



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL CASE NO.65 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

TAIKO KITENDE MUINYA.....ACCUSED

RULING

The accused has asked the court to grant him bail. The said request for bail was made immediately after the accused had pleaded “Not Guilty” to a charge of murder.

Pursuant to the information dated 1/9/10, the offence is said to have been committed on 11/6/10.

The accused says that he was arrested on 19/8/10, whilst he was at home, with his family. He says that there is no reason to warrant any conclusion that he might abscond if he is granted bail.

The state believes that whereas there is now no category of offences which are characterized as non-bailable, the accused should not be released on bail.

As far as the state is concerned there are compelling reasons to warrant the deprivation of bail, to the accused.

On 27th August 2010, the Republic of Kenya ushered in a new constitution. The said constitution was promulgated by His Excellency President Mwai Kibaki.

It was the result of a broad consensus by the populace, which was achieved through a National referendum.

In the said new constitution, there is no category of offences which have been classified as being non-bailable. The state concedes as much.

However, both the accused and the state agree that the persons accused of committing criminal offences do not have an absolute right to bail pending trial.

Article 49(1) (h) of the Constitution of Kenya, 2010 stipulates as follows:

“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.”

In my understanding of that provision, an arrested person is entitled to be released pending either his being charged or his being tried. Therefore, even before a person who is under arrest is charged, he is entitled to ask that he be released on bond or bail.

Secondly, the said person is entitled to be released on reasonable conditions. What is reasonable will be determinable by references to the facts and circumstances prevailing in each case.

Although an arrested person is entitled to be released on bond or bail, the court may decline to release him in appropriate cases. And the appropriateness or otherwise is no longer pre-determined by statute, as was the case prior to 27th August 2010, when all persons charged with offences carrying death sentences could not be granted bail or bond pending trial.

The question as to whether or not any particular case disclosed compelling reasons to deny an arrested person his right, is to be determined by the court.

In my considered view, the drafters of the constitution have done well to leave it open to the discretion of the court.

Although the Constitution does not cite the seriousness of the offence with which an accused is charged as a factor, I believe that it is undoubtedly a relevant factor.

Secondly, the sentence which the offence attracts is also a factor to be taken into account.

Thirdly, the relationship, if any, between the accused person and the potential witnesses is another factor.

I say so because accused persons may be more inclined to abscond if the charge against them was serious, and if the sentence was heavy.

And if the accused was a person who was either related to the witnesses or a person who stood in a position of influence vis-à-vis the potential witnesses, there could arise a legitimate anxiety about the impact he might have on the witnesses, if he was released pending trial.

In this instance, the deceased was a son to the accused. The accused is said to have absconded from home for about 2 months. That is what Ag. Inspector James Kariuki has stated on Oath.

Furthermore, the offence of murder is so serious that it still attracts the death sentence, upon conviction.

In the circumstances, I find that the state has demonstrated that, at present, there are compelling reasons to warrant the accused being deprived of his liberty pending trial.

However, as the case unfolds, I believe that there might arise developments which could result in a change on the position currently taken by the court.

For now, the application for the release of the accused is rejected.

Dated, signed and delivered at Nairobi, this 2nd day of September 2010.

FRED.A.OCHIENG

JUDGE

2/9/10

