



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram – D. K. Kemei - J

CRIMINAL CASE NO. 11 OF 2019

THE STATE.....PROSECUTOR

VERSUS

DAVID MASAI KIVILU.....ACCUSED

RULING

1. The accused person through his Advocates **R.M. Mutune & Co Advocates** filed a Notice of Motion dated 10.12. 2019 praying that he be released on bail/bond pending hearing and determination of this case. The application is based on the grounds that the applicant:

- a) *has a permanent place of abode hence not a flight risk.*
- b) *has good antecedents and is of high moral standing.*
- c) *Is ready and wishing(sic) to abide by the terms set by the court.*
- d) *Is a law abiding citizen.*
- e) *Has pleaded not guilty to the charges preferred against him hence is presumed innocent.*
- f) *There are no compelling reasons not to admit the applicant to bail.*
- g) *It is in the interests if justice to grant the orders sought.*
- h) *No prejudice shall be occasioned upon any of the parties if the orders sought are granted.*
- i) *It is in the interest if justice to grant the orders sought.*

2. The application is supported by the affidavit of the applicant sworn on 10.12.2019. He averred that he undertakes to be available for trial when required to do so and that he will abide by any condition set by court.

3. The State did not oppose the application and there is a bail report on record dated 24.1.2020.

4. I have considered the application. Bail pending trial as a constitutional right as provided under **Article 49 (1) (h)** of the Constitution which states:

“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.”

5. Bail pending trial is a principle of fair trial. An accused person is presumed innocent until the contrary is proved. **Article 50 (2) (a)**

provides:

“Every accused person has a right to a fair trial which includes the right to:-

To be presumed innocent until the contrary is proved.”

6. The right to bail can only be denied if the State proves that there are compelling reasons not to grant bail. The burden is on the prosecution. In the case of the **Republic v Danson Ngunya & Another (2010) eKLR** High Court stated:-

“In my judgment, the practice should never be to require the State to prove to the satisfaction of the Court that in the circumstances of the case the interest of justice requires the accused to be deprived of his right to be released from detention. The burden should be on the State and not the accused. He who alleges must prove. That is what we have always upheld in our courts. If the State wants the accused to be detained pending his trial then it is upto the State to prove when the Court should make such an order.....

7. The State did not oppose the release of the accused on bail. I have considered the Judiciary Bail Policy guidelines. The Policy guidelines defines a bail report as follows:

“A social enquiry report based on information generated about the background and community ties of an accused person, and its purposes are to verify information provided to Court by the accused person, to assess the likelihood that the accused person will appear for trial and enable the Court to impose reasonable bail terms and conditions.”

At Chapter 4:26 it is stated:

“The Court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision including the following instances:

- a. Where there is doubt on the information on the accused person relating to the grant of bail; or***
- b. Where the prosecution objects to bail with plausible reasons; or***
- c. Where the accused person has been given bail but fails to meet bail terms and seeks review of those terms; or***
- d. Where the victim of the crime contests the grant of bail or applies for review of bail conditions, or***
- e. On the Court’s own motion where it deems necessary.***

8. The bail report dated 24.1.2020 has been availed to court and the same has observed the accused has no asset in his possession and the family members are willing to seek sureties for him as well as are ready to deposit a family title deed and a title deed of the employer to the accused’s wife. It is reported that the accused is of good character and hardworking. The community members are reported as having given a good account of the accused and are not opposed to him being granted bail. The family of the deceased understandingly opposed the grant of bail to the accused and expressed fear that he would pose a threat to them. It was reported that the accused has a fixed abode and strong family ties.

9. In conclusion, having considered the circumstances relating to the case, I find that there being no compelling reason proved to deny the accused person bail, I am of the view that he should be allowed to enjoy the constitutional right to bail. I order that the accused be released on a bond of Ksh.1,000,000/= plus one surety of like sum pending trial. The accused is ordered not to interfere with witnesses in any way and to attend court at all mention and hearing dates without fail and in default his bond shall stand cancelled and the surety called to account.

Orders accordingly.

Dated and delivered at **Machakos** this **14th** day of **May, 2020**.

D. K. Kemei

Judge