



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

JOSEPH KIRERO SEPI.....ACCUSED/APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR/RESPONDENT

RULING

By Notice of Motion dated 14th May, 2012, pursuant to the provisions of Article 49 (i) (h) and Articles 20(20 and (3) and 259 of the Constitution of Kenya 2010, the applicant seeks orders:-

(i) THAT this honourable Court be pleased to certify this application as urgent and fit to be heard on priority basis.

(ii) THAT the honourable court be pleased to release the Applicant on reasonable bond or cash bail terms, pending the trial of the Applicant in the above Criminal Case.

The application is based on the grounds:

a) THAT the applicant who has been charged in the aforesaid Criminal Case, is Constitutionally entitled under Article 49 (1)(h) of the Constitution of Kenya to be released on bond or bail, on reasonable conditions, pending trial and there are no compelling or irresistible reasons why he should be denied bail as required by Article 49(1) (h) of the Constitution of Kenya.

b) THAT the applicant is a law-abiding citizen who is permanently resident in Kenya with a known fixed abode and is a family man with a wife and children in Kenya. The Applicant is the sole bread winner of his young family of two infants aged Five (5) years and one (i) year respectively and lives and provides for sickly mother who is over seventy (70) years old as well as his younger siblings and in the circumstances, it is only fair and just that he be admitted to bail to enable him continue to provide for his dependants.

c) The applicant is ready, able and willing to abide by any bond or bail terms and conditions that may be imposed by this Honourable Court.

d) The applicant will not abscond and will attend all the proceedings whenever and wherever required.

e) The accused/Applicant presented himself to the police on or about the 8th day of May, 2012 immediately after the occurrence of the incidence allegedly giving rise to the instant Criminal charges instituted against and forming the subject matter of this time, the Accused/Applicant has co-operated fully with the investigators and law enforcement agencies and there are no reasonable fears that he will interfere with any prosecution witnesses or future investigations.

f) The accused person has never travelled outside the jurisdiction of this Honourable Court. He does not hold a passport and there is no fear that he will abscond and not attend court for his trial.

g) This application is **bonafide**, well merited, well founded and is made in the interest of justice and it would be fair and just to grant the orders sought.

h) No loss or prejudice will be suffered by the Respondent if the orders sought herein above are granted.

The application is based on the annexed affidavit of **Joseph Kirero Sepi** sworn on the 14th day of May, 2012.

On behalf of the applicant, it was urged that he is a Kenyan Citizen and an employee of the Click Club. He is a family man married to Rose Mbura Mwachala, a house wife. He is a sole breadwinner to his wife and infant children in addition to his sickly mother aged over 70 years.

He has been in police custody since the 8th day of May, 2012 when he presented himself arising from a shooting incident at his place of work. He has fully co-operated with the police during investigation.

Since he has a family to fend for and has obligations to his elderly mother he is not likely to abscond.

He is willing and ready to abide by all the conditions which the honourable court may impose on him including but not limited to-

(i) attending court when and if called upon to do so,

(ii) travel restrictions,

(iii) reporting orders.

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

It was contended on behalf of the prosecution that the applicant presented himself before the Industrial Area Police Station so soon after the incident.

That the said investigating officer visited the scene, disarmed his co-accused, and recovered the spent cartridge in addition to collecting the body of the deceased lying in a pool of blood.

Upon investigations he established that the applicant and his employer, Jackson Maina Wangui, were connected with the shooting of Kevin Oduor Onyango.

After undertaking full investigation the prosecution preferred a charge of murder against the applicant and his employer Jackson Maina Wangui aforesaid.

It was the prosecution's contention 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.

That the penalty of murder is death as per the Penal Code. That in the disclosed circumstances the

severity of the sentence may tempt the applicant to abscond if released on bail.

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

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

I have taken judicial notice of the fact that in modern society, the incidence of crime has so increased and that criminals brought to court are so many that every criminal case brought before court takes quite sometime 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.

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 than 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 employer, 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. There is equally no evidence that the applicants resisted being arrested.

Most significant there is evidence that the applicant was a mere employee of Click Club, in the capacity of a bouncer.

The investigations is complete hence there is no danger that the applicant will interfere with investigations.

In any case, if he does then the prosecution will be at liberty to make an application for cancellation of his bail.

Last but not least, it must 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 this peculiar circumstances of this case, taking into due consideration that this applicant is the employee of Click club, he should be treated differently from the owner(director) of the said club (co-accused) who was licenced to handle a gun.

In the result, I am inclined to grant this particular applicant bail on the following conditions:-

1. To deposit with the court a cash bail of shs. 200,000 together with 2 sureties of Ksh. 400,000/- each.
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 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