



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE 41 OF 2011

REPUBLIC.....RESPONDENT

VERSUS

GALMA ABAGARO SHANO.....APPLICANT

RULING

Galma Abagaro Shano is charged with the murder of Mohammed Halkano Duba. The particulars of the charge are that he committed the offence on 5th May 2011 at Gatina Village, Kawangware Nairobi County. He was arraigned in court on 23rd May 2011. He pleaded not guilty and was remanded in custody.

The accused has now applied to be released on bail pending trial. He states in his application dated 10th May 2013 *inter alia* that the offence with which he is charged is bailable; that he is a law abiding citizen and ordinarily resident in Kawangware; that he will not interfere with witnesses; that he will attend his trial; that he will abide by any conditions imposed by the court; and, will not interfere with the investigations, witnesses or the trial. He also avers that he is a father of two young children and that his family risks being rendered destitute by his incarceration.

In a further supporting affidavit filed in response to the Replying affidavit of **PC Daniel Nderitu** the applicant avers that the primary consideration in his application is whether or not he will attend trial. He refutes the averment that he faces danger from the deceased's family if released or that he will interfere in any way with witnesses.

The application is opposed by the State vide the Replying Affidavit of **PC Daniel Nderitu** and the submissions of **Ms Ikol** the prosecuting counsel. From both the averments in the Replying Affidavit and the submissions, it is apparent that the State opposes the application for three reasons namely:-

- i. that the applicant made an admission in his statement under inquiry that he found the deceased in bed with his wife and attacked him causing his death;
- ii. that there was a likelihood of revenge attacks if the applicant is released;
- iii. that there was real likelihood of interference with witnesses.

On the issue of interference with witnesses, **Ms Ikol** submits that one key witness who was close to the accused has to date disappeared without trace and that all the witnesses live in the same locality with the accused and were therefore likely to be influenced by the accused if released.

Article 49 (i) (h) of the Constitution gives the right to bail to an arrested person pending trial. An accused may however be denied bail where there are compelling reasons. Where the State asks the court to deny an applicant bail, it must demonstrate to the satisfaction of the court the existence of the compelling reasons envisaged by **Article 49 (i) h**.

The duty of the State to bring forth the compelling reasons has been eloquently set out by **Ibrahim J.** (as he then was) in **Republic Vs Danson Mgunya and Kassim Sheebwa Mohammed, Mombasa Criminal Case No. 26 of 2008**. In all cases however, the court is given discretion to grant or not to grant bail depending on the facts and circumstances, touch and context of each case.

In the present case, it is the stated fear of the State that the release of the applicant may cause the witnesses to fear to testify. It has been submitted that the civilian witnesses lived in the same plot with both the accused and deceased. It has been demonstrated that one key witness who was a neighbour to the accused and lived with the deceased has disappeared. These are circumstances which make it unsafe to release the applicant. I am persuaded that there is likelihood of interference.

I am not however convinced that the applicant would face any danger or revenge attacks from the deceased's family as indicated by the Prosecution State. He has averred in his supplementary affidavit that he faces no such danger.

Having carefully considered the facts and circumstances of this case, I am persuaded not to grant the applicant bail at this stage. He is at liberty to renew his application once the key witnesses have testified.

The application is dismissed.

Ruling delivered, dated and signed at Nairobi this 2nd day of October, 2013

R. LAGAT - KORIR

JUDGE

In the presence of:

.....: Court clerk

.....: Applicant

.....: For the applicant

.....: For the State/respondent