



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT GARISSA**

**CRIMINAL CASE NO. 22 OF 2014**

**REPUBLIC ..... PROSECUTOR**

**V E R S U S**

**1. DAVID KASOVU SYENGO ..... 1ST ACCUSED**

**2. STEPHEN KIMANZI KIMWELE ..... 2ND ACCUSED**

**RULING**

Before me is a Notice of Motion brought under Article 49(1)(h) of the Constitution of Kenya 2010 and Section 123(1) of the Criminal Procedure Code Cap 75 (Laws of Kenya). The application has only one prayer - that the Honourable court be pleased to grant (bail/bond) to the two accused persons pending trial.

The application is supported by the affidavit of each of the accused persons, both dated 21st March 2016.

In addition to the two affidavits, learned Counsel for both accused Mr. Nyaga, made oral submissions in court.

Counsel emphasized that under Article 49 of the Constitution of Kenya 2010, bail or bond was availed to capital offenders, unlike the period before the promulgation of the said Constitution. Counsel submitted further that both accused persons were residents of Nguni location in Mwingi District, and were well known to their area Chief and Assistant Chief and had permanent abodes.

Counsel submitted also that both accused persons were under the law presumed to be innocent until proved guilty. According to counsel therefore, they were entitled to the grant bail or bond in order to continue with their normal life activities, until the court decided otherwise in the Judgment.

Counsel stated that the 1<sup>st</sup> accused was a father of a female child aged 4 years and was also a husband. Though the wife operated a small tailoring business, the same could not satisfy the family requirements. Counsel submitted further that the same accused was the first born of his parent in a family of five children, and that he supported his parents and paid school fees for his siblings, since he was a mason.

On the 2<sup>nd</sup> accused, counsel submitted that he was a husband and father of two children who relied on him, and that his wife operated a small hotel which could not sustain the family.

Counsel emphasized that the evidence of the husband of the deceased and two children had already been tendered in the case, and that only the evidence of one child and an uncle remained to be tendered.

In counsel's view, it was unlikely at this stage that any of the accused persons would interfere with the two pending witnesses.

Counsel stated also that the two accused persons were willing to abide by any conditions imposed by the court. Counsel relied on the case of *Aboud Rogo and another -vs- Republic (2011) eKLR*, in which the presumption of innocence was emphasized by the court.

Learned prosecuting counsel Mr. Okemwa opposed the application. Counsel submitted that bail was not an automatic right and was limited by both Article 49 and 24 of the Constitution of Kenya 2010. Counsel emphasized that where there existed compelling reasons, the court was perfectly entitled to deny an accused person bail or bond.

Counsel submitted further that in an application for bail or bond, the court had to consider the seriousness of the offence, whether the case had been partly heard, the weight of the evidence, and whether the accused would interfere with witnesses who had not testified. Ultimately also the court would have to decide whether in all cases the accused would turn up in court for the trial.

According to counsel, this last requirement was crucial in all criminal cases. Counsel relied on the Judiciary Bail and Bond Policy guidelines published in 2015, and stated that the Investigating Officer herein, Mr. Limo had written a letter dated 27th April 2016, stating that the mother of the 2nd accused had passed information that there was a likelihood of interference with witnesses. According to counsel, both accused and the deceased were closely related and already there had even been proposals from the family of the accused persons for negotiation to have the matter withdrawn which had been declined by the husband of the deceased.

Counsel emphasized that the fear of interference with witnesses was real and was a compelling reason for this court to consider and deny the accused persons bail. Counsel lastly stated that because the accused came from the same homestead there was a real danger of interference with witnesses.

Counsel also mentioned apprehension of threats to the husband of the deceased.

In response to the prosecuting counsel's submissions, Mr. Nyaga protested that the letter relied upon by the prosecuting counsel, was an ambush during the canvassing of the application. Counsel stated that as a procedure, documents to be used or relied upon in court should be served in good time on the other side. Counsel submitted that the contents of the said letter were based on conjecture and assumptions against the accused persons. Counsel stated that, with regard to public interest the Constitution provided that bail was a right to every accused person. According to counsel, from the disclosures made by the prosecution there was no basis to deny the two accused persons their entitlement to bail or bond.

