Bail; applicant charged with robbery with violence contrary to section 296(2) of the Penal Code, Cap 63; criteria to be considered in relation to "compelling reasons" under Article 49 of the Constitution; if court entitled to infer from material before it whether there are compelling reasons to deny bail; duty of the Applicant to be candid.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CRIMINAL MISC. APPLICATION NO. 15 OF 2010

KENNETH KIPKORIR KIRUI ……APPLICANT

VERSUS

REPUBLIC ……..RESPONDENT

RULING

The Applicant, **KENNETH KIPKORIR KIRUI** has sought bail pending his trial in Criminal Case No. 814 of 2010 at Sotik Principal Magistrate Court. He has rightly invoked **Article 49** of the **Constitution of Kenya** as the basis of his application and in his affidavit sworn on 9th December, 2010 he has averred that he will not interfere with witnesses or be involved in any destruction of evidence if he is released on bail. He claims to be asthmatic but has not offered any evidence to show this. He has not shown where he comes from or where he resides or what he does for a living. The application is also silent on his personal particulars and one cannot after perusing it tell from what area of the country he comes from.

When the application came up for hearing before me, **Mr. J.M. Motanya,** learned counsel for the Applicant, submitted that the Applicant is charged with others in the aforementioned criminal case with the offence of robbery with violence contrary to **section 296(2)** of the **Penal Code** which carries death sentence upon conviction. He based his client's application on **Article 49** of theConstitution and on the Applicant's affidavit. He cited authorities and in particular the case of **R. V. DANSON MGUNYA & KASSIM SHEEBWANA MOHAMMED** (MSA H.C. CRIMINAL CASE NO. 26 OF 2008) in which the Hon. Mr. Justice Mohammed K. Ibrahim on 15th October, 2010 granted bail to the accused who were facing a murder charge in the case which had progressed considerably and only three witnesses were remaining to be called before the prosecution closed its case. These were a police officer, a doctor, and the investigating officer. The learned judge reviewed local authorities and authorities from common law jurisdictions. I have found his judgment illuminating and extremely useful while dealing with bail generally and in particular in capital offences.

It is axiomatic that the new Constitution has made bail a constitutional right and that the right to bail is only subject to existence of compelling reasons not to grant bail. In effect, bail is grantable in respect of all criminal offences including capital offences subject to the absence of compelling reasons not to release

an accused on bail. The court is enjoined where bail is granted to give reasonable bail conditions lest the right to bail is defeated by unreasonableness of bail terms.

The burden of proving that there are compelling reasons not to grant bail reposes on the prosecution. But does this mean that all that an Applicant needs to do is to stand up and demand bail without giving particulars as to who he is, where he comes from, his occupation or profession, his employer, if any, his residence, who knows him, his nationality, his origin, the offence alleged against him etc. By furnishing these particulars in his application, the burden is not shifted to the Applicant to show that there are no compelling reasons not to grant him bail. Rather, the Applicant, in doing so, is merely giving a basis for his application to enable the court to exercise its discretion to grant him bail. If after furnishing such particulars, the prosecution does not show that there are compelling reasons, and if the court is satisfied from the material before it that there are no compelling reasons, the court must release the accused on bail. A finding by the court that the accused will not turn up for his trial constitutes a compelling reason (within the meaning of **Article 49** of the Constitution) to deny bail. The court can infer this from the material before it.

The overriding criterion in bail applications is always whether the accused shall turn up for his trial. Where, therefore, there is concealment of any matter which may adversely influence the outcome of bail, the court will be disinclined to grant bail. It is therefore necessary for anyone desirous of being admitted to bail to be candid and to state in his/her application all such matters as are relevant and within his/her knowledge.

The fact that the prosecution may not show that there are compelling reasons for the Applicant to be released on bail does not mean that the court is obligated to grant bail. If the court discerns from the application or material before it that the Applicant has not disclosed relevant facts touching on the issue of bail which are within the Applicant's knowledge or that the Applicant has distorted or misrepresented facts, the court may infer dishonesty on the Applicant's part and conclude that it is risky to admit Applicant to bail and in so doing find existence of compelling reason not to grant bail not least because the court's primary duty is to do justice in accordance with the law. One must not lose sight of the fact that an Applicant who does not turn up for his trial after getting bail subverts justice. It is not in pubic interest to allow subversion of justice. Although the burden of proving that there are compelling reasons not to release an accused on bail reposes on the prosecution, the court can, and is entitled, if there is material before it to establish this, to make a finding that there are compelling reasons not to release an accused person on bail. The notion that all that an accused person needs to do is stand up and request bail as a constitutional right without more and that it is up to the prosecution to show compelling reasons is not entirely true. The enjoyment of fundamental rights and freedoms is subject to the rights of others and in matters of crime in society, the right to bail must be enjoyed subject to the interest of justice which means in effect that what is in the best interest of society must be balanced with the individual right of the accused as to bail. This is why the criteria such as are alluded to in the case of **R. V. JOSHUA KIBET CHERUIYOT** (Kericho H.C. Cr. Case No. 6 of 2010) regarding what constitutes *"compelling reasons"* focus, *inter alia,* on whether the accused will subvert the course of justice if released on bail by not turning up for his trial or by tampering with evidence or interfering with witnesses.

In the present application, the Applicant has not furnished a copy of the charge sheet to show the particulars that constitute the offence. But no matter. He is charged under **section 296(2)** of the **Penal Code** which carries, on conviction, death sentence as aforesaid. He does not say where he comes from e.g. his village, location, or district. He does not indicate what he does for a living or where he can be found. He does not indicate whether he is a farmer, a businessman or a pubic servant nor does he state where he normally resides, or his age and whether he is a married man or not. All he says is that his father, John Kipkirui Kitur, is ready to stand surety to him. In effect, the application is devoid of important material facts within the Applicant's knowledge without which the court may not be able to gauge whether the Applicant is a person who is likely to abscond if released on bail.

The fact that he has kept such matters away from the court can only lead the court to infer that if they had been stated, they probably would have been adverse to the Applicant. Indeed, under **section 111** of the **Evidence Act, Cap 80**, an accused person assumes the burden of proving any fact especially within his

knowledge. But once the accused person has placed sufficient material before the court about himself which are relevant on the issue of bail, unless the prosecution shows that there are compelling reasons not to grant bail, the court must admit the accused to bail on reasonable conditions. But where, as here, the accused does not do so, the court may infer that it is risky to grant bail. The fact that he may jump bail is a criterion or factor that constitutes a compelling reason why the accused should not be granted bail.

In this application, the Applicant has not disclosed vital matters that are within his knowledge which bear on the issue of whether the accused will turn up to stand his trial if released on bail. It is clear in this application that there are compelling reasons not to grant bail. The application fails. It is dismissed. Bail is denied.

DATED at **KERICHO** this 2ND day of March, 2011

G.B.M. KARIUKI,sc
RESIDENT JUDGE

ADVOCATES
Mr. J.M. Motanya advocate for the Applicant
Mr. P. Kiprop, State Counsel for the Republic
Court Clerk – Mr. Koech