



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 5 OF 2011

REPUBLIC PROSECUTOR/RESPONDENT

VERSUS

1. JOHN MWEMA KISYANGA

2. PATRICK THINGO KILALE

3. JAMES ROCKY KITEME ACCUSED/APPLICANTS

RULING

This is an application in which the Applicants/Accused seek to be released on bail/bond pending the hearing of their case. Several grounds were listed on the face of the Notice of Motion. The grounds are, *inter alia*, that the Applicants are not a flight risk, that the Applicants are not a security risk and do not require any protection through detention given that the Applicants and the deceased come from the same clan. That the Applicants stand to suffer irreparable loss and damages if they remain in custody up to the time their case will be determined.

The application was filed with a supporting affidavit sworn on 28th June 2011 by Gideon Ogude Advocate for the Applicants. It was deponed *inter alia*, that witness statements had been annexed to the affidavit (which was not the case). It was also deponed that the Applicants were law abiding citizens and that they were not likely to interfere with witnesses. I observe that no documents were actually annexed to the affidavit.

The application is opposed and a replying affidavit sworn by PC JOSEPH MBUGUA on 26th October 2011 was filed. It was deponed in the replying affidavit that the accused without provocation approached and fatally attacked the deceased. That the 1st Applicant/Accused is a step brother of the deceased and is also related to key witnesses. That prosecution witnesses reside within the same known locations and that the Applicants are likely to interfere with witnesses. That the possible sentence of death would give rise to the temptation to abscond.

At the hearing, Mr Ogude for the Applicants submitted that the Constitution under Article 49 granted the right to bail, unless there were compelling reasons to justify denial of bail. Counsel contended that no facts were given to support the prosecution's opposition to bail on the allegations of interference with witnesses and absconding. Counsel relied on the case of REPUBLIC –VS- DANSON MGUNYA & ANOTHER – Mombasa H.C. Criminal Case No. 26 of 2008 (2010) eKLR.

The State Counsel Mr Mukofu, opposed the application. Counsel relied on the replying affidavit sworn on 26th October 2011 by PC JOSEPH MBUGUA. It was Counsel's contention that there was a likelihood of interference with witnesses if the Applicants are released on bail. Counsel emphasized that the 1st Applicant is a step brother of the deceased and is also related to key witnesses. Counsel sought to distinguish the case relied upon by the Applicants' Advocate.

I have considered the application. In the case of WATORO –VS- REPUBLIC (1991) KLR 220 at p. 283 Porter J stated:-

“...I take the view on authority that the paramount consideration in a bail application is whether the accused will turn up for his trial...”

Prior to August 2010, only persons accused of non-capital offences were entitled to bail. However, the position was changed when a new Constitution was promulgated on 27th August 2010. The Constitution from then made it a right for all accused persons, irrespective of the offence charged, to be entitled to bail, unless there are compelling reasons to deny bail.

Article 49 (1) (h) of the Constitution provides:-

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

In my view, though the issue whether an accused person will turn up for trial is the primary consideration in an application for bail, other relevant considerations are also important. The Constitution makes bail a right of every accused person. The court cannot refuse to grant bail, unless there are compelling reasons to justify such refusal. In my view, in cases where the accused is alleged to have caused the death of a close relative and he ordinarily lives in close proximity, that may be a compelling reason to deny bail firstly on the basis of interference with witnesses, and secondly, for the safety and security of the Applicant/Accused person himself. Tensions and emotions will ordinarily still be high until the court hears the evidence and determines the matter.

In the present case, I find that the Accused and the deceased are close relatives or neighbours. For that reason, the safety of the Accused persons and the high probability of interference or intimidation of witnesses are, in my view, compelling reasons to deny the accused/Applicants bail. I so find and decline to grant all the Accused/applicants bail pending trial.

Consequently, this application is dismissed.

Dated and delivered at Machakos this 14th day of February 2012.

George Dulu

Judge

In presence of:-

Nyalo – Court clerk

N/A for State

Mr Ogude for 1st & 3rd Accused/Applicant

N/A for 2nd Accused/Applicant