



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**Criminal Case 71 of 2011**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**SIMON MBUGUA NJUGUNA.....ACCUSED**

**RULING**

By a Notice of Motion dated 27<sup>th</sup> October, 2011 pursuant to the provisions of sections 123, 124 and 125 of the Criminal procedure Code and article 49(1) of the Constitution of Kenya 2010, the applicant seeks orders:-

1. THAT this application be certified as urgent and the same be heard on priority basis.
2. THAT the Honourable Court be pleased to grant the Applicant herein bond and in the alternative cash bail upon reasonable terms
3. THAT the Applicant be discharged from custody pending the hearing and determination of this case.

The application is based on the grounds that

1. The Applicant is confined in custody and the Applicant has been denied his constitutional rights to liberty since his arrest on the 1/9/2011.
2. The offence of murder is bailable offence under the Constitution.
3. The Applicant therefore has a Constitutional right to be released pending hearing of this matter.
4. The Applicant has unqualified constitution right to be presumed innocent until the contrary is proved.
5. The Applicant has by his actions prior to the commencement of these proceedings shown that he is ready, willing and able to attend court before the police or any authority that he may be required to attend and that he will therefore continue to do so attend during the cause of this proceedings, the applicants co-

operation with the authorities during cause of hearing cannot be impeached.

6. There is therefore no compelling reasonable excuse to deny the applicant bail.

7. The Applicant is not at all flight risk having never applied for or held passport of any country. The applicant does not intend to go out of the country.

8. The Applicant is the sole breadwinner of his family while particularly attending the proceedings before this court.

The application is predicated upon the annexed affidavit of Simon Mbugua Njuguna sworn on the 29<sup>th</sup> day of October, 2011.

On behalf of the applicant it was urged that the deceased was killed by a mob on allegation that the deceased had stolen a wooden door. That his only crime was that he rushed to the scene to see what was going on.

Subsequently he was arrested on 1<sup>st</sup> September, 2011 on suspicion that he was one of the people who lynched the deceased. That he has been informed by his advocate that murder cases are bailable and he has a constitutional right to be released on bail and/or bond on reasonable terms.

Last but not least, that the charges are trumped-up. The application was opposed by the state vide affidavit in reply of corporal David Martin, the investigating officer of the case.

That the incident occurred on 7<sup>th</sup> May 2009. The accused relocated at Kiandutu area and could not be traced.

In support of this fact is an annexed statement of CPL Ndungu recorded on 15<sup>th</sup> September, 2011 and marked as exhibit CN 1.

That it was not until 31<sup>st</sup> August, 2011 (2 years later) when the accused was arrested. In support of this fact is the annexed statement of CPL Mawita recorded on 12<sup>th</sup> September, 2011 marked as exhibit CN 2.

That in any event the prosecution witnesses are relatives of the accused person hence he is likely to interfere with the key witnesses.

Last but not least, that there is bad blood between the accused person and the witness in connection with a piece of land which the applicant want to acquire in isolation of his relative hence the temptation to abscond is more than real.

I have carefully analyzed and considered the evidence adduced by both parties.

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 exist 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 peculiar circumstances of this case, there is evidence by way of a replying affidavit. The investigating officer among others that:-

- (i) That some witnesses are relatives of the applicant.
- (ii) That the applicant was identified by those witnesses at the scene.

Against that background of evidence, it is abundantly clear that the likelihood of the accused person intimidating the witnesses for the prosecution is very real.

It is also clear to me, on the evidence, that the applicant fled after the incident. In the circumstances, it is evident that the applicant is a flight risk. In the result, I am disinclined to grant the application as the evidence adduced by the prosecution have more weight than the evidence in support of the application. It is so ordered.

Dated and delivered at Nairobi this 13<sup>th</sup> day of June, 2012.

**N R O OMBIJA**  
**JUDGE**