



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII
CRIMINAL CASE NO.124 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

EVANS CHARLES MEKENYE.....ACCUSED

RULING

1. The accused herein Evans Charles Mekenye has moved this court under the provisions of **Article 49 (1) (h)** of the **Constitution** seeking to be released on bail/bond pending hearing and determination of his murder trial. The particulars of the charges the accused is facing are that on the 12th day of November 2013 at Munianku sub location in Gucha South District within Kisii County in the Republic of Kenya jointly with others not before court murdered Keziah Monchari Okengo. He denied the charge.

2. Article 49 (1) (h) of the Constitution provides for release on bail/bond of any arrested person unless there are any compelling reasons not to be so released. Prior to the promulgation of the **2010 Constitution**, persons charged with murder and other offences which attracted a death penalty on conviction could not be released on bail/bond. The **2010 Constitution** is thus a paradigm shift from the repealed Constitution as concerns matters of bond/bail.

3. The first known case of an application for bail pending trial in a murder charge was **Republic -vs- Taiko Kitende Muinya – Nairobi High Court Criminal case No.65 of 2010** (unreported). In the case, the High Court stated that under the Constitution and as of 27th August 2010, there was no longer a category of offences characterized as non-bailable, but went on to say that the right of an accused person to be released on bail although a constitutional right was not absolute and that:-

“--- the court may decline to release him in appropriate cases and the appropriateness or otherwise is no longer pre-determined by statute as was the case before the promulgation of the new constitution when all persons charged with offences attracting death sentences could not be granted bail or bond pending trial.”

4. In **Nganga -vs- Republic [1985] KLR 951** Chesoni J (as he was then) stated that in exercising discretion to grant bail to an accused person under the Constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors. He said:-

“Admittedly, admission to bail is a Constitutional right of an accused person. If he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions generally in principle, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that -

- a) **The accused will fail to turn up at his trial or to surrender to custody; or**
- b) **The accused may commit further offences; or**
- c) **He will obstruct the course of justice.”**

5. In the instant case, the State filed an affidavit dated 14th November 2013 and sworn by No.59928 Police Constable Job Kipyegon in which he avers at paragraph 3 thereof that as investigating officer in this case, he has no compelling reasons why the accused should be denied bail/bond. PC Kipyegon is stationed at Nyamaiya police station.

6. The court also called for a Bail Assessment Report which was prepared by James N. Ooma, a Probation Officer within Gucha District. The report was filed in court on 28th April 2010. From the Bail Assessment Report, the court is informed that the accused has never been

charged in a court of law except with the current offence; there are relatives of the accused who are ready and willing to stand as sureties using their land title deeds and accused is not regarded as a flight risk if he is released on bond as he has a fixed abode with a stable family.

7. In his recommendation that accused be released on bond, Mr. Ooma states that the accused person is a family man with 4 children, he has a favourable home report for him to be released on bond as he is not considered a risk to the community, his family has promised to look for friends and relatives who can stand as sureties if the accused will be granted bond and his father has land security in case the land value will not be enough to be used as security.

8. After considering all the relevant parameters and circumstances of this case and relevant case law as cited above, I am satisfied that there are no compelling reasons why the accused person herein may not be released on bond. The application is therefore allowed on the following terms:-

1. *Accused may be released on his own bond of Kshs.1,000,000/= (Kenya Shillings One Million) with 2 sureties of like amount.*
2. *The sureties shall be approved by the deputy Registrar of this court.*
3. *Once he is released, the accused shall attend court once every thirty (30) days for mention of his case until the case is heard and determined or until further orders of this court.*
4. *In default of (3) above the bond shall stand cancelled forthwith and sureties put to account.*
5. *Mention on 08/08/2014.*

Dated and delivered at Kisii this 9th day of July, 2014

R.N. SITATI

JUDGE.

Mr. Majale (present) for State

Mr. S.M. Sagwe (present) for Accused

Mr. Bibu - Court Assistant