



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL CASE NO. 24 OF 2014**

REPUBLIC ..... PROSECUTOR

VERSUS

MOHAMED SUDI SAID ..... ACUSED

**RULING**

The Notice of Motion Application dated the 24th day of October, 2014 and which is expressed to be brought under article 49(i) (h), article 50(2) (a) of the Constitution seeks to have the Accused **MOHAMED SUDI SAID** admitted to bail.

The grounds are that the Accused pleaded not guilty to the charges and its a cardinal principle of law for the Accused to be presumed innocent until the contrary is proved.

That its the applicants Constitutional right to bail and he has an overwhelming chance of success in his defence and that he has a solid alibi defence.

That although its been alleged that the applicant was arrested on the 14th day of June, 2014 the truth is that he was arrested on 13th June, 2014 and evidence planted on him on 14th June, 2014.

That besides mere suspicions and fears there is no evidence on record that he would abscond if granted bond.

This application for bond is opposed and the grounds are found in the replying affidavit of PC Nicolous Osuri Otieno who depones at paragraph 3 of the affidavit that the Accused is not only facing this murder case but is also facing two other cases to wit, Mombasa Chief Magistrate's Court **Criminal Case No. 148 of 2011** and **1116 of 2014** in which he is charged with offences including;

- i. **Being in possession of a firearm without a licence**
- ii. **Being in possession of articles connected with purposes of training of Terrorists acts contrary to section 30 of the preventive of Terrorism Act.**
- iii. **Being in possession of ammunitions contrary to section 89(i) of the Penal Code”.**

Further it is deponed that the Accused committed the offence of murder and that in Mombasa Chief Magistrate's Court Criminal case No. 1116 of 2011 whilst out on bond in Criminal case No. 148 of 2011.

That given the seriousness of the offences the Accused is facing coupled with the fact that he is

an habitual offender Warrants for him not to be admitted to bail pending trial as the likelihood of committing more and even graver offences is real and chances of absconding are very high.

Counsel for the applicant Mr. Chacha Mwita submit is not a compelling reason to deny him bail. That the Accused is a Kenyan who resides at Mombasa County and has a big family and has no reason to abscond if granted bond.

Counsel has cited the case of ***Job Kenyanya Musoni – Vs- Republic 2012 eKLR*** in which Githua Judge granted bond in a case where the Accused had been charged with robbery with violence and wherein the grounds of objection were that the Accused had jumped bail in another case at Makadara Law Courts and that it was alleged that he had committed the current offence while out on bond in other criminal cases.

He also cited the case of ***Republic –Vs- William Mwangi 2014 eKLR*** in which Githua Judge granted bond to an Accused who had been charged with the offence of murder where the grounds of objection were that the Accused was a flight risk because his place of residence was unknown and his safety would be at risk if released on bond.

It is noted that in both cases there was no replying affidavit sworn by the investigating officer to substantiate the allegations. Counsel for the defence also relies on the High Court case of ***Republic –Vs- Kokonya Muhsin 2013 eKLR*** where Gikonyo Judge granted an Accused bond where the prosecution had objected on the grounds that the Accused had a Ugandan passport, was a frequent traveller to Uganda and had obtained a Kenyan identification card at the age of twenty eight (28) years creating suspicion and wherein the judge had defined compelling reasons as,

***“reasons that are forceful and convincing as to make the Court feel very strongly that the Accused should not be released on bond”.***

In the present case the Accused is charged with murder contrary to section 203 as read with section 204 of the Penal Code.

The particulars of the offence are that:-

***“On the 10th June, 2014 at Manyatta area of Likoni within Mombasa County, he murdered SHEIKH MOHAMED IDRIS MWAMLATSO”.***

It is not in dispute that the Accused faces two other cases in the Chief Magistrates Court Mombasa being criminal case Nos. 148 of 2011 and 116 of 2014.

