



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO.90 OF 2012

GILBERT KAPUE OKETCH.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Gilbert Kapue Oketch is charged with the murder of Caroline Mwanza Mutunga. The offence is said to have been committed on 2nd February, 2012 at Umoja Innercore Plot A67 House No. 18 within Nairobi County. He was arraigned in court on 14th November 2012 when he pleaded not guilty and was remanded in custody.

On 20th December 2012 he filed the instant application dated 17th December 2012 seeking to be released on bail pending trial. He states in the application that he has a constitutional right to bail; that he will attend trial; and, that there were no compelling reasons not to be admitted to bail. In his supporting affidavit, he avers that he gave himself up to the police prior to being arrested and that he was not predisposed to escape if admitted to bail.

The State has opposed the application through the replying affidavit of **No.76452 PC Pharis Thoya** who is one of the investigating officers in the case. In the lengthy affidavit the investigating officer avers that after the alleged murder the accused telephoned the deceased's father and informed him that he (the accused) had killed her and that he should collect the body from their house for burial; that the deceased's father did go to the house where he found his daughter's body on the bedroom floor; that subsequently the accused disappeared and was only arrested on 31st October 2012 at Malaba on the Kenya-Uganda border; that at the time of arrest the accused had a Ugandan Identity Card bearing the same Ojuma Richard. The investigating officer further deposes that the accused is likely to abscond if granted bail.

The application was urged before me on 17th June 2013. I heard submissions from **Mr. Njenga** for the accused/applicant and **Ms. Gichohi** for the respondent. **Mr. Njenga's** submissions emphasized the applicant's right to bail under **Article 49(i) h of the Constitution** and that the primary consideration for the court in an application for bail was whether or not the applicant would turn up for his trial. He disputed the averments in the replying affidavit stating that there was no evidence that the applicant would abscond. He submitted that being arrested at the border was not an offence as the applicant's home area was near the border.

Ms. Gichohi urged the court to consider the time lapse between the commission of the offence on 2nd February 2012 and the time of the arrest of the accused on 31st October 2012 which period confirms that

the accused was in hiding. She submitted that at the time of arrest, the applicant had a Ugandan ID with his photograph meaning that he was purporting to hold himself out as a Ugandan citizen and wanted to escape jurisdiction and hide in Uganda. She urged the court to find that the conduct of the accused demonstrated that he was keen on escaping trial.

In this application, it is apparent that the applicant's constitutional right to bail is not contested. The respondent acknowledges this right under **Article 49 (i) h**. It is obvious from the constitutional provision that the only fetter to the applicant's right to bail is the existence of a compelling reason. The issue then in this application is whether there is any such reason why the applicant cannot be granted bail. From the rival affidavits and submissions, it is apparent that the State opposes this application on the ground that the applicant may not attend his trial. It is the prosecution's fear that the applicant will abscond if granted bail.

I take the view that where the State opposes bail on account of any of the commonly known fears, including but not limited to the likelihood of the applicant absconding, and likelihood of interference with witnesses, the State must make the court appreciate the basis of such fears. It must provide persuasive argument backed by facts and experiences which demonstrate the real likelihood that the applicant will abscond or interfere with witnesses. As stated in **Jaffer V. Republic, 1973 E.A. 39**, the court cannot be called upon to speculate; **See Republic Vs Patius Gichobi Njagi Nairobi Criminal Case No. 45 of 2012(UR)**

After my careful consideration of the rival affidavits and submissions as well as pre-bail report in this application, I am of the view that the applicant is a flight risk. Firstly, the record supports the prosecuting counsel's submissions that the applicant went underground after the commission of the offence. The alleged offence was committed on 2nd February 2012 and the applicant was arrested on 31st October 2012, almost 8 months later. The alleged murder took place in Nairobi while the applicant was arrested in Malaba.

Further, from the pre-bail report, it is stated that the applicant was in an intimate relationship with the deceased; that indeed they were cohabiting. While not imputting any guilt on the part of the accused, I would imagine that upon discovery of the death of his partner, he would have been in Nairobi assisting the police with investigations rather than being some 500 kms away at the Malaba border. I am convinced that he was trying to run away. I find nothing to support his averment that he handed himself over to the police.

Secondly, it is not disputed that the applicant was arrested at the border. What defence counsel disputes in his submissions is whether or not the police actually recovered from the applicant a Ugandan ID bearing the applicant's photograph. While the burden of proof is on the prosecution to prove the same, it must be observed that such burden in an application of this nature is not one beyond reasonable doubt. I find in this case that it is more probable than not that the applicant was attempting to leave the jurisdiction of this court. I am persuaded that if released, he poses a flight risk.

Thirdly, the probation report states that the applicant's rural home is only 5km away from the border post through which he was attempting to leave the country. While I agree with the applicant's counsel that it is not an offence for one to live near the border, I find that the possibility of the applicant taking flight across the border is more probable than not.

In conclusion, I find that the State has stated, explained and demonstrated to the satisfaction of the court the compelling reasons why the applicant should not be admitted to bail.

The application dated 17th December, 2012 is dismissed. The applicant shall remain in custody pending trial.

Ruling delivered and signed at Nairobi this 19th day of September, 2013.

R.LAGAT-KORIR

JUDGE

In the presence of:

..... :**Court clerk**

.....:**Applicant**

.....:**Counsel for the Applicant**

.....:**Counsel for the Respondent**