



No. 10
REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL CASE NO. 81 OF 2011

REPUBLIC.....PROSECUTOR

-VERSUS-

CAVIN OTIENO OWUOR.....ACCUSED

RULING

1. By information dated 15th August, 2011 the accused, **Cavin Otieno Owuor** was charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the 26th day of July, 2011 at Nyasare River Estate, Migori County in the Republic of Kenya, jointly with others not before court murdered **Ronald Oile**. When plea was taken on 20/9/2011 he pleaded not guilty to the charge and was remanded in custody to await trial on 29/11/2011.

2. On 27th September 2011, the accused filed a notice of motion under certificate of urgency seeking the following orders:

- i. *That the application be certified as urgent and the same be heard on priority basis.*
- ii. *That the honourable court be pleased to grant the applicant herein bail/bond on reasonable terms pending the hearing and determination of the criminal proceedings in Kisii HCCR No. 81 of 2011.*
- iii. *That the honourable court be pleased to grant such further orders as it may deem fit to grant.*

3. The applicant relied *inter alia* on the ground that he is a young man working with KEMRI and seconded to the Migori District Hospital where he works as a Laboratory Technician and that his continued incarceration would lead him to lose his job. He stated in his affidavit in support of the application that as a young man with a promising job and career prospects, he was unlikely to abscond. In a supplementary affidavit dated 21st November, 2011 and filed in court on the same date, the applicant provided evidence of his employment as a laboratory technologist being his certificate of registration as a medical laboratory technologist issued by the Kenya Medical Laboratory Board on 15th December, 2009 (annexture KNCR01) and, a letter of confirmation as a Laboratory Technologist with the KEMRI – RCTP Programme at Migori District Hospital (annexture KNCR02). In further demonstration of his career

prospects, the applicant averred that he had been admitted to the Mt. Kenya University to pursue studies leading to Bachelor of Science Medical Laboratory Science degree with effect from 2nd September 2011.

4. The application was set down for hearing on 12th October, 2011 before **Sitati J.** However owing to time constraint it was taken out of the day's hearing list and reallocated for mention before me on the 9th November, 2011 whence I gave a hearing date of 30th November, 2011. During the hearing, **Mr. Nyasimi** learned counsel for the accused, relied on Article 49(1)h of the Constitution, to wit that bail is now a Constitutional right available to any accused person including murder suspects. He cited various persuasive authorities where the High Court in Kisii has granted bail to murder suspects. Finally, he endeavoured to demonstrate that the accused was a person of fixed abode holding a job as a public servant and was not likely to abscond. He pleaded his client's case that he was likely to lose his job if he was not released. Finally, **Mr. Nyasimi** confirmed to the court that the accused would abide by the bond conditions and attend court for his trial.

5. **Mr. Gitonga** learned state counsel did not oppose the application. He told the court that his attempts to get a report from the District Criminal Investigating Officer in Migori had not been successful and as such there were no compelling reasons to deny the applicant bail. He however urged the court to impose stringent terms that would ensure the accused's attendance at the trial. **Mr. Nyasimi** urged the court to uphold the provisions of Article 49(h) to the effect that bond terms should not be oppressive. He urged the court to take into consideration the fact that the applicant was also a student.

6. After hearing counsel for both the applicant and the respondent, the court moved *sue moto* to call for a pre-bail probation report on the accused. I consider such a report invaluable in giving the court an insight into the social environment into which an accused person seeking bail will be released into. In calling for such a report, the court was minded that murder is an offence that excites extreme passion which may at times put the life of a suspect in danger.

7. The probation officer's report was presented to court on 20th December, 2012 being the last day of the court term. On receipt of the report, the court gave a ruling date of 20th January, 2012 being the first week of the new term. The report returned a favourable recommendation on the accused. It confirms that the accused enjoys a stable family background and was rated highly by his peers and workmates at his place of work. Save for the mother of the deceased who is reported to be uncomfortable with the release of the accused, the report affirms that there is no notable hostility on the ground and the accused is likely to enjoy community acceptance.

8. I have paid due consideration to the application, the submissions by counsel for both the applicant and the state and the probation report. The law and practice on the grant of bail is that any accused person has a right to bail. Article 49 (i) (h) of the Constitution 2010 has removed the exceptions made in the earlier Constitution. Bail is however not an absolute right and where there are compelling reasons not to admit an accused to bail, an application for bail must necessarily fail.

Some of the factors that may amount to compelling reasons include:-

- i. *Whether or not the accused is likely to abscond.*
- ii. *The likelihood of the accused interfering with investigations.*
- iii. *The likely impact that the release of the accused will have on the community and whether such release is likely to threaten peace in the community.*

iv. The criminal record of the accused.

I have considered all the above factors. The accused has demonstrated to the satisfaction of the court that he is a person of known employment and fixed abode with plans to pursue further education. The probation report has also affirmed that the accused enjoys a stable family background and community support. Further the learned state counsel has conceded the application. I therefore find no compelling reason to deny the accused bail. Accordingly I allow the application and order that the accused be released on his own personal bond of kshs. 500,000/= with two sureties of similar amounts to be approved by the Deputy Registrar of this court. Upon his release, the accused shall attend court for the mention of his case once a month until the case is heard and determined. The first such mention shall be on 24th February, 2012 or 5th March, 2012.

9. It is so ordered.

Ruling dated, signed and delivered at Kisii this 23rd day of January, 2012.

R. LAGAT-KORIR
JUDGE

Before:

Hon. R. Lagat Korir J.

..... court clerk

Appellant

Respondent