



**REPUBLIC OF KENYA**

**High Court at Nyeri**

**Criminal Case 35 of 2011**

**REPUBLIC .....PROSECUTOR**

**versus**

**JOSHUA NDIRANGU NDERITU.....1ST ACCUSED**

**PETER KARIUKI NDERITU.....2ND ACCUSED**

**RULING**

The application before the court is a notice of motion brought under Article 49(1)(h) of the Constitution of Kenya for an order that the Applicant/Accused be admitted on bond pending the hearing of his case.

It is supported by the affidavit of Mr. Njuguna Kimani advocate on record where he deponed that plea in the matter was taken on 7th February 2012.

That a total of fifteen (15) witnesses have already recorded their statement and that the same supplied to him as counsel on record and there are no compelling reasons to deny the applicant bond pending the trial.

The application is opposed by the state through the replying affidavit sworn by pc. PHILIP LODUPAI wherein he stated that the deceased was last seen in the company of the accused on 5th November 2011 and on the morning of 6th November 2011 the deceased clothes a jacket, and a cap were found in the accused persons compound and he took possession of them claiming to know that they belonged to the deceased whose body was on 7th November 2011 found dumped in his family's arrow root farm.

That there is a likelihood of interference with witnesses by the accused person if released on bail as the witnesses are family members of the deceased. (Emphasis added,) and that it is believed that the accused person is likely to abscond if released on bail and there is no guarantee that he will surrender for trial in future.

It should be noted that the accused person faces a charge of murder contrary to section 203 of the Penal Code and before the constitution of Kenya 2010 the same was not bailable.

Article 49(1)b) of the said Constitution now provides as follows:

***“49(1) An accused person has a right (b) to be released on bond or bail on reasonable conditions pending a charge or a trial unless there are compelling reasons not to be released.*”**

This provision now makes it clear that a suspect is to be released on bond pending trial unless the court finds that there are compelling reasons not to be released. It is for the prosecution to provide the said compelling reasons. It should be noted that the jurisprudent that is now emerging from the criminal divisions of the High Court in Kenya is that the whereas it is largely the discretion of the trial court to determine the issue of whether or not to release the accused person the following guidelines should be noted:

- a) *The nature of the charge*
- b) *The strength of evidence supporting the charge*
- c) *The gravity of the punishment.*
- d) *Whether or not the accused person is a high flight risk.*

See **REPUBLIC vs NDIKIRA MUUMBA KIZUNDU and ANOTHER MOMBASA HIGH COURT CRIMINAL CASE NO. 23 OF 2004** Whereas the applicant herein is facing an offence of murder of which one of the sentence available is death, I have heard the submissions by both counsels here and looked at the affidavit in opposition to the bail application and have noted that the state has failed to provide any compelling evidence for not granting the applicant bail pending hearing. I agree with the applicant that the alleged witnesses who are likely to be interfered with are relatives of the deceased whose interest would be for justice to be met out and might not be willing to play ball with the accused person.

I have also taken judicial notice of the fact that getting dates for trial in our court has been next to impossible and therefore the applicant might have to stay longer in remand before the case is heard and determined as submitted by Mr. Kimani.

The state has not provided any proof that the applicant is a flight risk and therefore in the absence of any compelling evidence to enable me deny he applicant his constitutional right I allow the application herein and grant the applicant bond of Kenya shillings one million (Ksh.1,000,000/-) with one surety of similar amount. In the alternative the same may be released on cash bail of Kenya shillings five Hundred thousand (Ksh. 500,000/=).

Dated and delivered at Nyeri this 1st day of October 2012.

**J. WAKIAGA**

**JUDGE**

Read in open court in the presence of Miss Kitoto for the State and Mr. Kimani for the accused.

**J. WAKIAGA**

**JUDGE**