



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 80 OF 2015

ELIUD SIKUBALI WASIKE.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The Applicant was charged with murder contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on 23rd March 2015 at Malaa Mukengesya sub-location, Koma Location in Matungulu sub-county within Machakos County, he murdered Peres Aloo Anyango. The Applicant pleaded not guilty to the offence. The Applicant subsequently filed an application by way of a Notice of Motion dated 4th February 2016 seeking to be admitted to bail/bond upon such terms and conditions as this Court may deem fair and expedient in the circumstances.

The Applicant urged his grounds for the application in the said Notice of Motion, and a supporting affidavit he swore on 4th February 2016. The grounds are that the Constitution stipulates that he is presumed innocent till the contrary is proved, and that his mere indictment is not a bar to being admitted to bail. Further, that Article 4(1)(h) of the Constitution guarantees his right to be admitted to bail on reasonable conditions pending trial unless there are compelling reasons not to be released. Further, that the Applicant is a family man and has all his relatives and friends within Kenya and is therefore not a flight risk, and there is no evidence by the prosecution to show that he will be a flight risk, or no reason given as to why the Applicant should not be admitted to bail/bond. The applicant in the said pleadings gave an account of the pleadings leading to his arrest and taking of plea.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 1st March 2016 by PC Charles Oduor, a police officer currently attached to KBC Police Station Matungulu, and one of the investigating officers in this criminal case. The deponent stated that the Applicant used to live in Malaa within Machakos County, however that upon his arrest his properties were moved to the police station upon the request of his landlord, and in the presence of the Applicant, and that his relatives have failed to collect them to date. Further, that the Applicant used to operate a spare parts shop at Dagoretti Corner which has remained closed since his arrest, and he therefore has no fixed place of abode.

It was the prosecution's contention that the Applicant if granted bond and absconds, tracing him may not be possible. It was also averred that if the accused person is granted bail he may target the witnesses, including the key witnesses who were his neighbours, as he has been supplied with the witness statements. The prosecution also relied on the bundle of the witness statements which it availed to the Court.

The parties at the hearing of the Applicant's application relied on the pleadings filed. The issue in this

application therefore is whether there are compelling reasons why the Applicant should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons. In **Republic –vs- Danson Ngunya & Another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived of his right to be released on bond, then the State must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

The Prosecution in this regard has argued that the Applicant has no fixed abode, and it will therefore not be possible to trace the Applicant if he absconds after being released on bond. The Applicant did not controvert this averment. However, this is a risk that is addressed by the provision of sureties, who are required to assist in tracing and locating an applicant in the event that such an applicant absconds, and to avail him to Court. Therefore stringent terms as to sureties can adequately mitigate this risk.

As to the ground that the Applicant may interfere with the witnesses who are alleged to have been his neighbors, I find that given that the prosecution stated that that the Applicant has since left his former place of abode and closed his place of business, no physical proximity has been established between the Applicant and said key witnesses, and the possibility of interference with the witnesses has therefore not been shown.

The Applicant's Notice of Motion dated 4th February 2016 is accordingly allowed for the foregoing reasons, and I admit the Applicant to bail pending trial on the following terms:

1. The Applicant shall execute a bond of Kshs. 500,000/= with three sureties of similar sum.
2. The sureties for the Applicant will be approved by the Deputy Registrar of this court.
3. The Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until the case is heard and determined.
4. The Applicant shall be required to attend court for the remainder of the trial without fail.
5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

It is so ordered.

DATED AT MACHAKOS THIS 12th APRIL 2016.

P. NYAMWEYA

JUDGE