The charges include inter alia that of;

- I. **Being in possession of a firearm without a license.**
- II. **Being in possession of articles connected with purposes of training of Terrorists contrary to section 30 of the prevention of Terrorism Act.**
- III. **Being in possession of ammunitions contrary to section 89 (I) of the Penal Code.**

It is the contention of the prosecution vide the affidavit of the investigating officer that the Accused committed the offence of murder and the one in Mombasa Chief Magistrate's Court criminal case No. 1116 of 2014 whilst out on bond in criminal case No. 148 of 2011.

Under article 49(i) h of the Constitution,

***“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”.***

Article 49 of the Constitution falls under the chapter titled ***“Bill of rights”***.

There are limitation of rights and fundamental freedoms.

This limitation is recognized under article 19(3) (c) of the Constitution which provides,

***“The rights and fundamental freedoms in the bill of rights are subject only to the limitations contemplated in this Constitution”.***

This contemplation is found under article 24(i) (d) of the Constitution which provides,

***“A right or fundamental freedom in the bill of rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others”.***

The Court is cognizant of the Accused rights under article 50(2) (a) of the Constitution which provides,

***“An Accused person has the right to a fair trial which includes the right***

***(a) To be presumed innocent until the contrary is proved”.***

In deciding whether the prosecution has proved that there are compelling reasons not to grant the Accused bond its incumbent upon the court to inquire and address itself on all the prevailing circumstances surrounding the particular case.

Under the evidence Act section 60(i) (c) it provides,

***“The Courts shall take judicial notice of the following facts.....***

***“(1)All matters of general or local notoriety”.***

It is a fact of common notoriety that towards mid and much of late last year the country was hit by numerous security related problems with epicenters found in the counties of Mombasa, Lamu, Tana River, Mandera and Nairobi.

Most of these attacks bore the hallmarks of Terrorism.

It is with this in mind that the present Government deemed it prudent to legislate on matters of insecurity with the relevant Act still being scrutinized by the Courts.

In the County of Mombasa in particular, its a fact of common notoriety that some Muslim and Christian preachers have fallen as a result of Terrorism related matters.

The Accused in the present case is charged with the murder of one of those fallen preachers.

He also faces in other Courts cases related to Terrorism, being in possession of a firearm without a license, being in possession of articles connected with purposes of training of Terrorists and being in possession of ammunitions.

Granted the Accused has the right to be presumed innocent until the contrary is proved but the Court has a duty to balance the right to be released on a reasonable bond unless there are compelling reasons given and the presumption of innocence with the provisions of article 24(d) of the Constitution, which allows for limitation where,

***“The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and freedoms of others”.***

I do find that the Accused in the present case and other cases before other Courts faces serious charges with grave implications on security.

In the case of **Aboud Rogo Mohamed & Another –Vs- Republic (2012) eKLR.**

The two faced charges of engaging in an organized criminal activity contrary section 3(3) as read with section 4(1) of the prevention of organized crimes Act 2010. It was held that the prosecution had not proved any compelling reasons existed and the application for bond was allowed.

Not many months later the life of the preacher was cut short by a bullet. This was not an isolated incident as there documented others who have been released on bond and met the same fate.

I find there is need to secure the safety of Accused by denying bond.

The offences facing the Accused are very grave and in the peculiar circumstances of this case I am satisfied that there are compelling reasons not to grant him bond. The application for bond at this stage is denied. The right to make another application at a later date is not curtailed.

Ruling delivered dated and signed this **6th** day of **February, 2015.**

**M. MUYA**

**JUDGE**

**6TH FEBRUARY, 2015**

**In the presence of:-**

Mr. Mwaita for the Accused

Mr. Jami for the State

**M. MUYA – JUDGE**

**Court:**

Hearing 24th and 25th March, 2015.

**M. MUYA – JUDGE**

**Court:**

Certified copies of ruling to be furnished with to Defence and the Director of Public Persecution.

**M. MUYA**

**JUDGE**

**6TH FEBRUARY, 2015**