



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 61 OF 2010
REPUBLIC
VERSUS
WILSON SILOVI MANINI ACCUSED/APPLICANT
R U L I N G

Before me is a Notice of Motion dated 8th March 2011 brought by the Applicant under Chapter 4 of the Constitution particularly Article 49 (1) (h) and Section 123 (1) of the Criminal Procedure Code (Cap 75). It was brought under Certificate of Urgency.

The prayers that are alive are 2, 3 and 4. They are as follows:-

1. (spent)
2. **THAT the Applicant herein be released on bail on such terms as the court deems fit pending the hearing and determination of his case.**
3. **THAT this Honourable court be pleased to make such other and/or further orders as it may deem fit under the circumstances.**
4. **THAT in any event, the costs of this application be met by the State/Republic.**

The application has grounds on the face of the Notice of Motion. It was filed with a Supporting Affidavit sworn by John Mwangangi Advocate for the Accused/Applicant on 8th March 2011.

The grounds are that the Constitution guarantees bail in all circumstances unless compelling reasons to the contrary are provided by prosecution. That burden is on the prosecution. In addition, the Machakos G.K. Prison is overcrowded and the Applicant's health is not good and the prison conditions may aggravate his health conditions. The Applicant was provider especially of his sister's orphaned children. That denying him bail would deny him his Constitutional rights.

The Supporting Affidavit, annexes several documents under paragraph 10. The documents include five affidavits and two letters from relatives and neighbours, as well as the Assistant Chief (Entarara Sub-location) and local councillor. The documents support the request for the Applicant's release on bail/bond.

A further affidavit was filed, sworn by the same advocate on 19th August 2011. It annexed treatment notes to support the alleged medical condition of the Applicant.

The application was opposed. The State Counsel relied on an affidavit, which was not on the court

file. Though I asked him to provide the court a copy, he did not do so.

The counsel for the parties Mr Mwangangi for the Applicant, and Mr Mukofu for the State addressed the court.

Counsel for the Applicant relied on the two affidavits filed. He also relied on the Constitution which provided for the grant of bail in capital offences. He stated that there was no likelihood that the Applicant would abscond if released on bail.

The learned State Counsel submitted in opposition to the application. Counsel contended that the offence was committed by more than one person, some suspects were still at large. Release of Applicant might prejudice arrest of other suspects, and witnesses who are neighbours and whose copies of statements have been given to the Applicant may be interfered with. It was also counsel's view that medical treatment can be given to the Applicant while in prison custody.

Counsel for the Applicant promised to provide the court with case authorities, but he did not.

I have considered the application, and contentions on both sides.

Indeed, Article 49 (1) (h) of the Constitution 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 so released.**

The Constitution was promulgated in August 2010. It effectively changed the previous position under Section 123 (1) of the Criminal Procedure Code (Cap 75) wherein only those charged, other than those charged with capital offences, were entitled to bail or bond. The Constitution now provides that all offences are bailable, and bond or bail should be granted unless there are compelling reasons not to grant the same. The Constitution does not define what constitutes compelling reasons.

In my view, it is for the court to decide whether there are compelling reasons, and give such reasons in any case where it declines to grant bail. I have perused the information filed by the Republic. The Accused is said to have committed the offence with others not before the court. In my view, releasing the Accused herein on bond could easily compromise further investigations on the other suspects. The Accused could take advantage of the window and become advisor of the others.

The liberty of a person is important. However, justice has to be weighed both ways on the side of the public interest and on the side of the rights to liberty of the individual. In the circumstances of this particular case, I find that the fact that other suspects have not yet been arrested, to be a compelling reason not to grant bail.

Consequently, I dismiss this application and decline to grant bail to the Accused/Applicant.

Dated and delivered at Machakos this 17th day of **November** 2011.

George Dulu
Judge

In presence of:- Mr Mwangangi for Accused/Applicant
Mrs Gakobo holding brief for Mr Mukofu for State
Nyalo – Court clerk.