



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 85 OF 2012

REPUBLIC.....RESPONDENT

VERSUS

DENNIS MWENDWA MUTISYA.....APPLICANT

RULING

In the application before me, **Dennis Mwenda Mutisya** is seeking to be released on bail pending trial. He has been arraigned in court to face trial for the murder of **Kennedy Ogolla** which offence is stated to have been committed on 13th October 2012 at Kariokor Market within Nairobi County.

The application is brought under **Articles 10, 20, 23, and 49 (i) h of the Constitution** and is premised on the grounds that the court has jurisdiction to admit the accused to bail and that there are no compelling reasons to warrant the denial of bail. In his supporting affidavit sworn on 3rd June 2013, the applicant states that he is a Kenyan Citizen; resides in Huruma in Nairobi, that his parents are dependent on him; and, that he is willing to attend court whenever required.

The application is opposed by the State through the Replying Affidavit of **No. 52149 Cpl. Japheth Muluma** who has deposed *inter alia* that the accused stabbed the deceased with a knife in broad day light at the Kariokor Market in full view of the witnesses; that owing to the weight of the evidence, and the likelihood of conviction, the temptation to abscond was real.

At the hearing of the application, I heard oral submissions from **Mr. Opolo** and **Ms. Matiru** for the applicant and respondent respectively. While relying on the Replying Affidavit of **PC Muluma**, **Ms Matiru** submitted that the applicant was seen stabbing the deceased in public and in broad day light after which he fled the scene. **Ms Matiru** urged the court to consider the eye witness accounts as strong evidence which was likely to cause the accused to abscond trial if released. **Mr. Opolo** on his part urged the court to disregard the submissions of the prosecutor arguing that the same touched on evidence which was yet to be presented in court.

I have carefully considered the arguments for and against the application. The constitution grants the applicant the right to bail. The right however is not absolute and can be curtailed by the court where the court

finds compelling reasons to do so. It is the duty of the State to demonstrate to the court the existence of any compelling reasons envisaged under **Article 49 (i) (h)**. This duty was

aptly discussed by Ibrahim J. (as he then was) in the case of **R. Vs Danson Mgunya and Kassim Sheebwana Mohamed, Mombasa Criminal Case No. 26 of 2008** wherein he stated;

*“I do hold that if the prosecutor objects to the release of the accused from detention during the pendency of a trial, then at the first instance, the burden should be on the prosecution and not the accused to prove or at least demonstrate the existence of the **“compelling reasons.”**”*

Further, it must be remembered that each case must be decided upon its peculiar facts and circumstances. This, I must add, is the essence of the discretion given to the court under **Article 49(i) h of the Constitution.**

In exercising discretion however, the court must keep in mind that the primary purpose of bail is to secure an accused’s attendance at trial. See **Watoro V. Republic (1991)KLR 220.**

In the present application, it is the State’s view that the evidence it has against the applicant is so weighty that a conviction was highly likely. While the averments that the applicant stabbed the deceased in broad day light in an open market is yet to be tested at trial, it is highly probable that the existence of such evidence would make the applicant abscond trial to evade the probable conviction. I am persuaded that under such circumstances, the likelihood of absconding is real. This, I find, is a compelling reason why the applicant, though entitled to bail, should be denied the same to ensure that he attends his trial.

The application is dismissed.

Ruling delivered, dated and signed at Nairobi this 21st day of November, 2013

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk
.....: Applicant
.....: For the applicant
.....: For the State/respondent