



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MACHAKOS**

**Criminal Case 37 of 2011**

**REPUBLIC ..... PROSECUTOR/RESPONDENT**

**VERSUS**

**ROLEX WAITA MUKUNZU ..... ACCUSED/APPLICANT**

**R U L I N G**

Before me is a Notice of Motion filed under Article 49 (1) (h) of the Constitution of Kenya 2010 as read with section 123 of the Criminal Procedure Code (Cap 75). It is dated 23<sup>rd</sup> January 2012. It is an application for bail pending trial, for the accused (applicant) who is charged with murder contrary to section 203 as read with section 204 of the Penal Code.

The application has grounds on the face of the Notice of Motion. It was filed with an affidavit sworn by the applicant.

In the supporting affidavit the applicant stated that he was willing to abide by conditions set by the court and that he would attend court for the trial. He also deponed that investigations had already been completed and therefore there was no possibility of him interfering with witnesses. Lastly, that there were no compelling reasons why he should not be released on bond.

The State filed an affidavit sworn by PC Zachary Gitonga. It is deponed that the applicant had been supplied with statements of prosecution witnesses. He was therefore aware of the evidence against him as well as the weight of the prosecution case. It was deponed that the deceased was a girlfriend of the applicant, and the death had caused a heavy strain between the two families. It was also deponed that the accused and witnesses resided in the same area. That there was a likelihood and temptation for the applicant to interfere with witnesses, which would prejudice the prosecution case. That considering the serious nature of the offence, and the severity of the sentence, the court should find that there were compelling reasons why bail should not be granted.

At the hearing of the application, Mr Muema, appeared for the applicant while Mr Mwenda appeared for the State. Mr Mwenda stated that though there was a replying affidavit file in opposition to the application, the State was not opposing the bail application. Counsel urged that the terms of bail to be granted should be sufficient to ensure the attendance of the accused in court.

Indeed, under Article 49 (1), (h) of the Constitution an accused person in a murder case is entitled to bail. Bail is available to all persons accused of any criminal offence. The Article provides:-

**49 (1) An arrested person has the right-**

**(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be so released.**

Several court cases have deliberated on the considerations to be taken, in an application for bail pending trial. In **Nganga –vs- Republic (1985) KLR 54** Chesoni J, as he then was, stated, *inter alia*:-

**1. The court, in exercising its discretion to grant bail to an accused person under section 123 (1) or (3) of the Criminal Procedure Code (Cap 75), should consider the following factors:-**

**(a) In principle, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:-**

**(i) the accused will fail to turn up at his trial or to surrender to custody;**

**(ii) the accused may commit further offences;**

**(iii) he will obstruct the course of justice.**

**(b) The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In meeting this consideration, the court must consider:-**

**(i) the nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**

**(ii) the strength of the prosecution case;**

**(iii) the character and antecedents of the accused;**

**(iv) the likelihood of the accused interfering with prosecution witnesses.**

2. ....

3. ....

4. ....

Though the State filed a replying affidavit in opposition to the application, the State Counsel stated in court that they were not opposing bail but that they wanted adequate bail terms. In my view, in considering the grant of bail, especially in cases where a person has lost a life, the safety of the accused has also to be considered. In paragraph 5 of the replying affidavit, PC Zachary Gitonga swore as follows:-

**“5. THAT the accused person and the deceased were involved in a personal relationship. The accused was a boyfriend to the deceased. The families of both the deceased and the accused were aware of this relationship. As a result of this incident, a heavy strain has been placed between the two families.”**

No further particulars were given to support the above averment. No evidence of the strained relation was shown.

Having considered that investigations are complete, and that the applicant does not come from the same place, or live at the same place as the deceased’s family and since the State does not object to bail, I am persuaded to grant bail.

I grant the applicant bail on the following terms:-

- 1. Cash bail of Kshs.1 million with one surety of similar amount.**
- 2. He will appear for mention in court every month, first mention will be on 17/7/2012 before the Deputy Registrar.**
- 3. He will not interfere with witnesses, and in default, the bail granted herein will automatically lapse.**

Dated and delivered at Machakos this **18<sup>th</sup>** day of **June** 2012.

**George Dulu**

**Judge**

**In presence of:-**

Muema for applicant

N/A for State

Applicant present in person

Nyalo – court clerk.