REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MURDER CASE NO. 29 OF 2009

REPUBLIC..PROSECUTOR

-VERSUS-

ERIC OCHIENG OUKO
ALEX OHUBO ONYANGO alias
JOHN ONYANGO...ACCUSED

RULING

The accused persons, Eric Ochieng Ouko and Alex Ohubo Onyango alias John Onyango are 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 the 6th of May, 2008 at Wandieke village, in Kisumu East District, within Nyanza province they jointly murdered Willis Ochieng. The accused were initially separately charged however the two matters were consolidated on 29th of April, 2010.

At the time the accused persons were charged the offence was not bailable The position has since the passage of the new Constitution become obsolete and inapplicable in law. The provision of the new Constitution is what gave rise to the application made by the accused person through their respective counsels.

The 1st accused was represented by Mr. Ong'ele while the 2nd by Mr. Gichaba. The gist of submissions by learned counsel for both parties were similar in what the 1st accused is a juvenile aged 17 years. The 2nd accused is a form two student. They both hail from Kisumu District and are not likely to run away if released on bond. Section 49(1) (h) of the New Constitution was cited. Counsel relied on Mombasa Criminal Case No. 26 of 2008 – Republic –VS- Danson Mgunya & Kassim Sheebwana Mohamed.
The State represented by Assistant Deputy Director of Prosecution Mr. Gumo objected to the application stating that the right to bail/bond is not absolute and that Section 49(1) (h) cannot be considered in isolation and must be read alongside Article 159(2) (b). It was his contention that there are no compelling reasons to release the accused persons on bond.
Article 49(1)(h) of the current Constitution provides as follows:-

"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."

The above provision of the New Constitution does not distinguish a capital offence from the others. All accused persons are now admissible to bail unless there are compelling reasons. The court has jurisdiction and discretion to consider a bail

application for an accused person charged with a capital offence such as murder and to deny the same only if there are compelling reasons that is however to say that the right is not absolute either. This court held else where in Kisumu High Court Murder Case No.38 Republic Versus Caleb Odhiambo Okumu of 2010 that the court must of necessity consider certain factors in exercising its discretion in an application such as the one before court. The factors for consideration are:

(1) The likelihood of the accused to attend his trial;

(2) The risk and likelihood of the accused to interfere with the witnesses or tamper with evidence;

(3) The likelihood of the accused committing another crime;

(4) The risk the accused person is likely to face if he returns to his village/home;

(5) The gravity of the offence and likely punishment to be imposed.

In his submissions the learned State Counsel did not allude to the likelihood of interference with witnesses or evidence, or even commission of another crime by the accused and the court has no reasons therefore in this matter to take the said factors into consideration. The defence counsel gave an assurance on behalf of the accused persons that the accused will attend trial however the learned State Counsel urged the court to be cautious due to the seriousness of the charge.

In the case of Republic versus John Kahindi Karisa & 2 others Mombasa High Court Criminal Case No.23 of 2010 which is a persuasive. Ibrahim J stated as follows:

“Balancing and considering all the facts and circumstances of this case and bearing in mind the applicants 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 to attend court from time to time and for the trial.
I think that an accused person should have made some effort to show or give court some reason to dispel the apprehension that he would not abscond.” -----
The court went further to say:

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

The court concurs with the sentiments of Ibrahim J. The offence facing the accused is serious if found guilty the accused may be handed a death sentence, chances of absconding cannot therefore be overruled. The court also agrees with the learned State Counsel that a court in allowing bail in a case of murder should be cautious.

The granting of bail is predicated on the assumption that an accused will attend trial, the court therefore must be convinced that the accused will attend trial if released on bail. In Watoro versus Republic [1991] KLR 220 which Ibrahim J adopted in Republic versus John Kahindi Karisa & 20 others [supra] Porter J addressed this issue as follows:

“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 or other crimes, 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."

Persuaded by the two cases cited above this court is of the view that the offence facing the accused persons in this matter is serious. The penalty or sentence is likely to be grave. Even with assurance by the accused persons that they will attend court for trial, the court is left with doubt whether the accused persons if released on bail will indeed attend trial. The offence, sentence likely to be meted out if accused persons are found guilty and the doubt in the mind of the court are compelling reasons for this court to deny the accused bail pending trial.

Orders accordingly.

DATED AND DELIVERED THIS 26TH NOVEMBER, 2010.

ALI-ARONI

JUDGE

In the presence of:

…………………………………………………………………..………… for State

……………………….…………….. Accused person present