



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 56 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

PAUL MWANGI MACHARIA.....APPLICANT

RULING

Paul Mwangi Macharia is charged with the murder of Charles Kimani Wairire. According to the information dated 1st July 2011, he is alleged to have committed the offence on 19th June 2011 at Kiuu Village in Gatundu South within Kiambu County. He now seeks to be admitted to bail pending trial.

The application dated 3rd June 2013 is brought under **Article 49 (h) 10, 21, 22 and 25 (g) of the Constitution** and **Section 123 of the Criminal Procedure Code, Cap. 75 Laws of Kenya**.

The main ground set out in the application is that the applicant is in dire need of medical treatment which he has not been able to access while in prison owing to the cost.

The supporting affidavit has been sworn by **Alex Anambo** who is the defence counsel on record. He states that prior to his arrest, the accused was involved in a serious accident which necessitated surgery on his legs; that he still requires specialized medical treatment which neither the State nor the prisons department is in a position to finance; that the accused's relatives namely Lucy Nduta and John Njenga are willing to get him appropriate treatment if released; that the applicant faces the risk of his leg decomposing if no urgent measures are taken to access appropriate medical treatment; that the offence is bailable under the Constitution; and, that the applicant is ready and willing to comply with any terms and conditions imposed by the court.

The state opposes the application through the Replying Affidavit of **Isaac Kimani Kinai** who is the investigating officer. In the affidavit dated 14th June 2013, he avers that the applicant could not be treated at Kenyatta National Hospital due to an outstanding bill of Kshs.100,000/- which he had incurred prior to his arrest and that the applicant's family was required to meet any treatment cost in excess of Kshs.3,000/-; that there was no evidence that the applicant's circumstances would change after his release; and that considering the nature of the charge, seriousness of the offence and the likely sentence, the applicant may be tempted to flee the jurisdiction of the court.

At the hearing of the application on 18th June 2013, I heard submissions from **Mr. Anambo** and **Mr. Konga** for the applicant and respondent respectively. I also allowed **Mr. Njomo** who is on record holding watching brief for the family of the deceased to address the court.

In his submissions, **Mr. Anambo** urged the court to release the applicant owing to the extreme suffering he was undergoing as a result of the injury to his legs. He informed the court that it had been difficult for the applicant to access treatment while in custody.

In opposition **Mr. Konga** submitted that the applicant had not provided proof that his legs were affected. He further argued that the outstanding medical bill of Kshs.100,000 was incurred prior to the applicant's incarceration.

This application raises three issues. The first is whether the court should allow the participation of the victim on the offence in the application of this nature. The second is the right of the accused to access medical treatment and the third is the likelihood of the applicant absconding.

As stated earlier, **Mr. Njomo** sought the permission of the court to address the court on behalf of the family of the deceased. He argued that **Article 50 of the Constitution** gives the victims of crime the right to participate in criminal trials. He went ahead to submit that the deceased's family opposed the accused's application because the accused assaulted the wife of the deceased and that the family was fearful that he may harm them if released.

On the first issue aforesaid, I do not consider this application one in which I should make an expose on the place of victims of crime in criminal trials. Suffice it to state that our criminal jurisprudence recognizes the State as the complainant on the one hand and the accused as the defendant on the other. A victim of crime is not considered a party. By extension, therefore, an advocate holding watching brief has no right of audience before the court. Where therefore there are any concerns affecting the trial the victims of crime should bring the same on board through the prosecutor. See **Republic V. Florence Wambui Njuguna High Court Kisumu, Criminal Case No. 7 of 1990**. See also **Patrick Kariuki Muiruri & 3 others Vs Republic, Court of Appeal, Nairobi Criminal Appeal No. 314 of 2011**. I am of the view that the issues raised by counsel watching brief in this application should have been brought to the attention of the prosecutor for the same to be brought properly before court through affidavit evidence. In this application therefore, I have excluded the submissions of Mr. Njomo for the deceased's family.

On the main ground relied on by the applicant is his medical condition. The State has through averments in the Replying Affidavit and the submissions of **Mr. Konga** stated that the applicant has an outstanding medical bill of KShs.100,000 at the Kenyatta National Hospital. It is indicated that the bill was incurred before the incarceration of the accused and that the accused shall not be accorded the requisite treatment without the said bill being cleared. Other than the submissions made at the hearing of the application, the record shows that this issue of the treatment of the accused has been raised countless times before this court. It is therefore uncontested that the accused is in dire need of treatment and for which the State will not pay as clearly demonstrated by the submissions of the prosecuting counsel.

In the circumstances of this case, I am persuaded to grant the applicant bail on humanitarian grounds to enable him seek alternative treatment outside the prison. I admit him on the following conditions:-

- i. He is to execute a personal bond of KShs.500,000/- with 2 sureties of similar amount.
- ii. He shall not contact, intimidate or in any manner whatsoever interfere with the prosecution witnesses. Any such interference shall lead to the automatic cancellation of this bond.
- iii. He shall report to the Investigating Officer at Gatundu Police Station twice weekly until further orders of this court.
- iv. He shall attend court once monthly for the mention of his case. The first such mention shall be on 29th January, 2014.

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