



REPUBLIC OF KENYA

High Court at Meru

Criminal Miscellaneous Application 79 of 2008

REPUBLIC .....PROSECUTOR

VERSUS

GERALD MWENDA KAILEMIA .....ACCUSED

RULING

This is an application for bail pending trial brought orally by counsel for the accused under Article 49 (1) (h) and Article 50 (2)(a) of the constitution. Under Article 49 (1)(h) **“an accused person has a right to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”**

Mr. Otieno Advocate urged the application on behalf of the accused. He urged that the accused person is a young citizen with a bright future and that he had a permanent abode in Muthara Location, Meru County. Mr. Otieno assured the court that the accused had given him an undertaking that he would religiously attend the court whenever needed if his application is granted.

Mr. Mungai opposed this application on behalf of the State. In his brief submissions Mr. Mungai stated that the investigating officers of the case I.P Murao and P.C. Nyaga had indicated to him that there was still animosity between the families of the deceased and the family of the accused and that until the situation on the ground improves bond should not be granted.

I had an occasion to call for the pre-bail report by the probation department which was filed on 18<sup>th</sup> January 2013. In that report the probation officer MS Muchiri gives a brief family background of the accused. In that background shows that the accused is 26 years and is the 5<sup>th</sup> born of seven children. She points out that the family is polygamous and has unsolved land problems. She also sets out the facts that the economic status of the family is low considering that the accused and all his siblings are primary school drop outs on account of lack of fees and that the entire family lives on one acre piece of land without title.

The Probation Officer has also set out brief summary of the altitude of the deceased family to the accused being released on bond. The probation officer concluded that the family was against the accused being release bond and that they threatened the life of the accused if bond was granted. The Probation Officer has also pointed out that the members of the Community had warned that threats especially coming from the father of the deceased should not be taken easily as he was known for witchcraft activities.

I have considered the application by the Accused. The Constitution 2010 gives an accused person a right to be released on bond/bail pending his trial. The only condition given under the Constitution why bail should be denied are compelling reasons. Compelling reasons have not been defined under the Constitution. Mr. Mungai for the State has opposed bail on the ground that there was animosity between the family of deceased and the accused and on that ground he urged that the application should be denied for now. The State Counsel’s submissions that there was animosity between the two families concerned is well substantiated in the Probation Officer’s report. That report shows that the accused life could be in danger if he was released on bond because of bitterness that the father of the deceased avers against him.

Neither the accused nor his counsel has denied that animosity exists between the two families, neither has the accused person denied that the father of the deceased is extremely bitter against him on account of the

death of his son.

I have considered the application and the arguments by both sides. The accused person is facing a charge of murder contrary to section 203 of the Penal Code. He was arraigned in court on 27<sup>th</sup> January, 2009. That is four years ago for one reason or another this case has never proceeded to hearing. The witnesses have come on two occasions. The delay is attributable to both sides. I have considered that the accused is 26 years old and that as the law provides he should be regarded as innocent until proved guilty. This is a serious offence but it is now bailable under the new Constitution. The reason advanced why bail should not be granted is a threat by the father of the deceased to kill the deceased. The report by the probation officer shows that apart from the father of the deceased the community where the accused and the deceased come from are not opposed to the accused being produced on bail. I do not think that one person should hold everybody else at ransom. It is a compelling reason that just because one person has threatened to harm the accused he should be denied bail. For this reason and given the fact that the accused is a young person, that he has been in custody for the last four years awaiting his trial and given the fact that he suffered an illness while in custody which led to the loss of use of one eye I find the accused suitable to be considered for bail.

In the result I will allow the accused application and grant him bail in the following terms:

- 1. The accused should deposit a cash bail of Ksh.30,000/-.**
- 2. In addition the accused should sign bond in the sum of Ksh. 100,000/- with one surety of like sum.**
- 3. The surety will be examined by the Deputy Registrar of this court.**

**DATED, SIGNED AND DELIVERED AT MERU THIS 7<sup>th</sup> DAY OF MARCH, 2013.**

**LESIT, J.**

**JUDGE**