



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

**AT NAIROBI**

**CRIMINAL CASE NO. 69 OF 2015**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ONESMUS MUTUKU MWOLOLO.....ACCUSED**

**RULING**

Onesmus Mutuku Mwololo, the accused, is charged with murder contrary to section 203 read with section 204 of the Penal Code. The particulars of the offence state that on the night of 1<sup>st</sup> February 2014 at Kayaba slums within Nairobi County murdered Paul Mwanzia. He has denied the offence and the case has been set down to hearing on 15<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> February 2016.

The accused has, through his defence counsel Mr. Swaka, approached this court seeking to be admitted to bail pending the hearing and determination of this case. He has filed a Notice of Motion dated 4<sup>th</sup> August 2015 and a supporting affidavit sworn by the accused on the same date. The accused has based his application on Article 49 (1) (h) of the Constitution of Kenya 2010 and all other enabling provisions of the law.

In his supporting affidavit the accused has deposed that the offence of murder is bailable under the law unless compelling reasons have been advanced; that he has an unqualified constitutional right under Article 49 (1) (h) of the Constitution to be admitted to bail on reasonable conditions and that no compelling reasons have been advanced by the prosecution; that he has an unqualified constitutional right under Article 50 (2) (a) of the Constitution to be presumed innocent until proof to the contrary; that he will not abscond or interfere with witnesses; that he is a Kenyan citizen who at all material times has resided in Kenya and therefore he is not a flight risk.

Mr. Swaka made brief oral submissions in lines of the grounds advanced in support of the application. The accused relied on the following cases:

- i. **Samuel Macharia Njagi HCCR 50 of 2013**
- ii. **R. v. Rolex Waita Mukunzu [2012] eKLR**
- iii. **R. v. Shelly Kavila Nzomo [2012] eKLR**
- iv. **R. v, Julius Mutemi Kamotho [2012] eKLR**

**v. R. v. Lawrence Sebastian Lorunyei & 6 Others [2012] eKLR**

The prosecution counsel Ms Macharia opposed the application. She relied on the replying affidavit of CPL Stephen Kiogora the investigating officer dated 14<sup>th</sup> August 2015. CPL Kiogora deposes that the accused committed the offence on 1<sup>st</sup> February 2014 and went into hiding until the time of his arrest in Machakos on 5<sup>th</sup> July 2015; that the accused is a flight risk and likely to abscond if released on bond and that he has details and contacts of the witnesses and therefore there is high possibility of inflicting fear on them.

Before determining this application I wish to point out that it erroneously states that the accused has been convicted of murder and that he is applying for bail pending the hearing and determination of his Appeal which has high chances of success! This mix-up of issues escaped the defence counsel, the prosecution and even the court at the time the application was being canvassed. Since the defence counsel did not submit on the issue of conviction or a pending appeal I understand this as an error on the part of the person who prepared the application. I am of the view that the application is victim to ‘cut-and-paste’ style of preparing documents. That notwithstanding this court will proceed to determine the application for bail pending trial on its merit.

To my understanding, the prosecution is raising two major issues in opposing this application, namely that the accused is a flight risk and that he will interfere with witnesses. To support those two points the prosecution asserts that the accused went into hiding after committing the offence and secondly that he knows who the prosecution witnesses are and may interfere with them.

Counsel for the accused responded to the allegation that the accused had fled after committing the offence by submitting that the accused has his rural home in Machakos and he had gone there to visit his relatives.

I have considered this application, the supporting affidavit, the replying affidavit and the opposing oral submissions by both counsels. I have also considered the authorities cited by the accused in support of this application. I wish to state that each case must be considered on its own unique circumstances and that no two cases are similar. I hold the view that the fear that the accused may interfere with witnesses is not supported by evidence and shall remain just that. If it is true that the accused committed this offence (and I say ‘if’ because evidence is yet to be adduced and its veracity tested to prove this) he must have known the people who were present at the time and one year is long enough for anyone interested in covering their tracks to do so. In my view, allegations that he may interfere with witnesses are not supported by evidence to compel this court to deny the accused bail.

I have however considered that the accused was arrested over one year later at Machakos and that he did not address this issue in his affidavit. While the accused remains an accused until evidence that he committed this offence has been adduced and its veracity tested this court harbours doubts as to whether the accused will attend court when required to do so. The paramount consideration in granting or not granting bail in my view still remains whether the accused will attend court for hearing until this case is heard and determined.

In my considered view therefore, I find that I have been persuaded that the accused, based on his previous action, may be a flight risk. Consequently, his application for bail is denied. He shall remain in custody pending the hearing and determination of this case. It is so ordered.

**Dated, signed and delivered in open court this 15<sup>th</sup> October 2015.**

**S.N. MUTUKU**

**JUDGE**

**In the presence of:**

Ms the prosecution counsel

Mr. Anambo for Mr. Swaka for the accused person

Mr. Onesmus Mutuku Mwololo accused person

Mr. Daniel Ngumbi, Court Clerk