



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 59 OF 2010

REPUBLICPROSECUTOR

VERSUS

ALFONCE KYALO MUTHOKA.....ACCUSED

RULING

1. The application dated 27th February 2013 by way of Notice of Motion is brought pursuant to provisions of Section 123(3), 124 of the Criminal Procedure Code, Article 49(h) of the Constitution of Kenya, 2010 and all enabling provisions of the law.
2. It seeks an order releasing the applicant on bail pending trial.
3. It is premised on grounds that the applicant is willing to abide with bail terms that will be set by the court; the applicant is a resident of Lubwa Location, Muumandu sub-location Machakos; he is of good conduct and very responsible, it is his constitutional right to be released on bond.
4. In reply thereto No. **70516 Cpl Luka Wako** deponed an affidavit opposing the application.
5. He stated that the accused having been supplied with witness statements was aware of the prosecution witnesses and the weight of evidence to be tendered. The prosecution witnesses being family members, his release on bail posed a security threat to them.
6. In his submission **Mr. Mutinda Kimeu** counsel for the accused stated that if released the accused would attend court. Relying on the case of **Republic versus Danson Ngunya & Another Criminal Case No. 26 of 2008** he said that the criteria of granting an accused bail was his intended availability during trial.
7. Learned Counsel **Mr. Mwangi** for the State opposing the application stated that there were compelling reasons warranting the accused being denied bail. Having been charged with murder of his daughter he would interfere with the witness, a mother to the deceased. He also stated that the accused had been charged with attempted suicide hence it was risky for him to be out on bail. There was no guarantee that he would attend court.
8. The accused is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code (Cap 63), Laws of Kenya. On the 7th November, 2012, the accused offered to plead to a lesser charge of manslaughter. The issue was considered by the State. On the 17th January, 2013 the State declined to accept the offer. It is however the accused's right to be released on bail unless there are compelling reasons requiring him to be incarcerated pending trial.
9. As correctly pointed out the paramount consideration in bail application is whether the accused will turn up for trial (*see Watoro versus Republic [1990] KLR 220*).
10. The Supreme Court of Nigeria set out essential criteria on the issue whether or not to grant bail in the case of **Alhaji Mujahid Dukubo – Asari -versus Federal republic of Nigeria. S.C. ZOA/2006** where Justice Ibrahim Mohammed J.S.C stated thus ;-

“...When it comes to the issue of whether to grant or refuse bail pending trial of an accused by the trial court, the law has set out some criteria which the court shall consider in the exercise of its judicial discretion to arrive at a decision. These criteria have been well articulated in several decisions of this court. Such criteria include among others, the following:-

0. *The nature of the charges.*
 0. *The strength of the evidence which supports the charge.*
 0. *The gravity of the punishment in the event of conviction.*
 0. *The previous criminal record of the accused.*
 0. *The probability that the accused may not surrender himself for trial.*
 0. *The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.*
 0. *The likelihood of further charges being brought against the accused.*
 0. *The probability of guilty.*
 0. *Detention for the protection of the accused*
 0. *The necessity to procure medical or social report pending final disposal of the case.*
- 11.Guided by the said case, it is obvious that if found guilty of murder the accused shall be sentenced to death. The offence is indeed grave.
- 12.The accused herein is said to be the father to the deceased and the husband to the witness who will testify, a mother to the deceased. He had offered to plead to the lesser charge of manslaughter which is an indication that the probability of being convicted may be high.
- 13.Being released on bail means he has to go back to his home in Lumbwa where he will resume cohabitation with the mother of the deceased who is a witness. Chances will be he will interfere with her. The evidence to be tendered against him will definitely be suppressed.
- 14.As per the records with the Director of Public Prosecutions Office, the accused ought to be charged with the offence of attempted suicide. He therefore needs to be monitored closely. Being in detention under the protection of the Prisons Department will be for his benefit.
- 15.Following the circumstances of the case, I find that there are compelling reasons necessitating denial of bail in respect of the accused person at this stage.
- 16.However, as the case progresses and evidence is tendered by key witnesses, application for bail may be renewed.
- 17.In the premises, the application for bail stands dismissed.
- 18.It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 6TH day of JUNE, 2013.

L.N. MUTENDE

JUDGE