



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CRIMINAL CASE NO. 11 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JULIUS WANDERI MWANGI .....ACCUSED**

**RULING**

The accused person JULIUS WANDERI MWANGI is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that ***on 14<sup>th</sup> day of December 2002 at Wanjengi village in Murang'a within the Central Province, murdered BENSON CHEGE KINYUA.*** The accused person has pleaded not guilty to the charge against him.

The accused person has now filed an application before this court under Article 49(1) of the Constitution of Kenya 2010 in which he prays that he be admitted for bail pending hearing and determination of the case against him and states that he shall abide by any terms of bond this court may set.

His application is supported by his own affidavit sworn allegedly at Nairobi on 5<sup>th</sup> day of July 2011 before Alice N. Kamau Advocate emphasis mine.

The question to my mind at this stage is whether the affidavit in support of the application before the court was properly witnessed. From the records before the court the accused person first appeared before this court on 17/3/2011 when the plea was deferred to 29<sup>th</sup> March 2011 and it is clear that the accused has been in custody throughout and therefore the same could not have sworn the affidavit in support of his application herein at Nairobi on 5<sup>th</sup> day of July 2011.

In the absence of any explanation from the accused person's advocate as to the swearing of the said affidavit I hold that the said affidavit in support of the application herein is not properly executed and therefore is expunged from the record.

Miss Kingoo Advocate for the applicant addressed the court and submitted that the alleged crime took place in 2002 and that the accused person on his own in the month of February 2011 surrendered to the firm of Kingoo Wanjau with the purpose of being taken to Murang'a to be charged with the offence and that she took him to the police and was subsequently charged.

She submitted that there are no compelling reasons provided by the state as to why the accused person should not be admitted for bail. She submitted that the accused is a married man with two children and the circumstances leading to the alleged commission of the offence shows that he has a very strong defence to the charges.

Miss Mandu for the State opposed the application on the ground that the accused person has been on the run for Eight years and that if released on bond there is the possibility of the same running away.

To assist this court on this issue the court ordered the investigating officer of this case to appear before the same and when he appeared he supported the accused being released on bond and state that they looked for the accused person and when they would not get him they gave up on looking for him. He stated before the court that it is fear that made the accused person to runaway from home and that he surrendered to the police by himself and he was of the view that the action of the accused person shows that he is now ready to deal with the case before him.

These are the brief facts as regards the application before the honourable court. Before addressing my mind to the facts as stated what is the current state of the law as regards the application herein?

Article 49 of Constitution 2010 now makes it possible for an accused person on murder charge to apply for and be released on bail/bond. Article 49(h) provides:

***“An arrested person has a right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released”***

There have been several decisions of this court on the interpretation of this Article of the Constitution on grant/denial of bail in respect of those charged with murder and this court is alive to those authorities and in particular Republic vs Danson Ngunya and another Mombasa High Court Criminal case no. 26 of 2008, and Nairobi High Court Criminal Case No. 23 of 2008: Republic vs Joseph Wambua Mutunga, both which have discussed the principles upon which the court should look at in either granting or declining to grant bail in murder cases based upon Article 49(h) of Constitution 2010.

The Court is also alive to the fact that Article 159(2) of the Constitution state that in exercising judicial authority the court and tribunals shall be guided by the following principles:

***(e) The purpose and principle of this constitution shall be protected and promoted.***

In view of the foregoing it is my considered view that when an accused person applies for bail in murder case and has invoked the constitutional provisions aforesaid then the same principles and considerations in bail application in respect of any other offence shall be applicable to the cases.

The primary consideration as stated in the case of WATORO v REPUBLIC (1991)KLR 220 is whether an accused person shall attend court and be available at the trial as was stated by Porter J at page 283:

***“I think I have made it clear over a number of rulings in bail applications that I take the view on authority that the paramount consideration in bail application is whether the accused will turn up for his trial”***

The only other limitation placed by the provision of the Constitution is whether there are “compelling reasons not to be released” and the duty of providing those compelling reasons to my mind rests with the State.

In this present application before me the State through the investigating officer supports the accused being released on bond. The mother of the accused person has also deponed that she is willing to stand surety to the accused and always make sure that he attends court whenever he is required to without failure in the event that his application is granted. The accused person surrendered himself to the police through his advocate on record and therefore there is no possibility of the same not being available to attend hearing. I therefore see no valid reason to deny the accused person bond at this stage.

The final question for determination is what will be the reasonable term upon which to grant bond? This to my mind is determined by reference to the facts and circumstances of each case and that is why

the constitution did not attempt to set out the same. I have taken into account the fact that the accused though presumed innocent until proved guilty the offence facing the same is that of murder and have also taken into account that the accused person was away from the geographical jurisdiction of this court for eight years after the offence was allegedly committed. I therefore order that the accused be released on a bond of 500,000/- with two sureties of like amount to be executed before the Deputy Registrar and that the accused person to appear before the Deputy Registrar of this court for mention once every month on a date to be fixed by the Deputy Registrar until the final conclusion of this case.

Dated and delivered at Nyeri this 18<sup>th</sup> day of November 2011.

J. WAKIAGA  
JUDGE