



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO.70 OF 2010

REPUBLIC..... PROSECUTOR

VERSUS

KITEME MAANGI 1ST ACCUSED

RULING

The applicant, **Kiteme Maangi** was first arraigned before this court on 12th November, 2010 on information charging him with murder contrary to section 203 as read together with section 204 of the Penal Code. It was alleged that on 3rd November, 2010 at around 3 p.m. at Kalua village, Musukini sub-location, Mutitu Location, Mutitu District within Kitui County, he murdered **Katambo Maangi**. Though arraigned in court as aforesaid, it was not until 23rd May, 2011 that he entered a plea of not guilty. The case was then fixed for hearing on 21st September, 2011. On the hearing date aforesaid, the accused through his counsel indicated that he would be filing an application for bail pending trial and therefore wished to have the hearing of the case adjourned for that purpose.

On 23rd September, 2011, the applicant duly filed the application which was expressed to be brought under sections 123 (3) and 124 of the Criminal Procedure Code, Article 49(1) (h) of the Constitution of Kenya and all other enabling provisions of the law. In the main, he prayed that he be released on bail/bond pending the hearing and finalization of his trial.

The grounds in support of the application were that he was a person of fixed abode, ready and willing to abide by the bail terms that the court may impose, the circumstances of the offence were by themselves mitigating, he would readily attend court and be available for trial, a presumption that he is innocent until proven guilty works in his favour; he was born and bred in Kenya and has a family, therefore he is unlikely to abscond, it was a Constitutional right to be released on bail on reasonable conditions and finally that there were no compelling reasons to justify his continued detention.

The affidavit sworn in support of the application by the applicant merely reiterates and expounds on the grounds aforesaid.

The application was opposed. Through a replying affidavit sworn by **Daniel Otieno**, one of the Investigating Officers in this case, he deponed where pertinent that the applicant was suspected to have killed his step brother, the deceased. Following the incident he had gone into hiding. Pursuant to investigations it was established, that there was a long standing family dispute or feud. All witnesses were family members and neighbours who reside in the same locality with the applicant and there was therefore possibility of interference should the applicant be granted bail. The applicant had been supplied

with witness statements indicating the particulars of witnesses. Thus the likelihood of interference with the said witnesses was high. Considering the serious nature of the offence and severity of the sentence provided under the law, the deponent felt that the temptation of the applicant to abscond if released on bail was real. Finally, he deponed that though the offence of murder is now bailable, the grant of bail is not absolute but a matter for the discretion of the court. He therefore urged me to find that there were compelling reasons to deny the applicant bail.

When the application came up for interpartes hearing before me, **Mr. Kimeu** and **Mwenda**, learned counsel for the applicant and respondent respectively, agreed to canvass the same by way of written submissions. They subsequently filed and exchanged those submissions.

I have carefully considered the application, the rival written submissions on record and all the material placed before me. Under the provisions of Article 49 (1) (h) of the Constitution, It is now possible for an arrested person on a capital charge to apply and be granted bail. That article is in these terms:

“49 (1)

(a).....

(h) To be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

My reading and understanding of the article is that an arrested person whether charged in court or not is entitled to be released on bail pending either his arraignment in court or after being charged. Secondly, such person is entitled to be released on bail upon reasonable terms and or conditions. Of course what is reasonable will depend on the facts and circumstances of each case.

Thirdly, if there are any compelling reason(s), the court or the authority under whose custody the applicant is held may deny him bail. It is the prosecution or the person under whose custody the applicant is held to satisfy the court as regards the compelling reason as to deny such arrested person his right to bail and its upto the court to weigh and accept or reject the compelling reason(s) so advanced.

