



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL CASE NO. 75 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

GEORGE HUSSEIN MUSTA.....ACCUSED

RULING ON BAIL

George Hussein Muste, herein “the accused” is charged with murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of this offence show that on the night of 26th and 27th October 2019 at Buruburu Phase II Estate within Nairobi County he murdered Dancan Otieno Omolo alias Lefty.

The accused was arraigned in court for the first time on 12th November 2019 but the plea was deferred to 4th December 2019 for reasons captured on the court file record. He pleaded not guilty. Upon his plea of not guilty being recorded Ms Julie Soweto learned counsel for the accused applied, verbally, to have the accused admitted to bail pending the hearing and determination of this case. The application was opposed by the prosecution who urged that the defence should file a formal application to give the prosecution the opportunity to respond to the application by way of affidavit. This court overruled the objection and directed that the prosecution files an affidavit raising any issues they may have against the grant of the application. The court also called for a pre-bail report from the probation office.

The Affidavit opposing the bail/bond application was filed on 10th December 2019. It is sworn by CPL David Kubabi the investigating officer in this case. In that affidavit it is deposed that the right to bail under Article 49 (1) (h) of the Constitution is not absolute and that the court should consider all the facts of the case before exercising its discretion on whether to grant or to decline granting bail/bond. He deposes that the Bail/Bond Policy Guidelines state that it is justifiable to subject an accused person to pre-trial detention where evidence against the accused is strong. It is deposed that the accused went into hiding in Dandora Phase II after committing the offence from where he was arrested. It is deposed that the accused is known to civilian witnesses and he is likely to interfere with them.

Ms Ongwenko the prosecution counsel made brief submissions in opposing the application basing her arguments on the Affidavit and the pre-bail report that .

In response to the issues raised in the Affidavit, Ms Soweto for the accused argued that the prosecution has not placed before the court substantiated reasons that the accused will not avail himself for the trial. Ms Soweto submitted that the reasons given by the prosecution that the accused exhibited delinquent behaviour cannot be used to deny him bond; that the prosecution has not disclosed what this delinquent behaviour was; that the fact that the community from where the accused lived were reluctant to divulge information about him does not mean anything; that the accused is presumed innocent until proof to the contrary is provided and that the allegations that the accused is a flight risk were taken from the relatives of the deceased and that these allegations have not been substantiated. It was further submitted that the allegations contained in the affidavit of the investigating officer are based on matters of evidence and that the investigating officer cannot draw conclusions on a matter that has not been tested that the accused went into hiding; that the allegations that the accused is likely to interfere with witnesses cannot be ascertained given that the prosecution has not disclosed who these witnesses are. It was submitted that the pre-bail report reveals that the accused’s community ties are well known and he is easily traceable if released on bond.

I have considered this application. Every accused person is guaranteed the right to bail under Article 49 (1) (h) of the Constitution. That right is not absolute. The trial court handling an application for bail/bond is clothed with the discretion to admit or to decline to admit to bail/bond to an applicant seeking to be admitted to bail/bond depending of the facts presented to the court. The prosecution bears the burden of presenting any compelling reasons to the court on a balance of probability to persuade the court to decline to admit such an applicant to bail/bond. I have considered the Affidavit in opposition to this application. It is true that the trial court can decline to grant bail/bond and order pre-trial detention on the strength of the evidence by the prosecution. For the court to do this, that evidence must be presented in court and tested through cross-examination for the court to determine its strength and veracity.

Further the circumstances under which the accused went to Dandora Phase 4 from where he was arrested are a matter of evidence as argued

by Ms Soweto and without subjecting this evidence to scrutiny through cross-examination this court is not able to determine the veracity of the same. I also note that this court did not benefit from the particulars of the 4 civilian witnesses that are alleged to be known by the accused person and who are likely to be interfered with.

I have considered the information contained in the pre-bail report. This information cannot be verified especially when the same was given by the family of the deceased. Having said this, it is my view that all the parties in this case, the accused and the victims deserve justice and this right must be protected by this court. It is the duty of this court to take into account that an accused person who fails to turn up in court for his trial compromises the fair trial which ultimately leads to denial of justice to the victims of a crime. The attendance to court of an accused person who benefits from admission to bail or bond can be secured by putting in place terms and conditions of bail that would ensure his attendance.

Having considered this application and the opposition by the accused it is my finding that the reasons advanced by the prosecution are not substantiated and in my view do not amount to compelling reasons. I will therefore and do hereby allow this application and admit the accused to bail/bond on the following terms:

(i) That the accused executes a bond of Kenya shillings eight hundred thousand (Kshs 800,000) (with one surety of similar amount.

(ii) Alternatively the accused is at liberty to deposit cash bail in the sum of Kenya shillings two hundred thousand (Kshs 200,000) with the Registrar of this court.

(iii) The accused is strongly warned against issuing threats to the victims or witnesses in this case. He is also cautioned against doing anything that may amount to interfering with the course of justice in this matter.

(iv) The accused shall attend court at all times he is required to attend court until this case is heard and determined.

Orders shall issue accordingly.

Dated and signed this 11th day of December 2019 by **Hon. Lady Justice Stella N. Mutuku.**

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Signed by Hon. Mr. Justice.....this.....day of December 2019.

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