



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CRIMINAL CASE NO. 70 OF 2019**

**REPUBLIC.....DPP**

**VERSUS**

**MATTHEWAS MBAYA ALIAS MATHEW.....ACCUSED**

**RULING**

This matter comes up for the application of the applicant, Mathews Mbaya dated 24.2.2020. The same brought under various constitutional provisions and more particularly Article 49, seeks that the applicant (accused), be released on bail on reasonable terms pending his trial. The application is grounded on the grounds shown on the face of the application. No affidavit has been sworn in support of the same. The Respondent (the state) has opposed this application.

While moving the application, Mr. Marube for the applicant submitted that accused is not a flight risk. Also that he will not interfere with the witnesses. It was submitted from the bar that accused was a casual worker who had gone to his village and not to take flight. Further, that there is no evidence that the accused could interfere with witnesses. Counsel relied on the case of Grace Kaneno Namulo Versus Republic, HCCR. 35/2018(Machakos), (2019)eKLR, on the fact that the prosecution has not shown any compelling reasons in this matter.

In opposing the application, counsel for the state relied on the affidavit of the investigating officer. First, that though under Article 49 (1)(h) grants the right to bail, the same is not absolute and may be denied should there be compelling reasons. It was submitted that accused is a flight risk. That the offence was committed on 16<sup>th</sup>/17<sup>th</sup> June 2019 in Ruai, and accused was not arrested till on 28.9.2019, 3 months later in Bungoma county. That this is proof that if he is released, he would leave the jurisdiction of the court.

It was further submitted that there is fear of reprisals on the witnesses and good reason to believe that accused would interfere with the witnesses who are well known to the accused. Counsel pleaded that the court do order that accused do remain remanded in custody pending trial and determination of his case.

I have considered the submissions of the 2 learned counsel regarding this application. This application is basically brought under Article 49(1)(h), which states;

*Article (49) (1) 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”*

It is clear from the above constitutional provision that whereas pre-trial bail is a right, the said right may be denied should there be compelling reasons. These are reasons good enough is to justify the denial of this right.

The prosecution has raised 2 issues as constituting compelling reasons. The first reason raised is that the applicant is a flight risk. That the alleged offence was committed on 16<sup>th</sup>/17<sup>th</sup> June 2019 in Ruai, Nairobi, and it was not until 3 months later on 28.9.2019, that the accused was arrested in Bungoma county. That this shows that accused is likely to abscond if released on bond. This court notes that the applicant (accused), did not file any affidavit in support of this application. Further, that upon the application by counsel for the accused on 26.2.2020, this court granted the applicant leave to file a further affidavit. Again, no further affidavit was filed by the applicant. In effect, the submission by the counsel for the state that accused ran away from the alleged scene of crime in Nairobi, only to be arrested 3 months later, for away in Bungoma county, remains unchallenged.

This court is guided on this point, by the finding of the Hon. Muita J. in Republic Verse Godfrey Madegwa & 6 Others (2016)eKLR, at page 3 of the ruling

*“The primary purpose for bail is to secure the accused person’s attendance to court to answer the charge at the specific time. I would therefore agree..... that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial.”*

In our instant case, the accused apparently moved out of Nairobi and was only arrested 3 months later in Bungoma. He has not filed any affidavit or given any cogent explanation to this, leaving the only viable conclusion that he must have been on a mission to run away to avoid a possible arrest and prosecution. This court is persuaded so. I therefore agree with counsel for the state, that there is a likelihood that should he be released on bail, the accused is likely to abscond, never to appear in court for his trial.

The 2<sup>nd</sup> issue raised by the prosecution is that accused, if released, is likely to interfere with the prosecution witnesses. On this note, there is no doubt that the accused knows well the witnesses herein. However, there is no evidence to the effect that he has or has attempted to interfere with any of the witnesses. In any case, the said witnesses who are well known to the accused have all testified before the court and their evidence is on record.

It has been held severally by the courts that for this ground to stand as a compelling reason, there must be proof of existence of such interference or attempted interference (see Republic Versus Margaret Kemunto & Another HCCR 84/2019, and Republic Versus Sarah Wairimu Kamotho HCCR 60/2019. Also, Republic Versus Paul Ndolo Kasyoka, HCCR 49/2019.) by this court. No such evidence was shown by the prosecution. This ground therefore fails.

From the above observations, this court is convinced that the prosecution has proved that there is at least one compelling reason that would make this court deny the accused the right to pre-trial bail. That he is a flight risk, likely to abscond should he be released on bail. I so hold. The application of the accused dated 24.2.2020 for bail is hereby accordingly dismissed. The accused is ordered to remain in custody pending determination of this case. Orders accordingly.

**D. O. OGEMBO**

**JUDGE**

**15.5.2020**

Court:

Ruling read out by skype in presence of the applicant, his advocate Mr. Marube, and Ms. Gikonyo for the state.

**D. O. OGEMBO**

**JUDGE**

**15.5.2020**