



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CRIMINAL MURDER NO.74 OF 2013

REPUBLIC PROSECUTOR

VERSUS

RICHARD NYAEGA MOGAKA ACCUSED

RULING

1. The accused in this case, Richard Nyaega Mogaka was arraigned before this court on a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It is alleged that on the night of 3rd April 2013 at Engorwa sub location in Masaba South District within Kisii County in the Republic of Kenya, jointly with others not before the court, he murdered Jane Ombati. He has pleaded not guilty and is awaiting trial.
2. By the Notice of Motion dated 16th July 2013, the accused seeks to be released on bail/bond pending trial. The accused says there are no compelling reasons why he should not be released on bail. He has supported his application with an affidavit sworn on 16th July 2013. He depones therein that he has the right to be released on bail/bond as provided under **Article 49 (1) (h)** of the **Constitution**; that if granted bail, he will not abscond from attending court or move away from the jurisdiction of this court since he has a young family which entirely relies on him.
3. The application is opposed vide the Replying Affidavit sworn by No.53638 Cpl Julius Kiricha on 18th June 2013. The deponent says that if the accused is released on bond, his life will be in danger since the situation on the ground is volatile; that in dealing with this application, the court should also consider the rights and interests of the victim and deny the application for bail/bond.
4. To assist it in determining the application, this court called for a bail assessment report which was filed with the court on 1st August 2013. The report highlights the following:- the deceased was a neighbour to the accused; the accused abuses alcohol; both the family of the accused and the community at large have no problem with the accused being released on bond; the accused has strong community ties, especially in matters of security; the husband of the deceased is not amenable to seeing the accused released on bond.
5. It is also indicated that in order to secure the witnesses, the complainant in this case has had them relocated to another place from where they will come to testify, so that the issue of interference with the said witnesses by the accused does not arise.
6. The report also shows that the family members of the accused are ready and willing to stand surety for him and that the accused himself has undertaken to keep whatever bond terms this court may impose on him.
7. The anchoring provision for the application before me is **Article 49 (1) (h)** of the **Constitution** which guarantees every accused person **“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.”** The duty of establishing that compelling reasons exist rests on the state. However, the court has the final say on whether or not to allow the application.

8. Since the Constitution does not define what is meant by “compelling reasons,” this court, like other courts must come up with parameters to help it determine what may constitute compelling reasons as to warrant denial of the request for bond. Among the factors to be considered by this court are the following: if the trial will take place within reasonable time; if the order for bail or bond will not be prejudicial to the proceedings, such as the accused absconding once he is out on bond. In each case, the question of bail involves a delicate balance between two competing interests:- the welfare of society which feels aggrieved by the alleged offence and the constitutional right of the accused to be released on bail or bond. In each case, the court is called upon to exercise its discretion very judicially. In the instant case, the view of the state is that the interests of society far outweigh the personal right of the accused. That it will also not be in the interest of the accused to be released on bond because the situation on the ground is volatile.
9. I have now carefully considered the law. I have also read the affidavit in support, the replying affidavit and the bail assessment report. From all the above, I am persuaded that the application for granting bond is merited as there appear to be no compelling reasons why the same should not be granted. It is however noted that as a member of the local security team, the accused as law keeper must ensure that he attends court once the order is granted so that he does not bring the court into disrepute. It is to be further noted that being part of the local administrative security apparatus, he is under a duty to protect the community and not to expose any member thereof to undue peril.
10. In the premises, I allow the Notice of Motion dated 16th July 2013 on the following terms:-
 1. *The accused may be released on his own bond of Kshs.5,000,000/= (Shillings Five Million) with 2 sureties of a like amount.*
 2. *In the alternative, accused may deposit cash bail of Kshs.3,000,000/= (Shillings Three Million).*
 3. *The sureties shall be approved by the Deputy Registrar of this honourable court.*
 4. *During the pendency of this case, or until further orders of the court, the accused shall appear for the mention of his case once every 30 (thirty) days.*
 5. *In default of any one appearance without justifiable cause, the bond shall stand cancelled and sureties called to account or the cash bail so deposited shall stand forfeited to the State.*
 6. *Mention on 20th September 2013.*
11. 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