



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL (MURDER) CASE NO.117 OF 2011

REPUBLIC PROSECUTOR

VERSUS

C G O ACCUSED

RULING

1. The accused herein has pleaded not guilty to a charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code**. He was arraigned in court on 16th December 2011. It is alleged that on the 14th day of December 2011 at [particulars withheld] Centre, Nyandogo sub location within Migori County in the Republic of Kenya, he murdered Elly Otieno Ombeng.
2. This matter is now before me on an application for bond/bail pending hearing and determination of the case. The State filed a Replying Affidavit sworn by Number 32924 Sgt. Daniel Baraza of Macalder Police Station on 6th June 2013. In the said affidavit the deponent says that he does not have any compelling reasons why the accused should not be released on bond.
3. In his application for bond, the accused told the court that he was HIV positive and that as a result, he was suffering in prison. He also told the court that his wife had died. In the meantime, the court called for a bail assessment report which was furnished to the court on 17th July 2013.
4. From the bail assessment report, the following facts emerge. The accused is married to 2 wives T A and M A who are both well and alive. He has 14 children; most of whom are in primary school. He is the last born child in a family of 4 children who are all grown-ups and married. The accused is HIV Positive and he is said to be an honest person. The family of the deceased has no objection if he is granted bail, and so is the community.
5. The right to bail/bond for an arrested person is enshrined in **Article 49 (1) (h)** of the **Constitution** which 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.”** The party to show that there are compelling reasons for the accused not to be released on bond/bail is the State.
6. In considering whether or not to grant bail, this court must satisfy itself that the accused will avail himself to court each and every time he is required until the case is heard and determined. The court is also obliged to consider the circumstances under which the offence took place. In this case, the accused told the court when he appeared before Muriithi J on 3rd June 2013 that one of the reasons why he wanted to be released on bond was because his wife had died and that he had been left with children who were dependent on him. It has now transpired that the accused’s 2 wives and 14 children are all alive and well.
7. The issue that now arises for determination is whether the accused is the kind of person to be trusted to come to court each and every time he is required to so appear. The court has its doubts; particularly because the accused is not even capable of telling the truth to the court concerning the fact of whether or not his wife is alive or dead. If the court did not call for the bail assessment

report, it would have been completely misled by the statement made by the accused on 3rd June 2013 to the effect that his wife had died. In my humble view, the accused is not a person to be trusted to appear in court once he is released on bond. I am therefore satisfied that there exists a compelling reason why the accused may not be released on bond.

8. In the circumstances, the accused's application for bond/bail pending hearing of his case is declined.
9. I am aware that this is a 2011 case and ought now to be fixed for hearing on priority basis. The case could not proceed on 17th May 2013 because of the 2013 Election Petitions being heard by the 2 courts mandated to hear murder cases.
10. It is so ordered.

Dated and delivered at Kisii this 14th day of August, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. B.O. Masese for Momanyi Aunga for Accused

Mr. Shabola for State

Mr. Bibu - Court Clerk