



REPUBLIC OF KENYA

High Court at Machakos

Criminal Case 36 of 2012

REPUBLIC PROSECUTOR

VERSUS

PETER MWOVE WAMBUA ACCUSED

RULING

Before me is an application for bail brought by way of **Notice of Motion** dated 22nd November 2012. It was filed under **Article 159 (2) (d) and Article 49 (h)** of the **Constitution of Kenya (2010)**. The prayer that is for consideration is prayer 3 which states:-

3. THAT the applicant be granted reasonable bail/bond terms pending the hearing and determination of his case.

The application has grounds on the face of the Notice of Motion. The grounds are *inter alia* that the applicant has a fixed abode and is willing to abide by the terms that will be given by this court; that there are no compelling reasons to continue with the detention of the applicant pending hearing and determination of the case; that the accused/applicant is the breadwinner of his young family; that the applicant will attend court and be available at the time of trial.

The application was filed with a supporting affidavit sworn by the applicant on 22nd November 2012. It was deponed *inter alia* that the applicant (plaintiff) was in bad health; that he had a fixed place of abode at **Kitui** District and will be ready and willing to abide by the bail/bond terms imposed; and that the court had power in the wider interests of justice to grant the prayers sought.

At the hearing of the application, **Mr Mutinda Kimeu** for the plaintiff made submissions in support of the application. **Ms. Kwamboka** for the State made submissions in opposition to the application. No authorities were cited to me.

Indeed, under **Article 49 (1) (h)** an arrested person has a right to be released on bond, irrespective of the offence for which she/he has been arrested and charged. It 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 released.

Courts have held that the burden is on the prosecution to demonstrate the compelling reasons that would persuade a court not to grant bail. The courts have however developed certain parameters to be

considered in applications for bail pending trial. In **R –vs- Samuel L Sericho – Machakos H.C.Cr.Case No. 3 of 2012** the court listed the following parameters which should be considered in an application for bail pending trial.

- (a) **The likelihood that the accused person will appear for trial.**
- (b) **The likelihood that the accused person will interfere with witnesses or investigations.**
- (c) **The severity of the sentence likely to be imposed in the event of conviction.**
- (d) **The likelihood of commission of more offences or whether the accused person is a risk to the community.**
- (e) **The safety or security of the accused person.**

In my view, where the allegation against the accused relates to homicide, the applicant for bail has to demonstrate where he is likely to live when he is released on bond, and whether the relatives of the deceased, if he is going to live in the same locality, will not seek some violent revenge against him. His own safety or security as a person is also protected by the Constitution. The court will be failing in its duty if it lets an accused person go into the same community, so soon after being alleged to have killed somebody, where no witnesses have testified yet and assume that he is safe. The plaintiff and his counsel herein have not addressed this issue in the affidavit or documents filed. A life has been lost just recently on 1st October 2012, which is barely two months now.

I find that even though the Constitution provides for a right of the accused to be released on bond, the circumstances and nature of the charge do not justify such release. There could be a probability that the accused will not be safe, if released on bond. I decline to grant bail.

In the result, the application is not successful. I dismiss the application for bail.

Dated and delivered at Machakos this 5th day of **December** 2012.

George Dulu
Judge

In presence of:-

N/A for State

Mr Kasyoka holding brief for Mutinda Kimeu for Accused

Mutinda – Court clerk