REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 61 OF 2011
REPUBLIC…….....PROSECUTOR
VERSUS

NO. 74244 P.C. WILFRED MWITI .....…….....…….....ACCUSED

R U L I N G

The appellant, **WILFRED MWITI**, is seeking bail pending trial.

He was arrested on 26th May 2011, and was thereafter charged with the offence of murder.

The offence which he is alleged to have committed occurred on 18th February 2010.

According to the applicant, he knew, from as early as 18th February 2010, that there was a possibility that he could be charged with murder. His reason for so saying was that the firearm which he had on that fateful night, was taken away from him.

However, the applicant continued to carry out his duties since 18th February 2010, until 26th May 2011 when he was arrested. And although he was brought to court on that date, no criminal charges were preferred against him until 10th August 2011.

It is the contention of the applicant that he did not abscond even after he learnt that he would be charged with murder. He continued with his regular duties as a police officer. He also continued to respond to orders requiring him to report to his superiors.

That conduct, in the applicant's view, demonstrates that he was not a flight risk.

Secondly, the applicant argues that the evidence from the witness statements which he has been given by the prosecution is very weak. If anything, he says that the said statements contain exculpatory evidence, which would render his prosecution frivolous.

Mr.Karuri, learned state counsel opposed the application. He said that if the applicant was granted bail, he would return to his work, as a police officer at the Kariobangi Police Station.

However, if he were to remain on interdiction, the applicant would still have access to the other police officers, including the Investigating Officer. If that were to happen, the members of the public, who are to be witnesses in the murder trial, might think that the evidence would be suppressed.

The respondent concedes that the applicant did not flee between February 2010 and May 2011. However, it is said that that was because the Investigating Officer had originally recommended an Inquest. That recommendation is said to have given, to the applicant, confidence, as he would then not have been liable to being charged with murder.

As far as the respondent was concerned, there was ample direct evidence linking the applicant to the offence, as the killer-bullet, whose remains were removed from the body of the deceased, was traced to the applicant. Therefore, the respondent believes that a conviction will most likely result after the applicant is prosecuted.

And as the sentence prescribed for the offence of murder is death, the respondent submitted that that will tempt the applicant to abscond.

Whilst the applicant said that there had been a shoot-out at the scene, the respondent said that that cannot have been the case, because only a toy pistol was recovered.

Civilians saw the deceased being arrested by the police. Thereafter, the deceased is said to have been removed from the cells. Again a civilian saw that happening.

The next morning, that civilian learnt that the deceased had been shot dead.

That civilian is scheduled to give evidence at the trial. But if he learnt that the applicant was not in custody, the respondent believes that he may well relocate, for his own safety.

In reply to the respondent's submissions, Mr. Nyakundi, the learned advocate for the applicant, submitted that the court can impose conditions, to ensure that the applicant did not resume duty, if he was granted bail.

He also said that the alleged fear in the minds of the civilian witnesses was nothing more than an allegation.

Thirdly, the applicant says that he did initially not know that an inquest had been recommended. He only learnt about it after he had been arrested.

Finally, he says that some of the prosecution witnesses did talk about a shoot-out. He invited me to examine the witness statements to verify that position.

I am alive to the fact that one of the factors that the court may take into account when determining an application for bail pending trial, is the strength of the prosecution case.

However, that is easier said than done. I say so because not all persons who record witness statements are obliged to testify.

Secondly, even if they did testify, the court cannot predict how they will handle cross-examination. Some witnesses will remain firm, whilst other witnesses may be shaken.

The only definite fact is that a witness would not change the position he had recorded in his statement. Therefore, a perusal of the witness statements may enable the court to gauge the strengths or weaknesses of the prosecution case.

But if I were to conclude that the prosecution case was either strong or weak, at this early stage; and bearing in mind the fact I am not the trial court in the murder case, my said conclusion could make the work of the trial court very awkward. For that reason, I decline the applicant's invitation to examine the witness statements.

I have no doubt that as the trial progresses, the trial court may begin to formulate an opinion regarding the strength or otherwise of the prosecution case. I therefore choose to leave that task to the trial court.

Even if it is true that only a toy pistol was recovered at the scene, that, of itself, would not mean that there cannot have been a shoot-out. I say so because the deceased was said to have been in a group of 4 persons.

Had he been all alone, and was then gunned down; and the police thereafter only recovered a toy pistol, it would be possible to contend that in those circumstances a shoot-out would not have been possible.

But whether or not there was any shoot-out is not clear, because there is also a strong suggestion that the deceased was in police custody before he was killed.

If a potential witness was with the deceased in the police cells, before the deceased was shot dead, I believe that that civilian witness would have legitimate fears for his own safety. Such fear would be real, in my considered opinion.

I therefore find that the respondent has demonstrated a compelling reason to warrant a rejection of the application for bail, at this stage.

Dated, Signed and Delivered at Nairobi, this 10th day of November, 2011.

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It is the contention of the applicant that he did not abscond even after he learnt that he would be charged with murder. He continued with his regular duties as a police officer. He also continued to respond to orders requiring him to report to his superiors.

Secondly, the applicant argues that the evidence from the witness statements which he has been given by the prosecution is very weak. If anything, he says that the said statements contain exculpatory evidence, which would render his prosecution frivolous.

However, if he were to remain on interdiction, the applicant would still have access to the other police officers, including the Investigating Officer. If that were to happen, the members of the public, who are to be witnesses in the murder trial, might think that the evidence would be suppressed.

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Secondly, even if they did testify, the court cannot predict how they will handle cross-examination. Some witnesses will remain firm, whilst other witnesses may be shaken.

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FRED A. OCHIENG

JUDGE

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