What is the essence of bail? **Justice Niki Tobi** of the Supreme Court of Nigeria stated thus in the **case of Alhaji Dukubo – Asari Vs. Federal Republic of Nigeria, S.C. 20 A/2006.**

“The main function of bail is to ensure the presence of the accused at the trial Accordingly, this criteria is regarded as not only the Omnibus one, but also the most important. As a matter of law and fact, it is the **mother of all the criteria enumerated above.**”

“Dealing with the said criteria, the working party on bail procedure in the Magistrate’s courts in the united kingdom said on paragraph 22 of the report:-

“There are a number of other considerations to be taken not account in deciding a bail application, but in general they are not themselves reasons for granting or refusing bail but indicators of the likelihood or otherwise of the defendants appearance” As a matter of fact, all other criteria are parasitic on the omnibus criterion on availability of the accused to stand trial. Arising directly from the omnibus criterion is the criterion of the nature and gravity of the offence. It is believed that the more serious the offence, the greater the incentive to jump bail although this is not invariably true. For instance, an accused person charged with capital offence is likely to flee from jurisdiction of the court than one charged with a misdemeanor like affray. The distinction between capital or non-capital offence is one way crystallized from the realization that the atrocity of the offence is directly proportional to the probability of the accused person absconding. But the above is subject to qualification that there may be less serious offences in which the court may refuse bail, because of its nature. This does not however, apply in this case because the appellant is charged with treasonable felony, a heinous offence carrying a prison term of life...”

This erudite exposition of the law sums and says it all. Need I say anything more!

Thus, much as our Constitution states expressly and unequivocally that an arrested person has the right to bail on reasonable conditions pending trial, that right is however, circumscribed or fettered by the fact of “**compelling reasons not to be released**”. The court in considering the application and in the exercise of its discretion must bear in mind that caveats.

The prosecution has advanced the following as compelling reasons why bail should be denied to the applicant.

- Accused is suspected to have killed his step brother, the deceased
- He thereafter went into hiding.
- Majority of the witnesses are family members and neighbours. The possibility of him interfering with them should he be granted bail cannot be ruled out.
- Considering the seriousness of the offence and severity of the sentence provided by law, the temptation to abscond if released on bail is real.

I find that the aforesaid fears by the prosecution have not been sufficiently put to rest. However, of all the foregoing, I find the fact that the accused is suspected to have killed his step brother, and that the witnesses are family members and neighbours compelling reasons why I should decline to release the applicant on bail. The accused having been suspected to have killed his step brother, there must be tension in the family. That tension may not be helped by granting the applicant bail. If anything, it may exacerbate the already volatile situation on the ground. The family of the deceased may lay in wait to avenge the death of the deceased. In those circumstances, the security of the deceased may not be guaranteed. I note that the chief of Mutitu Location has addressed a letter to this court dated 9th May, 2011 that has a bearing of this application. She states in part

“...Kibue is therefore a family man and takes care of his family well. He cannot abscond if given bond. He is hard working and extremely organized.”

To my mind this letter is self-saving. How would she know that the applicant cannot escape or abscond. In any event who asked for her opinion on the matter. She is the least qualified to have an opinion on such matters.

The applicant having been supplied with witness statements, he already knows who among the family and or neighbour will say what at the trial. He now knows the witnesses whose evidence may nail him, if at all. This fact to my mind may cause the applicant to take such steps as may ensure that such evidence is not brought on board and or is suppressed. He may as well invoke drastic action of eliminating such potential witnesses. As stated in the case of **Republic –vs- John Kahindi Kansa & 2 others (MSA) H.C. Cr. Case No.23 of 2010 (UR)**.

“Murder is a serious offence and attracts the death penalty. Self-preservation is a natural reaction or response of any human being”.

That self-preservation may take the form of ensuring critical evidence is suppressed forever or the applicant himself takes a flight. That possibility has already been experienced, somehow.

Finally, such potential witnesses may not be comfortable seeing the accused walk around knowing that their evidence is critical to the success of the prosecution case. That is reason enough to cause such witnesses to have genuine fear, misapprehension and anxiety. It may lead even to such witnesses refusing to testify due to genuine misapprehension of their safety.

I find all the foregoing compelling reasons to warrant the rejection of the application. It is dismissed.

Ruling dated, signed and delivered at Machakos this 15th day of February, 2012.

**ASIKE-MAKHANDIA
JUDGE**