

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 5 OF 2012

REPUBLIC.....PROSECUTOR

-VERSUS -

OMAR WAITHAKA KEVAL.....
.....ACCUSED

R U L I N G

The accused is charged with the **offence of murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The accused is alleged to have murdered one Yvonne Njoki Maina. He has pleaded not guilty to the charge. The accused has invoked the provisions of **Article 49 (1) (h)** of the **Constitution**, among other provisions, for this court to admit him to bail pending trial. The accused averred that the right to be granted bail pending trial was a constitutional right which he should not be denied. The accused states that if he is released on bail, he will not be a flight risk. He is willing to abide by any terms that this court may impose to enable him to be released on bail. The accused stated that he suffers from severe duodenal ulcers which requires constant medical attention which cannot be readily available in remand custody. The State is opposed to the accused being released on bail. PC Pharis Thoya, the investigating officer of the case, swore a replying affidavit to the effect that there were compelling reasons for the accused not to be released on bond. One of the reasons is that the accused is likely to interfere with key prosecution witnesses who reside in the same estate as the accused. It was the State's case that prior to death of the deceased, the accused had threatened to kill the deceased. In that regard, it was the State's submission that if the accused is released on bond he is likely to abscond.

At the hearing of the application for bail, this court heard oral submissions made by Mr. Wandugi for the accused and by Mr. Karuri for the State. This court has carefully considered the said rival submissions. **Article 49(1)(h)** of the **Constitution** provides that any 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*". There are other principles which this court must take into consideration in determining whether or not the accused should be released on bail pending trial. The main principle is that the court should have the assurance that the accused will attend court during trial. The right of an accused person to be released on bail pending trial is not absolute but is dependent on whether or not there are compelling reasons for the court not to release such accused person on bail pending trial. In the present case, the State has argued that the accused will likely interfere with the witnesses if he is released on bail. The second reason the State has put forward is that if the accused is released on bail he is likely to abscond.

Are the reasons put forward by the State compelling reasons for this court to deny the accused bail pending trial? Other than expressing these fears, the State did not put forward any concrete or tangible evidence to support its claim that the accused will interfere with witnesses or will abscond if released on bail pending trial. This court has perused the statements of the two witnesses who the State expressed fear that the accused will likely interfere with. It is clear that the statements of the said two witnesses does not by itself directly point to the culpability of the accused. It is unlikely that the evidence of the said two witnesses, in the absence of other evidence, will secure the conviction of the accused on the charge facing him. The fear by the prosecution that the accused will likely interfere with the said witnesses is therefore not founded in fact. As regard whether the accused will abscond if he is released on bail pending trial, the

State did not place before this court any evidence in respect of any previous conduct by the accused that would lead this court to make a determination that the accused will likely abscond if he is released on bail pending trial.

In the premises therefore, the application by the accused has merit. The accused is hereby ordered released on bail pending trial on the following terms:

- (i) The accused shall post cash bail of KShs.1,000,000/= .
- (ii) The accused shall further provide two sureties of the similar amount of KShs.1,000,000/=. The sureties shall be approved by the Deputy Registrar of this court.
- (iii) The accused shall be required to appear before the Deputy Registrar of this court for mention once a month until the hearing and conclusion of the case.

It is so ordered.

DATED at **NAIROBI** this **8TH** day of **FEBRUARY 2012**.

L. KIMARU
JUDGE