fact that the situation on the ground is volatile constitutes a compelling reason why the accused should not be released on bond.
5. The issue of bond is now a constant constitutional question that the courts have to deal with on a very regular basis, especially after the promulgation of the Constitution of Kenya on 27th August

2010. Before then, offences punishable by death, namely murder and robbery with violence, were not bailable. Under the old law, as it is now, the courts are under a duty when considering applications for bail/bond to satisfy themselves that an accused person who is granted bond will avail himself to the court as and whenever he is required in connection with the offence of which he stands charged. This is particularly critical since the Constitution does not define what is meant by

“compelling reasons”.

6. In **Republic –vs- Dorine Aoko – Nkr HCCRC Case No.36 of 2010 (UR)** (unreported) Emukule J stated the following:-

“--- to my mind again, those compelling reasons are the very same ones

spelt out in section 72 (5) of the repealed Constitution, and elaborated in section 323 of the Criminal Procedure Code, namely that the accused person, as the applicant in this case, is charged with the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity (taking away another person’s life, disloyalty to the state of one’s nationality or grievous assault and injury to another person or his property) are offences which are by their reprehensiveness not condoned by society in general. It would thus hurt not merely society’s sense of fairness and justice, and more so, the kin or kith of the victim to see a perpetrator of murder, treason or violent robbery (committed or attempted) walk to the street on bond or bail pending his trial. A charge of murder, treason robbery with violence, (committed or attempted) would thus be a compelling reason for not granting an accused person bond or bail ----.”

7. In the above case, and for the reasons advanced by Emukule J, bond was refused. In **Republic – vs- Danson Ngunya & another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then it (State) must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.
8. The respective views by Emukule J and Muriithi J are peculiar to the cases that were before the learned Judges, because in the final analysis, the truth is that whether or not to grant bail remains the sole discretion of the trial court. In the instant case, the court called for a Bail Assessment Report which was submitted to the court on 14th August 2013. The report reveals that the accused abuses alcohol; that the home environment is still hostile and that the accused herein associates with people of questionable character. It is further revealed that following the death of the deceased who was the accused’s father, the family is reluctant to have the accused back to the home just yet, and that the possibility of lynching the accused if he is released on bond looms high. It is also indicated that that from the investigations, nobody is willing to stand surety for the accused. The report also shows that the accused person is a flight risk because of the hostility of the home environment.
9. I have now carefully considered the law and the circumstances surrounding this case. Although I entirely agree with Muriithi J that the security of the citizens of this country is the responsibility of the state, I find that the circumstances of this case dictate against an order for bail/bond. It is clear to me that because of the hostility of the accused’s own family towards him, it is very likely that the accused will jump bond. The court also finds that in view of the fact that no family member is willing to stand surety for the accused, any order for bond, which will of necessity include a requirement for sureties will be an order made in vain. It is important to note that courts should not make orders in vain.
10. In the premises and for the reasons above stated, the accused’s application for bail/bond pending trial is dismissed. I shall proceed to fix the matter for hearing when the diary for 2014 is available. Mention on 21st November 2013.
11. I have looked at the particulars of the charge facing the accused and note that there is need for amendment to include the first date in the first line and the year after **“28th March”**. That first

part in the first line simply reads “**between the night of March 2013 and 28th March**”. The State should endeavour to do so before the case is fixed for hearing.

12.Orders accordingly.

Dated and delivered at Kisii this 21st day of August 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of

Miss Cheruiyot for State

Mr. B.O. Masese for Accused

Mr. Bibu - Court Clerk