



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL CASE NO.20 OF 2013**

**HARRISON MAINA KAMAU ..... APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

**Harrison Maina Kamau** is the 2<sup>nd</sup> accused in Criminal Case No. 20/2013. His co-accused is **Antony Mbago Rumusu**. They are charged with the death of one **Nicholas Vaati Ndavi**. The offence is alleged to have been committed on 11<sup>th</sup> and 12<sup>th</sup> January 2013 at Umoja One Estate in Nairobi County. Their trial is set to commence on 4<sup>th</sup> November 2013.

The 2<sup>nd</sup> accused has now applied to be released on bail pending his trial. By his application dated 8<sup>th</sup> May 2013, he states that he has an unqualified constitutional right to be presumed innocent until proved guilty and that he has a constitutional right to be released on bail pending his trial.

The application is opposed by the State through the Replying Affidavit of **No.37885 PC Simon Mokaya** who is the Investigating Officer in the case. He avers that the applicant together with the 1<sup>st</sup> accused were the last people to be seen with the deceased; that there is strong circumstantial evidence against the accused and that the applicant was likely to abscond if granted bail.

In arguing the application **Mr. Kamau** for the applicant urged the court to disregard the averments in the Replying Affidavit as the same were matters of evidence to be adduced and tested at trial. **Ms Ikol** on the other hand submitted that the applicant was likely to abscond owing to the likely conviction and sentence of death if convicted; and that there was real likelihood of interference with witnesses. She explained that the applicant was a car washer while some of the witnesses were the deceased's workers namely a matatu driver and conductor both of whom were well known to the applicant.

I have considered the application. **Article 49 (i) (h) of the Constitution** on which the application is grounded provides that *“an arrested person has a 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 right however is qualified by the words ‘Unless there are compelling reasons.’ This means that the right can be curtailed by the court if there is good reason to do so. This is so because the constitution has, in its wisdom, not set out what would amount to compelling reasons” but left the decision thereof to the discretion of the court. It is then the duty of the court exercising discretion judiciously to decide each case on its own peculiar facts and circumstances. See **Dancun Livingstone Kimanthi & Winnie Wairimu Kariuki Vs Republic Nairobi Criminal Case No. 50 of 2012 (UR)**. Further, where the State opposes bail as in the present case, it is the duty upon it to bring to the attention of the court the existence of compelling reasons.

In the circumstances of this case I am satisfied that the prosecution has laid a strong basis for the fear that the applicant might interfere with the witnesses. Both the accused and the witnesses are in the same matatu industry. It is therefore prudent that the evidence of these witnesses be taken first before the applicant can be released.

The application is dismissed. The applicant is at liberty to renew his application at a later stage.

**Ruling delivered, dated and signed at Nairobi this 23rd day of September, 2013**

**R. LAGAT - KORIR**

**JUDGE**

In the presence of:

.....: Court clerk

.....: Applicant

.....: For the applicant

.....: For the state/respondent