



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
HIGH COURT CRIMINAL CASE NO 72 OF 2016

REPUBLICPROSECUTOR

VERSUS

ABASS SHEIKH ADENACCUSED

RULING

1. The accused **ABASS SHEIKH ADEN** is charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the Penal Code the particulars of which are that on the 12th day of October, 2016 at Mowlem area Dandora of Njiru Sub-County within Nairobi County murdered **OMUKHANGO ASILA ESHIKAT**.
2. He pleaded not guilty and by an application dated 7th November, 2016 sought to be released on bond on reasonable terms pending the hearing and determination of this case, which application was supported by his sworn affidavit in which he deponed that he is a family man married to two wives with six children between them together with his ailing father all who depend upon him and therefore it would be in their best interest if he is released on bond to continue taking care of them.
3. It was deponed further that he is a businessman who depends on his business to support his family and that his said businesses had since stalled as he was not around to run them since his wives were unable to carry on with them. It was deponed further that the same had fixed places of abode and not a flight risk.
4. The application was opposed by the prosecution through an affidavit sworn by CI Mose M. Mburu on 31/1/2017 in which it was deponed that the applicant did not qualify to be admitted to bond pending trial because the prosecution had a strong and irrefutable evidence that pointed to his guilt. It was deponed further that the applicant was charged with a very serious offence of murder and the temptation to abscond from the jurisdiction of the court was real.
5. It was further deponed that there was a risk of intimidation of the prosecution witnesses who were neighbours of the accused and known to him. It was stated that the accused had no fixed abode.

PRE-BAIL REPORT

6. To assist the court in reaching a just decision herein, I ordered for pre-bail report which has been submitted and in which it was stated that the accused hails from Garissa County, Garissa Township. He opened a cafe in 1998 in Garissa Town with assistance from his father but later moved to Isibania before moving to Njiru in Nairobi County where he has been operating a butchery, hotel and selling livestock. It

was confirmed that he was married to two wives with six children and that his brother who is an administration police officer was willing to stand surety for him.

7. On the victim impact assessment, it was stated that the deceased was aged 53 years, married with three children and an employee of Kenya Power and Lighting Company. He was a friend of the offenders neighbours with whom they had a disagreement on the issue of boundaries. It was stated that the victim's family had reservation on the accused release fearing that he may interfere with witnesses.

SUBMISSIONS

8. On behalf of the applicant it was submitted that the accused had a fixed abode where he lived with one of his wives and that he had not been in conflict with the law prior to his arrest. It was submitted that the same was allowed to stay at Buruburu police station for a period of one month while under treatment and that he had fully cooperated with the investigation officer.

9. It was submitted that the prosecution had not provided any proof of the likelihood of interference with witnesses who were all family members of the deceased thereby making it doubtful that the accused can offer them any compelling reason to enable them not testify against him. In support of the submissions herein reliance was placed on the following cases:-

1) Republic Vs Cyrus Mwangi Kimunyu

High court of Kenya at Kerugoya, Criminal Case No. 13 of 2014.

2) Republic Vs Peter Kerongi Kerongo

High Court of Kenya at Kisii Cr. Case No. 47 of 2014

10. On behalf of the prosecution it was submitted that the accused was likely to interfere with the witnesses who were all known to him since the accused and the deceased were neighbours.

ANALYSIS AND DETERMINATION

11. Bond is now a constitutional right of every accused person under **Article 49(1)h** which can only be limited where there are compelling reasons to be advanced by the prosecution on a balance of probability.

12. Whereas the constitution does not define what compelling reasons are Section 123 – 133 of Criminal Procedure Code gives the provisions as to bail and the judiciary through the National Council on the Administration of Justice has developed Bail and Bond Policy Guidelines to aid the Judicial Officer in granting bail.

13. In this matter the State has submitted that there is likelihood of the accused interfering with prosecution witnesses but has felt short of naming the said witnesses, neither have they stated any attempt the State has made in securing the said either by way of placing them under witnesses protection programme and therefore find that this allegation is not compelling reason enough to enable me deny the accused his constitutional right to bond. In this I find support in **Republic v Gerald Mutuku Nyalita & Others Machakos Criminal Case No. 44/2015**.

14. The other issue raised by the prosecution is that the accused does not have a fixed abode and was therefore a flight risk, however this contention has been controverted by the applicant in his affidavit in support of the application that he has a fixed abode with wives and children which has been independently confirmed by the pre-bail report. It is therefore clear to my mind and I find that the prosecution has failed to provide on the required standard any compelling reason to enable the court deny the applicant the enjoyment of his constitutional right to bail pending trial.

15. Having so found that there are no compelling reasons, the next issue for the court's determination is what there shall constitute reasonable bond terms? It must be pointed out that the primary consideration while granting bond is to secure the attendance of the accused person at this trial and therefore the terms must be those that will compel the same to avail himself at the trial. The court must also take into account the fact that the same is charged with murder where if convicted the only available sentence shall be death.

16. With this in mind I hereby order that the applicant be released on bond pending trial on the following terms:

a) Bond of Ksh. One million (Kshs.1,000,000) with one surety of similar amount.

b) In the alternative bond of Ksh. Five hundred thousand (Kshs.500,000) with three sureties of similar amount.

c) The accused shall report to the officer commanding Buru Buru police station once after every 30 days at a date to be set by the said officer upon the accused being released on bail until the final determination of this case.

DATED, DELIVERED and SIGNED at Nairobi this 21st day of February, 2017

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J. WAKIAGA

JUDGE

In the presence of:-

Mrs. Kinoti for the State

Mr. Hassan for the accused

Accused present

Tabitha court clerk