



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL CASE NO.2 OF 2019

REPUBLIC.....PROSECUTOR

- V E R S U S -

JOHN NJOGU WANDERI.....APPLICANT/ACCUSED

R U L I N G

By the Notice of Motion dated 12/3/2019, the accused/applicant, **John Njogu Wanderi** seeks to be released on bond pending the hearing of this case. The application is brought under Article 49 of the Constitution.

The applicant faces a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.

The application is supported by an affidavit sworn by the applicant's counsel, Mr. Maina Kairu, in which he depones that the accused suffers from a chronic illness which requires him to see a specialist regularly and requires a special diet. He purported to attach a medical report but none was on the file. It was also deponed that the applicant's place of abode is within the jurisdiction of this court and that there are no compelling reasons to deny him bond.

In opposing the application, PC Jesse Aluoch, the investigating officer in the matter swore an affidavit dated 13/3/2019 in which he deponed that after committing the offence, the applicant disappeared for three years till his arrest and there is likelihood that he will abscond if released on bond. The investigating officer also deponed that since the deceased was a nephew to the applicant he is likely to interfere with the witnesses; that there is still hostility on the ground and applicant's life is likely to be in danger.

In reply to the investigating officer's affidavit, Mr. Maina Kairu filed a further affidavit to the effect that the applicant never absconded but was employed as a casual worker in Narok County; that he co-operated with the arresting officers when they approached him; that there is no hostility on the ground and there are no facts to support the said assertion.

Article 49(1)(h) of the Constitution guarantees one's right to be released on bond or bail on reasonable conditions, pending a charge or trial, unless there are compelling reasons to deny the accused bond.

The onus lies on the State to demonstrate that there are compelling reasons to deny applicant bond. This is because one is presumed innocent until proved guilty. Some of the grounds to be considered are:

- (1) The nature of the charges;***
- (2) Whether the accused will fail to turn up for his trial or surrender to custody or;***
- (3) The strength of the evidence;***
- (4) The gravity of the punishment likely to be meted upon conviction;***
- (5) The accused may commit further offences;***
- (6) That the accused will obstruct the course of justice;***
- (7) That the accused's life may be in danger if released.***

The list may not be exhaustive but the grounds may vary from case to case and the prosecution need only prove one or more of the grounds.

The offence was committed in 2016 and the applicant was not arrested till 2019, a period of about 3 years. There is no evidence that he has committed another offence since or that he is likely to obstruct the cause of justice. If it is a matter of interfering with witnesses, he would have done so during the period he was not arrested.

On the allegation that the applicant is sickly, no evidence was given to court as to the ailment.

The primary consideration in an application for bail is whether the applicant will avail himself for his trial for the offence with which he is charged. In this case, the victim of the offence was a nephew to the applicant. The applicant disappeared for over 2 years. The prosecution did not give a detailed account of how the applicant came to be arrested. In the further affidavit, it is contended that the applicant gave himself up to police when he learnt that they were looking for him. The investigating officer never demonstrated what efforts were made to trace the applicant during that period and the court will not just assume that because the applicant had not been arrested, he had taken flight and is therefore a flight risk.

This court asked for a pre-bail report. What clearly stands out from the report is that there is still great animosity from the father of the deceased who is the applicant's brother. The applicant's home was razed down after the incident and therefore he has no place of abode. Apart from the probation officer suggesting that the applicant may go back where he worked in Narok or his sister's place in Limuru, there is no guarantee that he will be welcome there. From the foregoing, it is my view that the applicant being no fixed abode and bearing in mind his past conduct, he may not turn up for his trial if released on bond.

For that reason, I decline to grant the applicant bond. He will remain in remand during his trial.

Dated, Signed and Delivered at NYAHURURU this 13th day of June, 2019.

.....

R.P.V. Wendoh

JUDGE

PRESENT:

Mr. Maina Kairu for applicant

Ms. Rugut for State

Soi – Court Assistant

Applicant - present