

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 72 OF 2008

REPUBLIC.....PROSECUTOR

VERSUS

BEN KIPYEGON BIRIR.....ACCUSED

RULING

The Accused herein was arraigned in court on 9th June 2008, and only two witnesses have testified since then. The accused is husband to the deceased and PW2 is his son, then aged 13 years of age. His daughter, a child of about 8 years of age when the incident occurred and about 10 years as of 12th October, 2010 when she was called to testify against the accused (*her father*) was brought screaming. It has therefore been difficult to get her to testify.

Ms Idagwa learned State Counsel consequently opposed the accused's application dated 25th August 2011 and filed on 30th August 2011 for release pending trial. Counsel submitted that the State intends to call the daughter, and that if the accused is released it would be obvious that the accused will interfere with the witness. The release of the accused would cause serious psychological anguish to the accused's son who has already testified, and the daughter who is yet to testify. Counsel submitted that the accused has the statements and he knows there is overwhelming evidence against him, and there is good reason for absconding.

Article 49(1) of the Constitution is clear as to the rights of the accused to bail. Bail, I hold, is not automatic in respect of offences for which the punishment is more than six months. For such offences however, the law of the Constitution requires compelling reasons for not releasing the accused on bail.

Most cases cited stipulate that the conditions for bail must be such that the accused will turn up for trial, and that they must report to court every so often pending their trial. Some of the other standard conditions for release pending trial include no interference with witnesses. Whereas that condition has value in respect of independent witnesses, the condition is virtually meaningless where the offence is committed against a member of the family, witnesses are members of the family, and the accused when released will live among those members of the family. I think the situation is intolerable where the witnesses are minor children of the accused. There is no known or established scheme for protection of such witnesses.

On 7th April 2011, Mr. Ombati who was holding brief for Mr. Mugambi counsel for the accused indicated that the accused wished to plead to a lesser charge, but the State had declined the offer, and chose to maintain the charge of murder. That would have been an option for the accused.

For reasons primarily of interference with witnesses, in the absence of any scheme for their protection, I decline to grant the applicant's application for bail dated 20th August 2011, and direct the matter proceed to hearing on 18th & 19th July 2012.

I also direct that the Deputy Registrar of this court urgently install a moveable screen where a vulnerable witness such as a minor is protected from the glare of an accused person such as a father in this case.

Dated, signed and delivered at Nakuru this 30th day of March, 2012

M. J. ANYARA EMUKULE

JUDGE