

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CRIMINAL APPLICATION NO.60 OF 2011

PETERSON KOSKEI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant, Peterson Koskei Murei, is charged in the court below with three counts of **robbery with violence** contrary to **section 296(2)** of the **Penal Code** and one count of **having suspected stolen property** contrary to **section 323** of the **Penal Code**.

He has applied to this court to grant him bail pending trial on the grounds that his life will not be in danger if released on bond; that he will not interfere with prosecution witnesses; that as a sole bread winner to his family, (3 young children aged 7, 4 and 2 years), his family is suffering and in desperate need for care; that the children are under the care of his elderly mother.

The affidavit in support of the application is sworn by the applicant's sister, Lily Chebet Murei. The respondent through P.C. George Marita, the investigating officer, has opposed the application on the grounds that the applicant is being investigated for other offences. That due to these investigations and the seriousness of the offence with which he is already charged, the applicant is likely to abscond if granted bail.

I have considered the application, the reply by the respondent and submissions made before me on 18th July, 2011. There cannot be any doubt today that irrespective of the seriousness of the charge, the Constitution guarantees, by dint of **Article 49 (1)(h)**, any arrested person to be released on bond or bail on reasonable conditions pending trial unless there are compelling reasons not to be so released. The courts in this country including this court have upheld this provision in the Bill of Rights and granted several accused persons bail/bond since the promulgation of the Constitution.

There is no longer any debate as to the application of **section 123 (1)** of the **Criminal Procedure Code** in respect to offences of murder, treason, robbery with violence and attempted robbery since the coming into force of the Constitution. That section provides that:

“123(1) When a person, other than a person accused of murder, treason, robbery with violence, attempted robbery with violence and any related offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.”

Today, as I have stated earlier **Article 49(1)(h)** aforesaid does not distinguish between capital offences and other offences with regard to grant of bail. It is my considered view that all courts, including the magistrates' courts are enjoined to apply **Article 49(1)(h)**, unless a question of interpretation of the Constitution or where there is allegation that the suspect's rights under the Constitution have been or are

about to be violated. It is only then that the matter can be referred to the High Court pursuant to the provisions of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, with the necessary alterations, adaptations, qualifications and exceptions to bring them into conformity with **Article 22** of the **Constitution** (see Article 19(2))

I have stated these things because I find no justification why such applications cannot be made before the trial magistrate. As has been the case in the past in any other crimes triable by magistrates, the role of the High Court in such cases is limited to those envisaged under **section 123(3)** of the **Criminal Procedure Code**.

Turning to the application before me and reiterating that the applicant is entitled to be released on bond pending his trial subject to there being no compelling reasons, it has been deposed by the respondent that following recoveries from the applicant of assorted items suspected to be stolen, investigations are still ongoing. In view of this fact, alone, I am inclined to deny the applicant bond. The investigating officer is apprehensive that should the applicant be granted bail at this stage, he may interfere with those investigations; that he is also a flight risk. Those are genuine and reasonable fears.

For those reasons, this application fails and is dismissed.

Dated, Signed and Delivered at Nakuru this 16th day of February, 2012

W. OUKO
JUDGE