



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CRIMINAL CASE 35 OF 2012

JACKSON MAINA WANGUI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By Notice of Motion dated 15th May, 2012, pursuant to the provisions of Article 49 (i) Laws of the Constitution of Kenya, the applicant seeks orders:-

- (i) THAT this application be certified as urgent
- (ii) THAT the honourable court be pleased to grant bond terms with an alternative of cash bail pending the hearing, conclusion and determination of this suit.

The application is based on the grounds:-

- a) THAT the applicant has been charged with the offence of murder.
- b) THAT the offence of murder is bailable under Article 49(i) (h) of the Constitution of Kenya
- c) THAT the applicant has an unqualified Constitutional right to be released on bond or bail on reasonable conditions.
- d) THAT the applicant has unqualified Constitutional right to be presumed innocent until the contrary is proved.

On behalf of the applicant, it was urged that he is a businessman working for **Tag Systems, Across Logistics and Director of Click the City Ltd.**

On the 8th day of May, 2012, he was arrested and subsequently charged with the offence of murder on the 15th day of May, 2012. He pleaded not guilty and was remanded at Industrial Area Police Station.

He has since been advised by his counsel that the offence of murder is bailable hence this application.

To the best of his knowledge, there is no compelling reasons why he should not be released on bond and/or bail.

He has equally been advised by counsel that under the law he is presumed innocent until the contrary is proved.

It was further contended on behalf of the applicant that his continued detention pending trial deprives him of his liberty and freedom of movement which amounts to being punished before registering of any findings of guilt by a court of law.

If released on bail he undertakes to attend all mentions/trials sessions without fail. He is a person of fixed abode, being a resident at Dennis Pritt Road off State House Road, Crydon Apartments, House No. B9.

He is engaged in lawful business within Kenya. He is married to N W T and between them they are blessed with one daughter aged 4 years, namely, W T N M.

He has a health problem – suffers ulcers - which require special diet, regular treatment and medical check ups. Hence his continued stay in custody will greatly damage his health.

The application was opposed by prosecution vide the evidence embodied in the affidavit of No. 71023 Sgt John Shegu the investigating officer attached to Divisional CID Makadara.

It was prosecution's case that the applicant presented himself before the Industrial Area Police Station and owned up to having shot the deceased at Click Club.

Acting upon the said report he visited the scene where he disarmed the applicant and recovered the spent cartridge and collected the body of the deceased lying in a pool of blood.

Upon investigations he established that in deed the applicant (1st accused) and his employee Joseph Kirero Sepi (2nd accused) were connected with the death of Kevin Oduor Onyango.

After undertaking investigations the prosecution preferred a charge of murder against the applicant and his employee aforesaid.

It was contended on behalf of the prosecution that the accused and his co-accused know where the prosecution witnesses reside. Hence there is a high probability that they would be in contact with the said witnesses and hence inflict fear on them.

The penalty of murder is death as per the Penal Code. In the circumstances the severity of the sentence may tempt the applicant to abscond if released on bail.

Last but not least, the offence of murder though bailable, the grant of bail is at the discretion of the court.

I have carefully analyzed the arguments advanced for and against the grant of bail and/or bond.

I have taken judicial notice of the fact that in the modern society the incidence of crime has increased and the criminals brought to court are so many that every criminal case brought before the court takes quite some time before the actual trial commences. In all such cases, the court may ensure the presence of the accused person at some future date in one or two ways – by placing him in custody or by releasing him on bail or bond as the case may be.

The purpose of bail is to ensure the attendance of the accused at his trial and not to seek to evade justice. The amount of bail will vary according to the circumstances and the nature of the offence, the possible punishment and the station or position in life of the accused. It should not be no more that will probably secure the attendance of the accused, and should never be so large as to amount to a denial of bail. Each case should be treated on its peculiar merit. The guideline is the evidence.

Then there are minor considerations to be taken into account e.g

- (i) The nature and severance of the offence;
- (ii) The severity of the punishment involved;
- (iii) The strength of the evidence in support of the charge;
- (iv) Whether there exists some compelling reasons for refusing bail or bond.

Put in another way, if the presumption of innocence is to have any meaning at all then at this stage, an accused person should not be deprived of his liberty save in exceptional circumstances.

The person standing surety must be financially capable of answering for the sum stated in the bond. He must be a person of some social standing in the community - a reliable person.

Applying the above principles to the facts of this particular case, there is evidence that it is the applicant and his co-accused who reported the incident to the police and took the police to the scene. That speaks well of the conduct of the applicant. Moreover, there is no evidence that the applicant resisted being disarmed or being arrested. This equally speaks well of the conduct of the applicant.

Most significant, there is evidence that the applicant is the owner of Click Club and hence the employer of the 2nd accused. Equally there is evidence that the applicant is a man of fixed abode.

The investigations is deemed complete when the decision to charge the accused was made. In those circumstances, there is no danger that the applicant will interfere with investigations. If they do the prosecution will be at liberty to make application for the cancellation of his bail and/or bond.

Last but not least, it must always be remembered that the grant of bail is not automatic. It is always at the discretion of the court. It is incumbent upon the court to weigh the available evidence for and against the grant of bail.

In the peculiar circumstances of this case the evidence embodied in the supporting affidavit appears to me to be more weighty than the affidavit evidence in opposition to the application.

In the result, I am inclined to grant the application on the following conditions.

1. To deposit with the court a sum of shs. 1 million cash bail and one surety of like sum.
2. The applicant to report to the OCS Industrial Area Police Station every alternate Monday of every month until the case is heard and determined.
3. The applicant shall undertake not make any contacts; whether directly or otherwise with any of the witnesses to be summoned by the prosecution.
4. The applicant shall not to leave the jurisdiction of this court without prior order of this court.
5. The applicant shall attend all court sessions when and if so required.

Dated, signed and delivered at Nairobi this 21st day of May, 2012.

N R O OMBIJA

JUDGE