



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

Criminal Appeal 27 of 2011

REPUBLICPROSECUTION

VERSUS

PIUS NDWIGA NDERI1ST ACCUSED

ANTONY MURAGE2ND ACCUSED

MARY MWENDE MUTEMBEI 3RD ACCUSED

RULING

This is the oral application by Mr. Njage for accused 1 and accused 2 for bond/bail. Mr. Njage submitted that the offence facing the accused person is bailable depending on the circumstances of the case. He produced on their behalf letters from their churches and assistant chiefs. He further stated that the prosecution did not have a strong case against them.

In response the State through M/s Matiru opposed the release of the accused persons on bond. She submitted that the deceased and some of the witnesses for the State were cousins. Further there was no guarantee for the accused persons' safety. The accused and deceased were cousins.

Mr. Njage stated that what the prosecution stated were mere allegations.

This Court requested for detailed pre bond reports on the accused persons which were duly filed.

This application is made pursuant to the provisions of Article 49 (1) (h) of the 2010 Constitution which provides an 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. This court appreciates

that the charge facing the accused persons is a capital offence which carries a death sentence. It is the prosecution and the defence who are in possession of all the evidence that will eventually be given to this Court. Unlike the Court they are in a better position as of now to assess the evidence. And it is upon this trust bestowed on them that they are expected to assist the Court arrive at a fair decision as concerns the release of accused persons on bond.

The provisions of the Constitution are that prima facie every arrested person has a right to bail. However there may be circumstances dictating that the arrested persons should not be released. If such circumstances exist it is the duty of the Prosecution to bring itself within those exceptional circumstances.

Precautions have to be taken in cases like the one before me to ensure that an accused is not released on bond to go and die in the hands of irate relatives of the deceased. That is why a pre bond report is called for. It's not only about how the accused is a very good person. The tempers rising within the family of the deceased are an important ingredient of the considerations the court has to look at. The major considerations to be made are;

1. That the accused will attend court whenever required for mentions and hearings.
2. That he will not interfere with witnesses.

Once the court is assured of the above two then we know we are walking on safe ground.

In this matter the investigating officer did not file any affidavit. Are the witnesses people that the accused could have influence over? The investigating officer would have brought out all this.

I have looked at the letter from the assistant chief and the churches in respect of the 1st and 2nd accused persons. They speak well of them and let them be prepared to come and repeat the same in the event that the accused persons disappear.

The prosecution has failed to demonstrate before this court that the accused persons are likely to abscond or interfere with witnesses.

The District Probation Officer's office has also shown that the community is happily ready to have the accused among them as the case is heard. I will grant them bond as prayed. Though the 3rd accused did not apply for bond her pre bond report has been filed and considered along side the others.

1. The accused may each be released on a bond of 1 million shillings with a surety of similar sum.
2. They will attend monthly mentions before the deputy registrar.
3. Proper scrutiny and approval to be done by the Chief Magistrate/Deputy Registrar.

They are also informed that incase of any report of interference with witnesses their bonds will be cancelled.

DATED, SIGNED AND DELIVERED AT EMBU THIS 2ND DAY OF MAY 2012.

**H.I. ONG'UDI
JUDGE**

In the presence of;

M/s Matiru for State

Mr. Njage for 1st and 2nd accused

Mr. Ithiga for M/s Njeru for 3rd accused

Njue – c/c

All accused persons – present