



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 51 OF 2013

REPUBLIC.....RESPONDENT

VERSUS

FRANCIS KISIENYA MUMBI.....APPLICANT

RULING

Francis Kisenya Mumbi is charged with murder contrary to section 203 as read with section 204 of the Penal Code. According to the information filed in court, he murdered one **Paul Muchiri Kamoni** on 15th March 2013 at Umoja One Estate in Nairobi County. He denied the charge on 2nd May 2013 and is awaiting trial which is yet to commence. He now seeks to be released on bail.

The application is filed on behalf of the accused by **J.T. Nzioki Advocate**, who has also sworn the supporting affidavit. It is based on the grounds that the applicant has a constitutional right to bail; that there were no compelling reasons to warrant denial of bail; and that the applicant was willing to abide by the conditions which the court might set.

The averments in the supporting affidavit mirror the grounds aforesaid with the only addition being that the applicant was a resident of Umoja 2.

The application is opposed by the State. From the Replying Affidavit of **No. 49905 PC Kyalo Kilundo** (the investigating officer) and the oral submissions of **Mr. Konga** (the learned prosecution counsel) it is apparent that the State opposes the application on the grounds that the applicant might take flight and escape trial and that he may interfere with key prosecution witnesses.

At the hearing, **Mr. Nzioki** urged the court to release the applicant, pursuant to **Article 49 (i) h of the Constitution**. He submitted that there was no compelling reason why the court should not exercise discretion in favour of the applicant; and, that the State had not demonstrated any interference with witnesses.

I have carefully considered the rival affidavits on record as well as the oral submissions by respective counsel.

The constitutional basis for the application is not contested. **Article 49 (i) h** grants an accused person the right to bail pending trial. The right can only be curtailed by the existence of compelling reasons which reasons would make the court deny an accused bail. The Constitution has, in its wisdom, left the responsibility of defining what amounts to compelling reasons to the court. It is upon the court to consider the facts and circumstances in each case in order to exercise its discretion to grant or deny bail.

In the present case, the State has put forward the argument that the applicant might take flight if

released. It has stated that the applicant went underground for 5 days after the alleged commission of the offence. I do not think that is sufficient to conclude that the applicant will take flight if released. I agree with defence counsel that the period was negligible and may be equivalent to the time that the police took to conduct their investigations before arresting the applicant. I therefore dismiss the fear that the applicant might take flight. It is not supported by any fact or experience. It is mere speculation.

The second reason preferred by the State is the likelihood of the applicant interfering with witnesses. It is the State's argument that after committing the offence, the applicant threatened and detained the eye witness who is lined up to testify as the first prosecution witness.

The witness statements of the said witness to which I was referred reveals that the accused and the deceased were in an intimate relationship with PW1 and that the incident leading to the death of the deceased occurred when the accused found the said witness in bed with the deceased. The statement, though yet to be tested at trial, shows at the very least that the applicant and the witness are not only known to each other but that their intimate relationship was likely to lead to interference with the said witness. Such a scenario cannot be ignored by the court. I am persuaded that the possibility of interference is real.

In the premises, I consider that the interests of justice in this case will be served better in disallowing rather than allowing the present application.

The applicant may renew his application once the key witness has testified.

The application is dismissed.

Ruling delivered, dated and signed at Nairobi this 28th day of October, 2013

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Applicant

.....: For the applicant

.....: For the State/respondent