



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL CASE NO.101 OF 2013

REPUBLICPROSECUTOR

VERSUS

MILTON BOSIRE OBURI..... ACCUSED

RULING

1. Milton Bosire Oburi hereinafter referred to as the applicant made an oral application to be released on bail pending the hearing of the case. The application was anchored in **Article 49 (1) (h)** of the **Constitution**.
2. The above application was opposed vide an affidavit dated 15th May 2014 sworn by No.67867 PC Alfred Nasio, one of the investigating officers in this case on grounds, inter *alia*, that: the applicant was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**; that if the applicant is released on bail, his own life will be in danger as the situation on the ground is volatile as after commission of the offence, the community is hostile against applicant and he will not be received well. In addition PC Nasio averred that the accused, if convicted upon trial, would suffer a maximum sentence of death as provided by the law.
3. Furthermore, the deponent averred that in view of the severity of the sentence and all the above circumstances taken into consideration, it was his view that the temptation to abscond or to go into hiding if released on bail pending trial is real.
4. Apart from the affidavit against the application, the court asked for Bail Assessment Report on the applicant. The report was filed in court on 18th June 2014. It is indicated in the report that the applicant suffers from TB, he interacts well with the community and the general view of the community is favourable as they still consider the applicant innocent. They pray that the applicant be granted favourable bond terms because they understand that it is his constitutional right to be released on bond.
5. Furthermore, the report reveals that the applicant has promised to obey the court at all times and respect bail terms if granted the opportunity, he has also promised to avail himself wherever required, his parents and siblings have promised to avail the accused person before court on all the appointments if he is granted bail. In addition, the parents and relatives of the applicant are willing to deposit land title deeds as a security to enable him conduct the case from outside. The area chief informed the Probation Officer that the accused is not a threat to the community and that his life is not in any danger. The applicant is recommended for bond subject to the court's discretion.
6. At this juncture, a brief history of what brought about this application would be necessary. The state charged the applicant with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. It was alleged that on the 21st day of September, 2013 at

- Upbridge village in Kisii Central District within Kisii County with others not before court, the applicant murdered Taberious Okemwa Ombuna. The applicant initially took plea on 23rd October 2013 when a plea of not guilty was reached. However a medical examination was conducted to check the applicant's mental status. The report dated 10th October 2013 revealed that applicant was not fit to stand trial.
7. Consequently, the plea earlier taken was cancelled and the applicant was taken to Kisii Level 5 for psychiatric treatment. Afterwards on 8th May 2014 on establishing that accused had been going for psychiatric treatment, another medical report was produced revealing that accused could now stand trial when the plea was taken afresh on 23rd October 2013 the applicant pleaded not guilty to the charge. He is awaiting trial.
 8. Prior to the promulgation of the Constitution on the 27th August 2010, the law then prohibited the grant of bail/bond to accused persons facing capital offences. This was provided for in **Section 75 (5) of the Repealed Constitution** as well as **Section 123 of the Criminal Procedure Code**. All this however changed with the coming into force of the new constitution. Under the new **Constitution, Article 49 (1) (h)** permits release of any arrested person including persons charged with capital offence on bail/bond pending trial, unless there are compelling reasons not to do so. Thus those charged with capital offence are now on similar footing with those charged with non capital offence when it comes to bail. Such persons are entitled to bail bond as a matter of right which right can only be restricted or taken away by court if there are compelling reasons.
 9. In the case of **Republic -vs- David Nyasora Nyamongo – Criminal case No.50 of 2010** (unreported) Makhandia J stated:-

“At the end of the day however whether or not an accused should be admitted to bail is largely a matter of discretion of the court to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again, the court must bear in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to be released on bail.”

10. Therefore in accordance with the wording of **Article 49** and being persuaded by the holding in the **Nyamongo case** (supra) what the plea court should consider in any application for bail/bond is whether there are any compelling reasons as to why the accused should not be awarded bail.
11. **In the case of Republic -vs- Danson Ngunya & another [2010] e KLR, the Court adopting the reasoning in M. Lunyizu -vs- Republic (MSCA Appeal No.4 of 1995** the learned Judge stated:-

“..... In my judgment the practice should rather be to require the state to prove to the satisfaction of the court that in the circumstances of the case, the interest of justice requires the accused be deprived of his right to be released from detention. The burden should be on the state and not on the accused. He who alleges must prove. That is what we have always upheld in our courts. If the state wants the accused to be detained pending his trial, then it is up to the state to prove when the court should make such an order”

12. I agree with the above sentiments. The question that now arises is whether there are any compelling reasons why the applicant herein should not be released on bail/bond pending trial.
13. When the application came before me for hearing on 25th June 2014, Mr. Kaburi for the applicant submitted on paragraph 3 of the replying affidavit that no evidence had been attached to show that the accused's life is in danger; that if there were such threats, the probation officer who visited the scene would have noted the same. He urged the court to ignore the affidavit and release the accused person on bond.
14. I have carefully studied the affidavit sworn by the state as well as the probation officer's report.

Upon perusal of the affidavit and upon consideration of the law as stated under **Article 49 (1) (h)** and the authorities cited above, I make the following findings:-

- *Apart from the allegation at paragraph 3 of the investigating officer's affidavit contending that the applicant's community is hostile against him, the probation officer's report seems to counter this assertion by the state. The probation report indicates that the accused is a person who associates well with his community. His chief has vouched for him as a good member on his community and the community itself does not even term the accused as guilty of the offence but sees him as innocent unless otherwise he is found guilty, the accused's people are willing to stand surety for him, in case this court allows him to attend his trial on bond.*

15. I am therefore satisfied that the state has not given any compelling reasons why the court cannot release the applicant on bond pending his trial. I accordingly allow applicant's application for bond on the following conditions:-

1. *Applicant shall be released on a bond of Kshs.2,000,000/= (Two Million) with two sureties of the same amount, to be approved by the Deputy Registrar of this honourable court.*
2. *Applicant shall present himself before the Deputy Registrar Kisii High Court once every 30 days for the mention of his case, the first such mention shall be on 04/08/2014, until the case is heard and determined or until further orders of this court.*
3. *If applicant breaches any of the above conditions his bond shall be cancelled forthwith and the sureties called to account.*

Orders accordingly

Dated, signed and delivered at Kisii this 03rd day of July, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Majale for State

Mr. S.M. Sagwe h/b for Kaburi for Accused persons

Mr. Bibu - Court Assistant