I have considered the application and argument on both sides.

This is an application for bail or bond. It was brought under Article 49 of the Constitution of Kenya 2010 as well as section 123 of the Criminal Procedure Code (cap.75). Section 123 of the Criminal Procedure Code deals with the procedure of applying for bail. Article 49 of the Constitution of Kenya 2010 on the other hand, relates to the right to bail or bond of an accused person. In particular Article 49(1)(h) of the Constitution provides as follows:-

***“49(1) an arrested person has a right –***

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***(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”.***

It is clear therefore that for all offences in Kenya, since the promulgation of the Constitution of Kenya in 2010, there is a right to bail or bond to every arrested person whether charged in court or not. The accused herein stand charged with the capital offence of murder.

Prior to the promulgation of the Constitution in 2010, those charged with capital offences were not entitled to bail or bond. However from 2010, all offences in Kenya, be they capital or otherwise became bailable with the proviso that, where there are compelling reasons the court may deny the grant of bail or bond. The Constitution has not defined what constitutes compelling reasons.

Courts have in various cases defined what could constitute compelling reasons, each case depending on its peculiar facts and circumstances. The Judiciary has also published Bond and Bail Policy guidelines in 2015.

In brief various factors are taken into account in determining whether a court may or may not grant bail. Counsel for the accused persons herein has relied on the case of ***Aboud Rogo and Another –vs- Republic (2011) eKLR***. I agree with the reasoning therein. An accused person is presumed innocent until proven guilty.

Courts have also held that the primary burden of providing compelling reasons to the court lies on the shoulders of the prosecution. The list of such compelling reasons is broad and not closed.

In the present case, the prosecution has stated that there is high likelihood of the two accused persons interfering with prosecution witnesses and that in fact attempts had been made by relatives of the two accused persons to negotiate the case out of court. The prosecution has also talked of threats.

It is imperative to note that the husband of the deceased, and two of his children have already tendered their evidence in court. The court has been told that there are two other civilian witnesses, one a child of the deceased and another witness who is an uncle of the children. The prosecution has maintained that because of close family relation between the accused family and the family of the deceased, there could be interference with witnesses.

Considering all the facts placed before me, though it is not necessary for the prosecution to establish its allegations in opposing bail on the basis of affidavits, I do not think that the reason of interference with witnesses can be a good reason to deny the accused persons herein bail. The husband of the deceased has already testified and is alive and well. Two of his children have already testified and their evidence is on record. I do not see the possibility of interference with witnesses.

In my view in the unlikely event of the accused persons attempting to interfere with witnesses, a formal report or complaint can be made to the authorities and the court, for consideration at that point, whether or not to cancel the bond or bail of any of the accused persons.

The prosecution has also mentioned the issue of threats to the deceased's husband by the accused persons. This one in my view is a more serious allegation than that one for interfering with prosecution witnesses.

In my view the prosecution should have given more facts to show that indeed there were threats on the husband of the deceased. The burden of proof in bail application is on the balance of probabilities.

In my view though the two accused and the husband of the deceased are all residents of Nguni area and appear to have been working at Manderla with the husband of the deceased before the incident, the prosecution did not establish on the balance of probabilities that there is a real threat, which could be a compelling reason to deny the accused persons their right to bond or bail. I will thus allow the application of the two accused persons.

Consequently, I allow the application for bail or bond of the two accused persons and order that each of the two accused persons will be released on bail on the following terms:-

1. By executing a personal bond of Kshs 1,000,000/- with one surety of similar amount.
2. Alternatively on payment of cash bail of Kshs 700,000/-.
3. Each of the accused will keep the peace.
4. Each will not interfere with prosecution witnesses.
5. Each will appear in court at every mention and the hearing of the case.

**Dated and delivered at Garissa this 5th day of July 2016.**

**GEORGE DULU**

**JUDGE**