



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL CASE NO. 12 OF 2010

REPUBLIC.....PROSECUTION

VERSUS

KENNEDY IRERI ALIAS CHUMA & 3 OTHERS.....ACCUSED

RULING

The Accused persons herein are charged with the offence of **murder contrary to Section 203 as read with Section 204 of the penal code**. The offence has hitherto been unbailable but by dint of article 49(1) (h) of the new Constitution, the same is bailable. Under that article, an Accused person

“Is entitled to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released.”

From the very wording of the above article, release on bail is not an absolute, automatic right. The Constitution subjects the same to absence or lack of compelling reasons not to be released. It will be noted that the word compelling is not defined and the same is therefore left to the courts and the parties seeking to invoke that article in their favour.

In this case, Accused I Kennedy Ileri has applied for bail through his counsel. According to his counsel, there are no compelling reasons as to why he cannot be released on bail. He is also said to be disabled. The stick he was using as a walking aid was detained by the police as an exhibit and so he has been made to walk on all fours and that amounts to being subjected to inhuman treatment while in custody. On this point however, I wish to state that every Accused person has a right not to be subjected to any inhuman or degrading treatment. In this case however, the state has nothing to do with the alleged inhuman treatment, reason being that the walking aid cannot be returned to the Accused since the same is still being held as an exhibit and it has yet to be produced in court.

Secondly the state has stated through the affidavit by the Investigating officer that the Prison Department has no problem with the Accused’s relatives providing another walking aid for him.

This therefore does not amount to a compelling reason to allow him to be released on bond.

I will therefore consider his application for bail along with that of Accused 4 Obadiah Mugendi. Both Counsel have not given the court any other reasons as to why the 2 shall be released on bond.

The Investigating Officer has sworn an affidavit maintaining that if released, the Accused persons may interfere with the witnesses. He has also undertaken to expedite the trial by bringing to court all the remaining witnesses. He has also stated that the offence is of a serious nature and the Accused persons face a serious sentence upon conviction.

I have considered the application by both accused persons along with the contents of the Affidavit by the investigations officer.

I would like to state for the record that this court has previously released an accused person on bond for murder after moving itself *suo motu*. I do believe therefore that every accused person is entitled to be released on bail even for the offence of murder as provided for in the constitution. This nonetheless is subject to the absence of compelling circumstances that might warrant the denial of the said right. Each case must therefore be considered in its own circumstances.

The Investigations Officer has deponed that the Accused persons are a security threat to the witnesses if released on bail.

The averment was not interrogated or rebutted by the Applicants. Threat to witnesses would in my view amount to a forceful or compelling reason for the court not to grant bail.

The nature of the sentence they are likely to face is also in my view an irresistible or overpowering reason for the Accused persons not to avail themselves to court for trial if released.

The prosecution has yet to call other witnesses whose security as stated by the investigating officer is likely to be threatened if the Accused persons are out on bail.

If the accused's right to liberty will therefore compromise the right of the witnesses to security of their person, then this court has every reason to limit the Accused exercise of such a right.

I therefore find it meted and just to refuse the application for the Accused persons release on bail in this matter. The application for bail for Accused 1 & 4 is hereby dismissed.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 1st day of December 2010

In presence of:- Mr. Mugambi for Accused 1 and all Accused persons. Ms. Matiru also present for State. Mr. Githinji Karuri for Momanyi for Accused 4 also present.