



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 23 OF 2010

REPUBLICPROSECUTOR

VERSUS

JOHN KAHINDI KARISA
PETER MUSYA

PHILIP ANYANYAACCUSED

R U L I N G

The two Applicants herein Peter Musya and Philip Anyanya were charged in this court on 23.9.2010 with the offence of murder contrary to Section 203 as read with Section 204 of the Penal code. It was alleged that on the night of 6th and 7th September 2010 at Shanzu Township in Kisauni district within the Coast Province, jointly with others not before the court murdered Shakila Mwajuma.

The two denied the charges and pleas of not guilty entered. The hearing of their case was then due to be fixed but the court directed it to be mentioned first on 29.9.2010 when the court would deliver a Ruling on the application for bail.

The two accused applied to be released on bail under the provisions of Article 49 (1)(h) of the New Constitution which provides that:-

“49 1 (h)

- An arrested person has the 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.”

This Constitutional provision came into force after the promulgation of the New Constitution. As a result of this, the provisions of Section 123 of the Criminal Procedure Code which made the offences of murder, treason and robbery with violence non-bailable offences became obsolete and in effect repealed and inapplicable. In all these case, the mandatory sentences provided by law is Death, and were referred to as Capital Offences. The said sentences are still applicable. It means now that in case a suspect is charged with any offence under the Penal Code including those that attract the death sentence e.g. murder, the same is bailable. A murder suspect has a Constitutional right to be released on bail. This is an inalienable right and can only be restricted by the court if there are compelling reasons for him not to be released.

The High court is therefore given the discretion and jurisdiction to consider whether there are any compelling reasons for an accused person in a murder case to be denied his Constitutional right to be released on bail.

I have considered the application by the two accused and the reasons given by the state against the release of the two accused.

It is my considered view that at the first instance, once an accused person applies for bail in a murder case, the same principles and considerations in bail applications in respect of any other offence shall be applicable. The primary consideration is whether the Accused person shall attend court and be available at the trial. All factors and circumstances for the release will be centered on this question. Any other factor will be secondary. In the case of WATORO V REPUBLIC (1991) KLR 220 at 283, Porter, J stated:-

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

I agree with the said view. So is it enough for the Accused to state that since he is presumed to be innocent until proven guilty he is entitled to bail and he assures the court and undertakes that he will be in attendance at the trial? I think that having stated the Constitutional right to bail and cited the provision which underpins it, there can be no debate on the protection of the said right. It is true that the applicants may be citizens or otherwise and are innocent until proven guilty.

However, the Respondent has told the court to consider the seriousness of the charge i.e. that of murder, and that it is a capital offence. That the sentence is that of death as a result it is reasonable to foresee that the accused is likely to be inclined to abscond. That there is a huge risk of flight. The Respondent stated that the Applicants are likely to interfere with witnesses and evidence as they will have had access to the Committal bundle. The State also argues that if the Applicants, if released on bond in a murder case so soon after the incident may be lynched by the public out of anger for their release and that it is for their own security that they should remain in remand. That there could be a danger to their lives as there is possibility of vigilantism.

Counsel for the accused did not agree with the said views that stated that there was no evidence to back the allegations of intention to destroy evidence or interfere with witnesses. That the Accused are not scared to go back to their homes as they are innocent and nobody has threatened them. That it is serious admission by the state that it cannot ensure there is security and adherence to the law by the public. That there are no compelling and/or exceptional circumstances to warrant the accused to be denied their constitutional right to bail.

From the foregoing and on authority, I form the view that there are many possible factors and circumstances which can affect the availability of the Accused in a murder case at the trial. Murder is a serious offence and attracts the death penalty. Self preservation is a natural reaction or response of any human being.

Whatever the court will decide, the fear and anxiety exerting on an accused’s mind during the trial in a murder case cannot be ignored. The possibility of thinking of flight by an accused person facing a capital offence is real and cannot be wished away. It is therefore true that the seriousness of an offence and the sentence for which is possible upon conviction is a matter which can bear on the accused and can affect his decision to attend trial or not. Porter J in the above case put it so succinctly, he said:-

“.....

