



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 79 OF 2010

REPUBLIC PROSECUTOR/RESPONDENT

VERSUS

DANIEL MUASA KAMANDE ACCUSED/APPLICANT

R U L I N G

This is an application dated 6th October 2011 filed by the Applicant/Accused under Chapter 4 of the Constitution and particularly Article 49 (1) and Section 123 of the Criminal Procedure Code (Cap 75 Laws of Kenya). The Applicant seeks to be released on bail on such terms as the court deems fit pending hearing and determination of his case.

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn by John Mwangangi Advocate for the Applicant on 6th October 2011. The affidavit annexed several documents to support the application.

The application was opposed through a replying affidavit sworn on 26th October 2011 by CPL MICHAEL SIKUKU. The State Counsel Mr Mwenda however, at the hearing of the application submitted that he was not objecting to the accused being released on bond.

I have considered the application. I am aware that Article 49 (1) (h) of the Constitution makes the release of an arrested person on bond a right without exception, unless there are compelling reasons not to do so. It provides:-

49 (1) An arrested person has a right-

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

Courts have indeed held that where the prosecution objects to bail or bond, it is their burden to demonstrate the compelling reasons. In REPUBLIC –VS- DANSON MGUNYA & ANOTHER (2010) e KLR the High Court stated:-

“I do hold that if the prosecutor objects to the release of the accused from detention during pendency of a trial, then at the first instance, the burden should be on the prosecution and not the

accused person to prove or at least demonstrate the existence of the compelling reasons.”

I fully agree with the above observations. In our present case however, the State Counsel has conceded to the application. In my view, even where the prosecution does not object to the bail or bond application, the court is not bound to go by the position of the prosecution. The court has discretion to consider the wider interests of justice in the circumstances of any particular case. I will fall back to the same case of R – VS- DANSON MGUNYA (above) wherein the learned judge stated:-

“In our Constitution it is stated expressly, positively and unequivocally that an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial. This means an accused must be released on bail or bail on reasonable conditions. The only exception or fetter is that there must be compelling reasons not to be released. The court must therefore exercise its discretion with this in mind – existence of compelling reasons.”

In my view, even where the prosecution is not opposed to the application for bail, but the court is of the view that there are compelling reasons; it may refuse to grant bail, provided it specifically states those reasons in such refusal. The court has unfettered discretion in determining whether in the circumstances there are compelling reasons to refuse the grant of bail.

In the present case, the Applicant is alleged to have killed his own wife. All the documents in support of the application appear to have come from the family or lineage of the accused person except that of the chief and assistant chief and councilor. The killing is said to have occurred at Mananja Location and Sub-Location, but the chief who signed an annexed letter is from Kirimiri Location in Muranga South District. The reason for a chief from another area signing the letter has not been explained. The court has also not been told or given details regarding the people who recorded witness statements, and whether the requested release on bond or bail will not affect those witnesses. I am mindful that this is a case where a **“wife”** who must be a descendant of a different family was killed. I would have expected some documents from the deceased’s family to have been annexed. That was not done.

In the circumstances of this case, I find that the gravity of the offence, and the fact that the deceased is a wife of the accused, but a descendant of another family whose information on their position regarding grant of bail has not been given, to be compelling reasons against the grant of bail. Additionally, the fact that witnesses, who might require protection have not been disclosed, are also compelling reasons not to grant bail. This is a capital offence where someone from a different family has lost a life and family or clan tempers might continue to be high up to the close of the court proceedings. On that also, I find that the grant of bail is not appropriate. I find this to be an additional compelling reason against grant of bail.

For the above reasons, I decline to grant bail. The application is therefore dismissed. Orders accordingly.

Dated and delivered at Machakos this 13th day of **February** 2012.

George Dulu

Judge

In presence of:-

The Accused/Applicant in person

Mr Mukofu for State

Nyalo: court clerk