



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
CRIMINAL CASE NO. 34 OF 2015

REPUBLIC.....PROSECUTION

VERSUS

ANTONY MUGENDI MBUNGU.....1st ACCUSED

TIMOTHY KAMAU DUNCAN.....2nd ACCUSED

RULING

By their notice of motion dated 8th February, the accused persons through their counsel have applied for bail pending their trial on charge of murder contrary to section 204 as read with 203 of the Penal Code (Cap 63) Laws of Kenya. They have brought their application under the provisions of Article 49 (h) and 51 (I) of the 2010 Constitution of Kenya and under sections 356 and 357 of the Criminal Procedure Code (Cap 75) Laws of Kenya.

The state does not oppose their application.

Their application is supported by both accused's supporting affidavits dated 7th January 2016. According to the affidavit of the first accused, he is presumed innocent until proved guilty (paragraph 5). He has also stated that he has high chances of being acquitted of the murder charge against him. Furthermore he has stated that he will abide by the bail/bond terms set by the court if granted bail/bond and will also attend the court as and when required until judgement and sentence passed.

Additionally he has stated that he is charged with a bailable offence in terms of 2010 Kenya Constitution. He also believes that his trial is likely to take a long time before the case is tried and finally determined.

The first accused in support of his application for bail has stated that he is a carpenter and makes Kshs.1,000/= per month. In terms of property, the first accused says he owns a quarter an acre on which he grows bananas. The first accused has also stated that he is married with three children. Finally he says that the deceased was his grandmother.

The evidentiary contents of the affidavit of the second accused from paras 5 to 10 are identical to those of the first accused.

The Applicable Law

According to the 2010 Constitution in Article 49 (1) (h) a person who has been arrested has a right to be

released on bail or bond on reasonable conditions pending a charge or trial unless there are compelling reasons against the release of such person.

It is clear that the right to be released on bail is a constitutionally guaranteed right. It is also clear that all offences are bailable under the 2010 Constitution of Kenya. The Constitution requires that persons who are arrested are released on bail unless there are compelling reasons that militate against their release.

The reasons for this constitutional provision is that every person, who is charged with an offence is constitutionally presumed to be innocent in terms of Article 50 (2) (a) of the 2010 Constitution. It follows from this presumption of innocence that such a person should not lose his freedom lightly.

In considering whether or not a person should be released on bail or bond the court is required to exercise its discretion judicially. A major consideration in matters of bail is whether or not the accused will attend his trial if he is released. Once it is shown that an accused is likely to attend his trial if released on bail, he should be released, unless there are conditions that militate against his release.

Once such militating factor is interference with witnesses. It has long been recognized that an accused who interferes with witnesses does not qualify to be granted bail. In *Panju v R (1973) E.A. 282* the High Court held that where an allegation of interference with witnesses is used as a ground of opposing release on bail, the prosecution must produce evidence. This was the practice under the independence Constitution of 1963. The requirement to produce evidence to support an allegation of interference with witnesses is in principle good law. The reason being that a decision of a court must be based on evidence.

In *R v Joktan Mayende & 4 Others the High Court (at Bungoma) in Criminal Case No. 55 of 2007* the accused person therein was denied bail on the ground of interference with witnesses. That decision was based upon the provisions of Article 49 (1) (b) of the 2010 Constitution.

Furthermore, in terms of section 123 (2) of the Criminal Procedure Code (Cap 75) of the Laws of Kenya, ***“the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.”***

It is important to point out that ***sections 356 and 257 of the Criminal Procedure Code*** do not apply to this case. They apply to situations where the accused has been convicted and applies for bail pending the entering (filing) of appeal to the convicting court in terms of section 356 of the Criminal Procedure Code. After the appeal has been entered (filed) the applicant is then entailed to file an application for bail pending appeal in terms of section 357 of the Criminal Procedure Code.

Evaluation Of The Affidavit Evidence Findings And The Law

I have considered the affidavit evidence of the first accused. I believe and find that the first accused makes 1,000/- shillings per month from his occupation as a carpenter. I also believe and find that he is a married person with three children. Finally, I find that the accused is a person of moderate means in terms of his earning capacity and family status. After considering the circumstances of this case, together with the offence charged, I find that this is a proper case for the release of the first accused person on bail pending his trial on a charge of murder. I also find that there are no factors militating against his release on bail.

I have also considered the affidavit evidence of the second accused. I believe and find that the second accused as a watchman earns Kshs 6,000/- per month. I also believe and find that he is a married person with two children. Finally, I find that the accused is a person of moderate means in terms of his earning capacity and family status. After considering the circumstances of this case, together with the offence charged, I find that this is a proper case for the release of the first accused person on bail pending his trial on a charge of murder. I also find that there are no factors militating against his release on bail.

In the light of the constitutional provisions and the principles set out in the foregoing cases, I find that both the accused persons have met the constitutional threshold for release on bail pending their trial on a

charge of murder.

The upshot of the above is that each accused person is hereby granted bail pending in the sum of Kshs 300,000/- with a surety of a similar amount.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **11TH** day of **FEBRUARY 2016**

In the presence of Mr Onjoro for the state and in the presence of both accused persons and in the absence of their counsel.

Court clerk Njue

J.M BWONWONGA

JUDGE

11.02.16