



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 12 OF 2020

REPUBLIC.....DPP

VERSUS

WYCLIFFE MOGAKA ONGERI.....ACCUSED

RULING

This matter has now come up for the hearing of the application of the accused WYCLIFFE MOGAKA ONGERI, dated 17.4.2020. He seeks that the applicant be admitted to bail pending the trial and determination of his case. An affidavit of the advocate for the applicant is attached to the applicant in support of the same. In the short submissions, counsel for the applicant submitted that bail is a constitutional right under Article 49(1)(h) of the constitution and that the accused is presumed innocent till proven guilty. Further that he had cooperated fully with the investigators was the sole breadwinner of his young family.

Counsel went on that there is no evidence that accused has interfered with any witnesses, and that he undertakes to attend his hearings.

In opposing bail, counsel for the state (Ms. Onunga) submitted that the court ought to consider the serious nature of the offence and the likely sentence in case of conviction. Secondly, that since accused and the witnesses hail from the same locality, he is likely to interfere with the witnesses. She otherwise pleaded for strict terms of bail should the court rule on his favour.

I have considered the submissions of both sides. This is an application for bail pending trial. Under Article 49(1)(h), an accused person has the right to be placed on bail pending hearing and determination of his case. The proviso to this is that the right to bail may be denied if the prosecution side can prove the existence of any compelling reason. The burden to prove the existence of such compelling reason is on the prosecution side.

In this case, the prosecution has based its arguments, first on the fact that accused is facing a serious charge which attracts a stiff sentence in case of conviction. There is no doubt that the accused indeed faces a serious charge. It is a charge of murder contrary to section 203 of the Penal Code. And the charge also attracts stiff sentence in case of conviction. But can this alone lead to denial of accused of the right to bail? I think not. As stated above, the constitution (Article 49(1)(h)), guarantees the right to bail to all accuseds irrespective of the charges they are facing. This ground therefore, taken in isolation cannot constitute a compelling reason good enough to make this court deny the accused the constitutional right to bail.

Secondly, the prosecution has submitted that accused is likely to interfere with witnesses if released on bail. The prosecution has however, failed to show any evidence of real or perceived interference with any of the prosecution witnesses from the side of the accused. This court in HCCR No. 10 of 2020, republic versus Lucy Waithera Njuguna and John Hari Gakinya held that for this ground to succeed, the prosecution must demonstrate actual or perceived interference. See also the holding the Hon. Lesiit J, in Republic Versus Richard David Alden (2016)eKLR, that failure to show evidence of such interference would be tantamount to asking the court to speculate.

As it is, the prosecution has not shown any evidence of interference or perceived interference with the witnesses. The allegation of the prosecution therefore remains totally unproven and cannot stand as a compelling reason. I accordingly dismiss this objection.

The sum total is that the prosecution has not succeeded in proving any compelling reason that would persuade this court to deny the accused the right to bail. I dismiss the prosecution's objection and order that the accused may be released on bond on the following terms:-

- (i) Accused may be released on a bond of Ksh.500,000/= with 1 surety of a similar amount.
- (ii) In addition, accused shall deposit a cash bail of Kshs.100,000/=

(iii) The accused is ordered never to contact and or interfere with any prosecution witnesses, whether directly or through any proxy or agent.

(iv) He is ordered to attend court at all times for the hearing of his case or as may be ordered from time to time by the court till this case is determined.

D. O. OGEMBO

JUDGE

5.6.2020

Court:

Ruling read out in open court in presence of the applicant, Ms. Odembo for the applicant and Mr. Okeyo for the state.

D. O. OGEMBO

JUDGE

5.6.2020