



**REPUBLIC OF KENYA**

**High Court at Garissa**

**Criminal Case 30 of 2012**

**JULIUS MUTEMI KAMOTHO.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

1. The applicant seeks bail pending trial. He appears as accused number one having been charged jointly with Gedion Mutie Masila and Mutinda Kimotho as accused numbers two and three respectively. The three are facing murder charges before this court but the application for bail is brought in respect of the applicant alone. The charge reads that on 29<sup>th</sup> June 2004 at Munyumbuni Market in Mwingi District of Kitui County the three jointly murdered Patrick Muneeni Makasa. The application is anchored on Article 49 (1) (h) of the Constitution of Kenya and all other enabling provisions of the law.
2. Learned counsel for the applicant submitted that bail for murder suspects is now available under the constitution unless there are compelling reasons; that the applicant is not a flight risk; that he is an established family man and that he is an elderly teacher who would wish to be free to submit his retirement papers. The application was opposed by the learned state counsel who submitted that since the lower court directed the arrest and charging of the applicant after an inquest there is likelihood that this court may find the applicant implicated in the murder since the same evidence will be adduced; that there is likelihood that the applicant may abscond since the penalty for murder is severe; that there are facilities where the applicants health problems can be managed to while in custody and that the applicant may interfere with the prosecution witnesses.
3. Without wasting time it is now settled under our law that right to bail pending trial is available to and can be enjoyed by all suspects. That right however is not absolute. It is discretionary and can be denied where there exists compelling reasons (**see Article 49 (1) (h) of the Constitution of Kenya 2010**). Courts have used various considerations to grant or refuse to grant bail pending trial including the following:
  - i. Probability of the accused person turning up for trial
  - ii. The nature of the charges
  - iii. The strength of the evidence supporting the charge
  - iv. The gravity of punishment in the event of conviction
  - v. Any previous criminal records of the accused
  - vi. Presumption of innocence

vii. Protection of the accused

viii. The likelihood that the accused will interfere with the witnesses

4. Our courts have however, in majority of cases, considered whether an accused person will turn up for his trial if released on bail to be the paramount consideration (see **Watoro v Republic (1991) KLR 220 at 283**). The burden of proving there are compelling reasons to warrant denial of bail rests on the prosecution. In this matter therefore the prosecution has a duty to prove that there exists compelling reasons to deny the applicant bail. Going by the submissions the learned state counsel is contending that there is likelihood that the applicant will interfere with witnesses; that he may abscond due to gravity of penalty attached to the charge and also that since the evidence used to charge him is the same evidence to be presented to this court. There is no affidavit based on investigations to these grounds by the state which will therefore remain allegations. As submitted by counsel for the applicant neither the court nor the applicant is privy to the evidence available to the prosecution and therefore cannot judge the veracity of the same.

5. I have carefully considered this application and the grounds for and against the same as well as the oral submissions of both sides. I find nothing on record to persuade me against allowing this application. The applicant in my view is not a flight risk. He has also lived with the same witnesses from 2004 when the alleged crime was committed to date and I see no reason why he will interfere with them now. I am alive to the fact that an applicant who is released on bail is given conditions by the court. The import of the conditions so given is that in the event that the applicant fails to abide by them the bail/bond can be cancelled straight away.

6. My orders therefore are that the applicant is hereby released on bail/bond on the following terms:

i. He will sign a bond of two million Kenya Shillings (Kshs 2,000,000) with two sureties of similar amount each.

ii. In the alternative he will deposit in court a cash bail of one million Kenya shillings (Kshs 1,000,000).

I make orders accordingly.

**Stella N. Mutuku, Judge**

Signed, dated and delivered this 8<sup>th</sup> day of November 2012.