



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISC HCRC NO. 3 OF 2018

ANTHONY WAMBUA WILLY.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The Applicant filed a notice of motion dated 14th May, 2018 seeking bail pending trial. The grounds upon which the application was made was that he is a family man with three (3) children and a wife, that he has no relationship or connection to the witnesses and that he is willing to abide by the bond terms ordered by this court.

2. In response thereto, the PC Alfred Kiviyaso Rupia filed a replying affidavit on 23rd July, 2018 opposing the application. He stated that the Applicant is charged with murder and that the alleged offence occurred on 6th December, 2017 at Etukani village where the Applicant together with others who are at still large assaulted the deceased who later succumbed to the injuries. That the Applicant was arrested on 10th February, 2018 after he had been at large having fled to an unknown location for about two months and that he is likely to abscond. That in the event of a conviction being entered, the Applicant will face death penalty and this on its own is an incentive for him to abscond.

3. The substantive law on the grant of bail is found under Article 49 (1) (h) of the Constitution which states:

“An arrested person has the right-

h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.” (Emphasis mine)

4. Applying the test, this court ought to consider whether or not the Applicant is a flight risk or is likely to interfere with the witnesses. In the case at hand, the prosecution has contended that the Applicant went at large after the murder of the deceased only to be arrested two months later. On the other hand, the Applicant has not rebutted the said allegation. In the circumstances, the lack of rebuttal amounts to admissions of facts. In this regard I associate myself with the holding in **Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR** where it was held as follows:

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what was deponed to was not entered nor rebutted by the Respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, it means that the respondents have no claim against the applicant.

In this regard, the court held in Kipyator Nicholas Kiprono Biwott Vs George Mbuguss and Kalamka Ltd Civil Case No. 2143 of 1999

..... From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit..... having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I, therefore have no alternative but to strike out paragraphs 3, 4, 5, 6 and 10 of the defence and enter judgment for the plaintiffs on liability....”

As is has been indicated by the state that the Applicant went into hiding immediately after the murder and only arrested after about two months, I find that the accused’s conduct is one of a person who has a propensity or likelihood to jump bail once granted bond. He has avoided responding to the investigating officer’s averments. It is clear that the accused only resurfaced after the coast had become clear.

The state's reasons appear to me to be compelling and militate against the release of the accused on bond. It has also been indicated on the particulars of the information that there are other suspects still at large and there is a high likelihood of the accused interfering with the investigations to reach those suspects still at large. Under those circumstances, I find it would not be appropriate to grant the accused bond at this stage. The accused however shall be at liberty to renew his quest for release on bond after most of the key witnesses will have testified.

5. In the end, I find that the Applicant has not satisfied the conditions set for granting bail pending trial. The application is dismissed. The defence is directed to proceed with the trial.

Orders accordingly.

Dated and Delivered at **Machakos** this **17th** day of **September 2018**.

D.K.KEMEI

JUDGE

In the presence of:-

Anthony Wambua Willy - for the Applicant

Machogu - for the Respondent

Josephine - Court Assistant