



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 44 OF 2014

JOSEPH ONYANGO OCHIENG.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The application before me seeks orders that the accused one Joseph Onyango Ochieng be released on bail pending trial. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He was first arraigned in court for plea on 12<sup>th</sup> May, 2014. It is alleged that on the 18<sup>th</sup> May 2014 at Dandora Phase IV in Njiru District within Nairobi County murdered one Benson Oluoch. His application is founded on the grounds that the accused was charged with murder and is in custody; that he was the sole bread winner for his family, that the court has jurisdiction to admit him to bail and bond terms; and that there are no compelling reasons why the accused should not be admitted to bail.
2. The accused has sworn a replying affidavit in which he avers inter alia that he was arrested at his home in Dandora where he resided with his wife, that **Article 49 of the Constitution** entitles him to bail save where there exist compelling reasons; that he was innocent of the crime accused of; that his siblings Jane Atieno Ouma and Bernard Owuor Ochieng both of Nairobi would stand surety for him; that he will attend court diligently; and that he would not interfere with witnesses.
3. **PC Jeremiah Oganga** of Dandora Police Station and an investigating officer in the case has sworn an affidavit in support of the State's opposition to the application. The said affidavit was sworn on 15<sup>th</sup> September 2015 and filed the following day. He avers *inter alia* that although **Article 49(i) h of the Constitution** grants the accused the right to bail, the right is not absolute but subject to the court's judicious discretion; that the applicant has been charged with a very serious offence of murder and the likelihood of absconding was highly likely; that the accused and the prosecution witnesses reside in Dandora Phase IV and there was likelihood of interference with such witnesses.
4. **Mr. Gachau**, learned counsel urged the application for the accused. He submitted that there were no compelling reasons why the applicant should be denied bail. According to him, the accused was innocent until proven guilty. With respect to the averments in the replying affidavit of the investigating officer, counsel submitted that there was no demonstration that the accused would interfere with witnesses if released. In his submission, it was not enough for the prosecution to merely allege. In response to the prosecution counsel's submission that witnesses were in fear, counsel raised an objection that the allegation had not been deponed upon by the investigating officer and was merely an unsupported statement from the bar.
5. **Mr. Okeyo** learned prosecution counsel urged the court not to release the accused. He submitted that the seven witnesses in the case resided in the same flat with the accused. He singled out 3 female witnesses as having expressed fear. He urged the court to consider the circumstances of the

- case and exercise discretion to deny the accused bail.
6. The Constitutional basis of the application is not disputed. **Article 49 (i) h of the Constitution** grants an accused person the right to bail unless there are compelling reasons. The duty to demonstrate the existence of compelling reason is upon the State. See **R. V. Danson Mgunya & Kassim Shebwana Mohammed, Mombasa Criminal Case No. 26 of 2008**. Further in determining the existence of otherwise of compelling reasons, the court must carefully consider the circumstances of each case and exercise discretion judiciously. In **Republic V.Ezekiel Momanyi Onsongo & 2 others, Nairobi Criminal Case No. 67 of 2015**, Lesiit J. held, and I agree, that *“whether or not the prosecution demonstrates the existence or otherwise of compelling reasons, the court must satisfy itself, that there exist no compelling reasons to warrant the withholding of an accused person right to enjoyment of bail, by examining all the facts presented before it and the circumstances of the case. Each case must be determined on the basis of its unique facts and circumstances”*
  7. In the present case the primary reason argued by the State for denial of bail is that the accused person and all the civilian witnesses reside in a flat in Dandora Phase IV where the incident leading to the death of the deceased occurred. I have looked at the statements given to the police by the prospective prosecution witnesses. The address indicated for each is Dandora Phase IV. From my perusal of the statements it is correct to state that the accused, the deceased and the witnesses resided in the same block of flats where the incident took place. Under those circumstances I am inclined to believe that the release of the applicant will instill real fear in the witnesses. Such fear would ultimately affect the trial in this case.
  8. In the premises I find that in the circumstances of this case, it would not serve the interests of justice to grant the applicant bail. His application is thus rejected.

Orders accordingly.

**Ruling delivered, dated and signed at Nairobi this 11th day of November, 2015**

**R. LAGAT - KORIR**

**JUDGE**

In the presence of:

.....Court clerk

.....Applicant/Accused

..... For the Applicant/Accused

.....For the State