



REPUBLIC OF KENYA
IN THE REPUBLIC OF KENYA
AT KAKAMEGA
CRIMINAL CASE NO. 31 OF 2010

REPUBLIC PROSECUTOR

VERSUS

LABAN OMWAKAACCUSED

RULING

1. The accused person herein, **Laban Omwaka**, was charged with the offence of murder contrary to **S.203** as read with **S.204** of the Penal Code. It was alleged that on 28.8.2010 at Emanko village, Shibembe Sub-location in Butere District, within the Western Province, he murdered Ernest Oingo Oniango. He denied the charge and now seeks bail/bond pending trial.

2. Act 49 (1) (h) of the Constitution provides as follows;

“49 (1) An arrested person has the right –

(a)

(b)

(c)

(d)

(e)

(f)

(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.

3. In ***R vs Danson Mgunya & Ano. [2010] e KLR***, Ibrahim J. stated as follows;

“I have carefully considered the aforesaid arguments and submissions. The counsel for the 1st Applicant Dr. Khaminwa referred to a decision of the Supreme court of Nigeria ALHAJI MUJAHID DUKUBO – ASARI –V- FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006; in which the said court set out some essential criteria on the issue of whether to grant bail pending trial of a an accused by the trial court Justice Ibrahim Tanko Muhammed J.S.C. held that:-

“.....When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the trial court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

- (i) The nature of the charges***
- (ii) The strength of the evidence which supports the charge***
- (iii) The gravity of the punishment in the event of conviction***
- (iv) The previous criminal record of the accused if any***
- (v) The probability that the accused may not surrender himself for trial***
- (vi) The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him***
- (vii) The likelihood of further charges being brought against the accused***
- (viii) The probability of guilty***
- (ix) Detention for the protection of the accused***
- (x) The necessity to procure medical or social report pending final disposal of the case.***

The said court stated that the criteria was not exhaustive. Other factors not mentioned may be relevant

to the determination of grant or refusal of bail to an accused person.”

4. I adopt the above reasoning and in the instant case, it is argued by the learned State Counsel that the accused person has no known abode and he may not attend court if released. Further, by a letter dated 13.12.2010, Teresa Cheruto, OCS, Butere Police Station, has stated that the accused's house was set on fire after the incident and that the deceased's family and the accused's family are presently in an agitated state and that the accused's "*life is in danger if he is released to his community unless he has somewhere else to go.*"
5. Are the above reasons compelling and strong enough to force this court to derogate from granting the accused person the Constitutional right to be released on bail?
6. If an accused person has no home to go to because it was razed down in an arson attack, and if his family and that of the deceased are in a state of anger and if the accused's safety is not assured, then the likelihood of him not turning up for trial is real and not imagined. He may actually not turn up for trial because he may himself become the victim of a homicide. In *Watoro vs R. [1991] KLR 220*, it was held that the primary consideration in any bail application is the likelihood of the accused turning up at his trial, and I agree.
7. This case suggests that he may not be safe and detention for his own protection is better than release on bail.
8. In any event, although he was arraigned in court on 23.9.2010, four (4) witnesses have already testified and the case is slated for further hearing on 9.5.2011, and so the trial may so well be concluded expeditiously and no prejudice will be caused to him.
9. I am inclined for the above reasons to deny bail at this stage but the accused person may renew his application at any time in the future.
10. Orders accordingly.

Delivered, dated and signed at Kakamega this 13th day of April, 2011.

ISAAC LENAOLA

J U D G E