



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 82 OF 2010

REPUBLIC RESPONDENT

VERSUS

GEORGE OGUTU..... ACCUSED/APPLICANT

RULING

1. The Applicant, **George Ogutu**, is charged with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Cap 63), Laws of Kenya**.

The particulars of the offence were that on the 21st day of November, 2010 at **Kathiani market, Katutu Location, Kitui West District** within **Kitui County** murdered **Swaleh Ndemwa**.

2. The Applicant pleaded not guilty. The Applicant has applied for bond/bail pending the hearing and determination of his case. The application is based on the following grounds:-
 - a. **That the Applicant is the bread winner of his family.**
 - b. **That the Applicant is not a flight risk and will abide by the terms of bond imposed by the court.**
3. The application was opposed to by the State. The Investigating Officer, **Cpl. Charles Wahome** in an affidavit sworn on 29/7/13 raises the following issues:-
 - a. **That the Applicant and the witnesses are from the same locality and his release will pose a security threat to the prosecution witnesses and the accused may also be tempted to interfere with witnesses.**
 - b. **That the seriousness of the offence and the severity of the sentence provided for by the law may be an incentive for the Applicant to abscond and also provide compelling reasons why the accused should not be released on bail.**
 - c. **It was also submitted that the Applicant's permanent place of residence is not known to the Investigating Officer.**

4. I have considered both the application and the reply to the same. **Section 49 (1)** of the **Constitution** states as follows:-

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending the charge or trial unless there are compelling reasons not to be released.”

5. However, the court has discretion to grant or refuse bail depending on the circumstances of each case. The court is required to take into consideration settled principles of the law when

determining whether or not to grant bail pending the hearing of a criminal case or pending the hearing of an appeal. The principles to be considered by this court in determining whether or not to grant bail were set out in **Mwaura v Republic (1986) KLR 600**. The said principles include the following; the nature of the offence, the strength of the evidence, the character or behavior of an accused and the seriousness of the punishment to be meted if the accused is found guilty. The primary underlying consideration is whether the accused will turn up at the appointed place and time for his trial. The court further held that in the exercise of its discretion, if certain exceptional circumstances personal to the accused exist which when weighed against the risk of the accused absconding, the balance will tilt in favour of granting bail. Another factor that the court will consider is whether the accused will interfere with witnesses if he is released on bond.

6. The State has not given any compelling reasons why the Applicant should not be released on bond. Compelling reasons should not be a matter of conjecture, guesswork or speculation. Being supplied with statements of prosecution witnesses is a matter of right guaranteed by the **Constitution** under **Article 50 (2) (j)**. There are no cogent reasons given in support of the assertion that the Applicant is likely to interfere with witnesses. The provision for death sentence cannot be used against the Applicant as that would negate the Constitutional guarantee for bail in capital offences. On the whether the Applicant has a permanent place of abode, the same issue has been settled by the pre-bail report which gives the Applicant's home particulars and has recommended the Applicant as suitable for release on bond.
7. With the foregoing, I allow the application. The Applicant may be released on a Kshs. 1 Million personal bond with one surety of a like sum.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of December 2013.

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B. THURANIRA JADEN

JUDGE