



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 61 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

FRANCIS MAINA WAIRIMU.....ACCUSED

RULING

Francis Maina Wairimu, the accused in this case and applicant, is charged with murder contrary to section 203 as read with section 204 of the Penal Code. In the particulars of that offence it is stated that on the 15th day of June 2019 at Soweto Village in Kahawa West within Nairobi County he murdered Lameck Odongo Ogola. The accused pleaded not guilty to these charges. He has now come to court seeking to be admitted to bail pending the hearing and determination of this case.

By a Notice of Motion dated 22nd October 2019 and filed on even date, the accused is asking this court to admit him to bail/bond on such reasonable conditions as the court may determine pending the hearing and determination of this case. The application is supported the grounds found on the face of the application and on the supporting affidavit sworn by the accused on 21st October 2019. The grounds in support of the application are that:

- i. That the offence of murder is bailable under the Constitution of Kenya.
- ii. That the applicant has a qualified constitutional right to be released on bond or bail on reasonable conditions.
- iii. That the applicant has an unqualified constitutional right to be presumed innocent until the contrary is proved.
- iv. That the applicant will avail himself and attend the trial until its conclusion.
- v. That the applicant seeks release from custody on medical grounds to enable him seek treatment.

In his affidavit the applicant deposes that he was shot by the police during his arrest and has been treated both in Kiambu District Hospital and Kenyatta National Hospital where he underwent surgery; that he was stitched and stitches were to be removed within two weeks but his has not been done despite several court orders addressed to the authorities at Industrial Area GK Prison where the applicant is being held in custody. He deposes that his health is worsening due to lack of medical attention and that he is a Kenyan with a known abode in Murang'a County where his mother lives.

In his brief oral submissions in support of the application, Mr. Mureithi holding brief for Ms. Odiya for the applicant told the court that the applicant has a mother who is willing to take him in and to ensure that he attends the trial. He submitted that this court has discretion to give terms of the bond/bail that the applicant must meet once released on bond. Mr. Mureithi further submitted that the prosecution has not submitted a charge sheet showing that the accused has been involved in robberies and breakings. He submitted that the prosecution has not attached the alleged warrant of arrest against the accused making this a mere allegation. He submitted that the mother of the accused has undertaken to stay with the accused in Murang'a and to ensure that the accused attends court. Mr. Mureithi urged this court to allow this application and admit the accused to bail/bond pending the hearing and determination of this case.

The application is opposed. The prosecution is relying on an Affidavit sworn by PC Frederick Muturi who describes himself as the investigating officer in this case. PC Muturi deposes that the accused attacked the police during the time of his arrest and as a result he was shot by the police and injured on the right thigh. He deposes that the accused was taken to both Kiambu Level 5 Hospital and Kenyatta National Hospital for treatment. He deposes that the accused led police to the recovery of a Ceska Pistol Serial Number A780727. He deposed that the accused is a flight risk and that he absconded from the jurisdiction of a Kiambu Court in Criminal Case No. 1516 of 2018 and a warrant of arrest issued against him. It was further deposed that the key witness, who was injured during the time the deceased was

killed, is scared and worried that if the accused is released on bond he is likely to kill him.

The prosecution counsel Mr. Solomon Naulikha submitted that the right to bail under Article 49 (1) (h) of the Constitution is not absolute and can be denied where compelling reasons exist. It was submitted that with a warrant of arrest over his head the accused cannot be trusted with freedom. Counsel asked the court to decline granting this application.

This court called for a pre-bail report from the probation officer. The report was filed on 28th October 2019. I have read the report. It shows that the mother of the accused is supportive of him and undertakes to live with him in Murang'a during the pendency of this case. The report confirms that the accused has a criminal case in Kiambu court being Criminal Case No. 1516 of 2018 where he was released on bond pending the hearing and determination of that case. The report further shows that the accused jumped bail in that case and a warrant of arrest which is still in force was issued against him. The report is not favourable to the accused due to his antecedents.

I have considered this application and the response by the prosecution. I have also read the probation report. I am alive that the accused is ailing following an injury during the time of his arrest. Indeed this court has been following up on that matter with the Prisons Authorities. I have noted that the accused jumped bail in another matter as deposed by the PC Muturi and confirmed in the probation report. This alone is sufficient reason to persuade this court that the accused is a flight risk. An accused person that is released on bond and breaches the terms of that bond cannot come back to court and ask to be released on another bond. It is my view that the promise by the mother to live with the accused and ensure he attends court cannot be taken seriously given that the accused has not honoured the terms of bail in the Kiambu Court matter.

For this reason, it is my finding, and I so hold, that the prosecution has demonstrated compelling reasons to persuade this court to decline granting this application. Consequently, I decline to admit the accused to bond/bail. He shall remain in custody until this case is fully heard and determined. His medical condition shall be attended to while he is in custody. Orders shall issue accordingly.

Dated, signed and delivered in open court this 14th day of November 2019.

S. N. Mutuku

Judge