



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO. 58 OF 2013

REPUBLIC.....PROSECUTOR

-VERSUS -

PAUL ODERO NGUKA..... ACCUSED

RULING

This is an application dated 23rd July 2013 seeking for orders of bail pending disposal of this case. Mr. Olando argued the application on behalf of the applicant Paul Odero Nguka.

The grounds supported the application are that bail is a **Constitutional** right under **Article 49(1)(h)** for an accused awaiting trial. In the supporting affidavit, the applicant depones that he is not a flight risk and will be ready to abide with any conditions given by the court. He states that even after the demise of the deceased, he did not abscond and continued working until he was arrested five years later. He worked as a signal operator with the Kenya Armed Forces at Kahawa Barracks Nairobi before he was arrested and has a history of an obedient servant. He says he values his job which is his only source of livelihood. It is not his intention to interfere with witnesses.

The State opposed the application on grounds that the accused has a history of escaping arrest by police. When he learnt that police were looking for him, he deserted duty at Kahawa Garrison. The police had to seek assistance of the military police who assisted in arresting him. The deceased was living with accused as his wife and they had two children. The wife was killed while the daughter went missing and is still missing todate. The State is convinced that the applicant is a flight risk and should not be granted bail.

The right to bail under **Article 49(1)(h)** is dependent on whether the prosecution proves that there exists compelling reasons for the court to deny bail. The primary consideration for the court in an application of this nature is whether the accused is likely to turn up for trial. The seriousness of the offence and the severity of the sentence are relevant in imposing bail conditions but should not be used to deny the accused person bail. This reasoning is supported by **Article 50(2)(a)** which presumes the accused person innocent till proven guilty.

The allegations that the applicant is a flight risk are denied by the defence in the oral response by the counsel but not on oath. The applicant had the opportunity to file a further affidavit to counter the

allegations. However, the court has perused the investigation covering report which confirms that the police had a lot of difficulty in arresting the applicant. When he came to know that he was wanted by the police, he deserted duty and went to stay with colleagues in various stations outside Nairobi. This fact places him in the category of persons who are not likely to comply with bond conditions.

The court requested for a pre-bail report which was filed in court on 23rd January 2014. The report was prepared after an interview with the close family members of the applicant and that of the deceased. It reveals that his own parent and siblings are not keen to have the accused released on bond. He is said to be very reserved and hardly keeps contacts with the family. He has settled away from his family in Suba. Members of the family were non-committal and did not want to take responsibility on cooperating with the relevant authorities to ensure the applicant attends the trial. The chief of the area and the family of the deceased expressed concern that the daughter of the accused went missing without trace while in his custody and that the applicant has not been cleared of involvement in an existing case pending before Eldoret Children's officer no.180 of 2007. Further information from the report was that the sister of the deceased one Judith who has been pursuing the case of the missing child had been threatened with harm by the applicant. The person is said to be a witness in this case. There is a great probability that if the applicant is released on bond, he could use the opportunity to pursue the sister of the deceased and interfere with her as a voluntary witness in this case.

In the supporting affidavit, the applicant depones that he cannot abscond because he does not want to lose his job with the Armed Forces which is his only source of livelihood. The probation officer obtained information that the accused was dismissed from the Force in June 2013 as a result of disciplinary proceedings where he was charged with deserting duty.

Information given to the Probation Officer by the applicant that he owns a hardware shop in Gwasssi South location in Suba was found to be untrue. The correct position is that he sold the business long ago. The pre-bail report confirms that the applicant is not an honest nor a reliable character and is a great flight risk.

For the above reasons, I find that the prosecution have demonstrated that the applicant is a flight risk and that if released on bail is not likely to attend trial. Attending trial by the applicant is a primary concern in a bail application and I hold the view that it is a compelling reason not to release the accused on bail.

I decline to allow this application.

F. N. MUCHEMI

JUDGE

Ruling delivered in open court on the 12th day of March 2014 in the presence of the applicant, his counsel Mr. Olando and the State Counsel Ms Onunga for Magoma.

F. N. MUCHEMI

JUDGE