



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL CASE NO. 115 OF 2014

REPUBLIC.....PROSECUTOR

VERSUS

ERASTUS NGURA ODHIAMBO *alias* BABA BILLY.....ACCUSED

RULING

The Accused, Erastus Ngura Odhiambo was charged with **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of the offence were that on the nights of the 11<sup>th</sup> and 12<sup>th</sup> December 2014, at Waihura Court, Buruburu Phase Five Extension within Nairobi County, he murdered Linda Wanjiku Irungu. The Accused pleaded not guilty to the charge when he was arraigned before court. Trial is yet to commence. The accused has made an application seeking to be released on bail pending trial pursuant to **Articles 49(1)(h)** and **50(2)(a)** of the **Constitution**. The application is supported by an affidavit of the Accused. The application is opposed. PC. Charles Muthomi, the investigating officer, in his replying affidavit stated that there were compelling reasons why the Accused should not be released on bail. He stated that the accused intimately known to the witnesses and is therefore likely to interfere with them because the majority of the witnesses are relatives of the deceased. He urged the court to disallow the application.

Oral submissions were made by Mr. Onyango for the Accused and Ms. Mwaniki for the State. The issue for determination is whether the Accused made a case for the court to release him on bail pending trial. The **Constitution** under **Article 49(1)(h)** grants any person charged with a criminal offence the right to be released on bail pending trial unless there are compelling reasons to make the court reach a contrary finding. The **Constitution** does not define what constitutes “**compelling reasons**”. However, courts have rendered decisions that articulate what constitutes compelling reasons and include the following: *the nature of the charge, the seriousness of the punishment, the strength of the prosecution case, the character and antecedents of the accused, the failure of the accused to honour bail terms previously granted, the likelihood that the Accused will fail to attend court during trial, the likelihood of interfering with the witnesses, the need to protect the victim of crime and the accused person, the relationship between the accused and potential witnesses, the age of the accused, the flight risk, whether the accused person is gainfully employed, public order, peace and security imperatives.* (See **ALHAJI MUJAHID DUKUBO-ASARIN Vs. FEDERAL REPUBLIC OF NIGERIA S.C. 20A/2006**). The court will consider these reasons basing on the circumstances of each case and in the interest of justice.

During the hearing of the application, the learned counsel for the Accused stated that there were no compelling reasons not to release the Accused on bail pending trial. The Accused is not a flight risk. He is a holder of a passport and prepared to deposit it with the court. He further stated that there is no cogent reason put forward by the prosecution to support the claim that the Applicant will interfere with the prosecution witnesses. He further stated that the witnesses were under no threat from the Accused. He submitted that knowing the witnesses is not a sufficient ground for not granting bail pending trial. He submitted that the court may impose a condition that the Accused should not reside in the same locality with the witnesses. No allegations have been made that the Accused will jeopardize the security of the community. He reiterated that the Accused will attend court without fail and abide by any terms that may be imposed by court.

The prosecution opposed the application by relying on **Article 49(1)(h)** of the **Constitution** and the

replying affidavit of PC. Charles Muthomi. The prosecution states that there is a likelihood that the Accused will interfere with the witnesses since he knows all the witnesses. The State further argued that if the accused is released on bail pending trial, it will traumatize them. She stated that the accused prevented the family of the deceased from taking her to the hospital soon after the assault. He had also threatened to kill the deceased prior to eventually killing her. She further stated that the Accused ought to remain in remand custody until the said witnesses testified. She stated that the offence is serious in nature. She urged the court should balance the right of the Accused and that of the deceased.

This court has evaluated the facts of this application. It is of the view of the court that the prosecution has established compelling reasons for this court to deny the Accused bail pending trial. The prosecution opposed the application on ground that the Accused will interfere with the prosecution witnesses who are mostly relatives of the deceased and if released on bail it will traumatize them. The Accused resides in the same locality with the witnesses. The relationship between the one of the potential witness and the Accused is one of master-servant, the accused is therefore likely to intimidate or influence him. The allegation that Accused prevented the family of the deceased from taking the deceased to the hospital after the shooting incident shows that the accused is likely to intimidate the witnesses if released on bail pending trial. The nature of the offence is a serious one and attracts a serious punishment; the Accused is likely to abscond. The prosecution has produced viable evidence in support of compelling reasons.

In the present application, I decline to grant the Applicant's application to be granted bail pending trial. He shall remain in custody until the said witnesses have testified in the trial against him.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF FEBRUARY 2015.**

**L. KIMARU**

**JUDGE**