



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA**

AT NAKURU

CRIMINAL CASE NO. 63 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

**PETER MWANGANGI MUTINDA.....1ST ACCUSED
JOHN IRUNGU MWANGI.....2ND ACCUSED
PATRICK KARIUKI MUTHONI.....3RD ACCUSED**

RULING

John Irungu Mwangi, the 2nd accused herein was charged jointly with others before this court, with an offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. By the Notice of Motion dated 22/3/2011, the 2nd accused, hereinafter referred to as the applicant, sought an order that the court grant him bail pending the hearing and determination of the case on terms that the court deems just and that the case be determined expeditiously.

The grounds upon which the application is founded are; that the applicant is an elderly man of 68 years old; that he undertakes to abide by any conditions that the court may impose. Further grounds are found in the affidavit of Evelyne Wangeci Irungu, the wife of the applicant who depones that the applicant has been traumatized by the remand and that he will attend court as the court will direct. Counsel relied on the case of **REP V DANSON MGUNYA CRE 26/08** where the court granted bail to persons charged with murder.

The learned State counsel, Mr. Nyakundi opposed the application for reasons that the case is parheard and evidence has been tendered which adversely mentions the applicant, and if released on bail, he is unlikely to show up for further hearings. Further it was submitted that the deceased was a close neighbour of the accused and the deceased’s relatives are still bitter and there is likelihood of the relatives seeking revenge as they tried to burn him at the time of arrest. It was further urged that since the charge carries a maximum life sentence, there is a high risk of the applicant absconding for fear of spending the rest of his life in prison. Counsel relied on decision of J. Emukule, **R V MILTON KABULIT CR. 115/08** where the court declined to grant bond to the accused persons.

This application is brought pursuant to **Section 49(1)(h)** of the **Constitution** (New Constitution) which provides as follows:-

“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.

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by pursuant for not more than six months.”

From reading of the above provision, the court has been granted the discretion to grant bail to accused person in all cases where an accused is charged with an offence punishable by fine alone or imprisonment for a period not exceeding 6 months. However, in all other cases the court will grant bail on reasonable conditions pending a charge or trial when there are compelling reasons not to be released.

I have considered the two authorities cited by counsel whereas J. Ibrahim held in the **DANSON V MGUNYA** case that bail is an inalienable right. J. Emukule in **REP V MILTON KARULIT** held that bail is alienable because that right can be alienated where there are compelling reasons (**Sec.49(1)(h)**). I am persuaded to agree with J. Emukule on that point. The term compelling reasons has not been defined. The findings in the above decisions considered the Nigeria case of **ALHAJI MUJAHID DUBUIKO ASARI V FEDERAL REPUBLIC OF NIGERIA** Supreme Court of Nigeria SC 208/06 where that court set out what it considered to be compelling reasons for declining to grant bail:-

- (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 applicant;***
- (v) The probability that the criminal may not present or surrender himself for trial;***
- (vi) The likelihood of further charges being brought against accused;***
- (vii) The likelihood of accused interfering with witnesses or may suppress any evidence that may incriminate him;***
- (viii) The probability of finding the applicant guilty as charged;***
- (ix) The detention for the protection of the accused;***
- (x) The necessity to preserve medical or social report pending final disposal of the case.***

In the above cited cases, the courts did consider the above criteria and found some to be inapplicable to an application of bail pending trial since the Nigerian case was on appeal. In this case, the prosecution has already called a total of 13 witnesses and only two are remaining. The observations that an application for bail should be made at the earliest time possible is important in that the court would not need to consider whether or not there is sufficient evidence adduced to support the charge, because that puts into question the principle of innocence until proven guilty. This court cannot avoid to consider the evidence on record as it considers this application.

In **DANSON NGYBTA's** case the court held that the most important factor to consider in an application for bail is whether the accused will show up at the time of trial. On the other hand, in the **KABULIT's** case, the court was of view that the most important consideration is the public policy and public interest.

In this case, the charge that the applicant faces is a capital offence of murder. It carries a death sentence if one is found guilty. Most of the witnesses have testified and there is no possibility of interference with the witnesses. The applicant is said to be a neighbour of the deceased and Mr. Nyakundi, counsel for the State, feared for his safety if released on bond but it was disclosed by Mr. Njogu, counsel for the applicant, that the applicant's wife has since moved away to Molo where the applicant will go to reside if released on bond. The applicant is also said to be an elderly man of about 68 years who is suffering from unfavourable conditions in remand. I take into account the fact that prior to the arrest, the applicant had not moved away from his home and being an elderly man with a family, and balancing all the factors considered above, it is unlikely that he is a flight risk. In my view, there are no compelling reasons to continue to detain the applicant in remand. For that reason I hereby release the 2nd accused on bond of Kshs.500,000/- (five Hundred Thousand only), with 2 sureties of like sum. I also direct that the 2nd accused/applicant do report to the court every 2 weeks until further orders of this court.

DATED and DELIVERED this 11th day of April 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Kahiga holding brief for Mr. Njogu for the 2nd accused/applicant.

Mr. Omutelema for the State.

Kennedy – Court Clerk.