The seriousness of the offence in terms of the sentence likely to follow a conviction has been held repeatedly to be a consideration in exercising discretion. If the presumption of innocence were to be applied in full, there would never be a remand in custody

What I think is important for the court to bear in mind, and the reason for the caution to remember the presumption of innocence, is that it would be wrong to leap to the conclusion that the Accused was guilty merely because he had been charged and decide the bail application on that basis.

Nevertheless the seriousness of the offence has a clear bearing which the court ought to bear in mind on the factors influencing the mind of an accused facing a charge in respect of the offence as to whether it would be a good thing to skip or not, and such a possibility is not out of question: it has happened before, and in similar cases.

I do not mean to say that because other people have decided to leave business family and friends, for other climes, rather than to face prosecution, this applicant will do so, that decision depends on all prevailing circumstances of the applicant. All I mean to say is that the presumption of innocence cannot rule out consideration of the seriousness of the offence and the sentence which would follow on conviction...”

I am persuaded by the aforesaid reasoning and observations. I do not think that it was in necessary for the Republic to file an affidavit to prove or substantiate such fears or misapprehensions. Of course, I would overrule any suggestions of possible interference with witnesses and evidence unless there is some tangible or at least some prima facie material that the Accused had attempted to do this or likely to do so by some known incident or specific conduct/demeanor.

I also reject the idea that the accused should be remanded and not granted bail for their own safety, security and good. Any accused person released on bail has his Constitutional rights secured and protected. No member of the public or any other person can try him or punish him. This can only be done by a competent court with appropriate jurisdiction. The practice by sections of the Kenyan Society to kill or murder innocent persons only on mere suspicion or even upon a citizen’s arrest of suspects for various perceived offences including practicing witchcraft by mob lynchings, torching etc in so called “Mob Justice” is deplorable, criminal, unlawful, illegal and unconstitutional. The fact that it has continued unabated in various parts of the country including Coast Province, Nairobi and Kisii is a shame for the law enforcement agencies, the Government and the entire Kenyan Society. What is happening is inhuman, degrading and amounts to acts of terrorism which should not be allowed in a democratic society which is chest-thumping of having promulgated one of the best Constitutions in the World recently to start a new era of Respect for Human Rights and the Strict adherence to the Rule of Law.

As a result, it would amount to a judicial aiding and abetting of this Criminal trend of public murders or so called “mob justice” for the court to purport to deny bail to the accused so as to protect them from being lynched by members of the public.

Balancing and considering all the facts and circumstances of this case and bearing in mind the Applicant’s Constitutional right to bail and their respective presumption of innocence I am still not convinced that the two accused here have given the court sufficient comfort and assurance that they will be available and attend court from time to time and for the trial.

I think that an accused person should have made some effort and show or give court some reasons to dispel the apprehension that he would abscond. The present accused persons have not told the court the following:-

- What they do for a living i.e. occupation
- Marital status
- Whether they have children
- Whether they are Kenya citizens or not
- Any references from their Church, Mosque, Temple or Synagogue
- Any leadership or other in society which makes them dependable.

Of course the court could release them on bail on condition or terms including sureties. However, in a serious case of murder, monetary or property security should not be the only consideration.

The court can assess whether a surety is indeed independent or one indemnified by the Accused. However, murder involves the loss of life of the victim who is a father, mother, brother, sister, son, or daughter of somebody in society. There is a victim who has lost life and an aggrieved family. Murder touches on the social fabric and it affects the security of and peace in the community.

As a result, there is great desire by a court to be assured that all things being equal, the Accused shall not likely but indeed attend court on the day of trial, freely voluntarily and without any coercive compulsion.

I am of the view that in this case there is real risk that if released upon bail the applicants will be tempted to abscond. In other words the risk of or probability of flight are high if not real in this case. Such bona fide apprehension by the court is a compelling reason not to release the Applicants. I am therefore constrained to refuse bail in this case.

Orders accordingly.

Date and signed at Mombasa this 29th Day of September 2010.

M. K. IBRAHIM
J U D G E

29.9.10

Ibrahim, J
Court clerk – Kazungu
Mr. Mutisya for the 1st Accused
Mr. Opulu for the 2nd Accused
Mr. Onserio for the State

Ruling delivered in their presence. Right of Appeal explained.

IBRAHIM, J