



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL APPLICATION CASE NO. 68 OF 2009
BENJAMIN MUSYOKI THOMASAPPLICANT/ACCUSED
VERSUS
REPUBLICRESPONDENT

RULING OF THE COURT

1. The Accused/Applicant has filed a Notice of Motion dated 22nd October 2015 seeking for the following prayers namely:

- i. That this Honourable court be pleased to release the Applicant on bail/bond pending the hearing of the charge preferred against him.***
- ii. That this court be pleased to issue any order and expedient that may meet justice.***

The Application is supported by an annexed affidavit of the Applicant and further on the following grounds:-

- a. The Applicant stands to suffer prolonged mental break down and stress as his trial has taken unreasonable time to be heard.***
- b. The Applicant is an ordinary citizen of Kenya and is not a flight risk if admitted to bail/bond.***
- c. The Applicant is a family man and as such owes duty of care, education and security of his elderly parents and other dependants.***

2. The Application is opposed by the Respondent. A replying Affidavit sworn by the Investigating officer No.88725 PC. Amina Nasiri Almasi who raised the following grounds of objections:-

- a. That the Prosecution has presented a water tight case against the accused after it called eight (8) witnesses and has since closed its case.***
- b. That once the Applicant is released on bail, there is a high likelihood he will abscond since the evidence tendered against him is overwhelming.***
- c. That as the Prosecution has closed its case, the matter is almost being concluded and a final determination reached and as such the Applicant does not in any way stand to suffer long period of incarceration.***

d. That though the offence of murder is bailable, the grant of bail is not absolute but a matter of discretion on the part of the court.

e. That considering the seriousness of the offence, the severity of the sentence provided for in law, this Honourable Court should find there are compelling reasons as to why the Applicant should be denied bail.

3. With the leave of the court, parties filed written submissions which I have carefully considered. The issue for determination is whether there are compelling reasons why the Applicant should not be released on bond or bail. The Applicant is charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 7th December 2009 at Slaughter Estate Wote Township in Makueni District of the Eastern Province murdered **CECILIA MUENI MUSUMBI**. So far the Prosecution has called all its witnesses and has in fact closed its case and that what is now remaining is for the parties to tender submissions on whether the Prosecution's evidence at this stage has raised a prima facie case against the Applicant.

4. Under the Provisions of Article 49 (1) (h) of the Constitution of Kenya 2010 an arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial unless there are compelling reasons not to be released. Hence the right of an arrested person to bond or bail in respect of any offence is solely at the discretion of the court seized of the Application. The Respondent through the investigating officer has averred that it has already closed its case which according to them is watertight and that there is a likelihood of the Applicant absconding and that the matter should be concluded since it is now at the tail end. The Respondent further submitted that the plea for bail is being made after substantial evidence has been received. In the case of **REPUBLIC =VS= DANSON NGUNYA & ANORTHER [2010] KLR** Justice Ibrahim cited with approval the procedure stated by Justice J. Katsala in the Malawi case of **M. LUNGUZI =VS= REPUBLIC MS CA APPEAL NO. 1 OF 1995** (unreported) where the state objects to the release of an accused on bail. The learned judge stated as follows"-

“ in my judgment the practice should be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial then it is up to the state to prove when the court should make such an order.”

Indeed the gravity of the offence herein and sentence provided are such issues for consideration by the court when considering whether or not to grant bail/bond. The ideal situation is for an accused to raise issues of release on bond at the initial stage of the proceedings so that the same is dealt with before the reception of the evidence. In the present scenario the request for bail/bond was not made right from the time the matter was registered in 2009 and that the Applicant waited until 2015 when he made the present Application by which time the Prosecution was about to wrap up its case. Already the Prosecution has closed its case and what is remaining is for the parties to present submissions on case to answer. No reason has been advanced by the Applicant for the delay in making a plea for bond. The Respondent contends that there is a high likelihood of the Applicant jumping bail since he now has all the evidence adduced by the Respondent and that the temptation to abscond is quite high. I find that since the matter is at the tail end of it being finalized, I find the applicant would not be prejudiced if the matter is now concluded and a determination made by the court. A perusal of the court proceedings reveals that the Applicant had indicated his willingness to plead to a lesser charge of manslaughter which request is still awaiting the Prosecution's response. Under those circumstances I am inclined to find that it would be prudent not to allow the Applicant's Application at this juncture.

5. In the result it is the finding of this court that there are compelling reasons for the Applicant not to be released on bond pending the trial herein. Consequently, I decline to grant the prayers sought in the Notice of Motion dated 22nd October 2015 and dismiss the same. I direct that the trial of the Applicant do proceed as scheduled and on priority basis as it is fairly an old matter.

It is so ordered.

Dated, signed and delivered at Machakos this 3RD day of MAY 2017.

D. K. KEMEI

JUDGE

In the presence of:-

Mukula for Applicant

C/A: Kituva