



NO.258

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CRIMINAL MURDER NO.68 OF 2011

STATE PROSECUTOR

VERSUS

AMOS OMONDI AREGO ACCUSED

RULING

1. The accused herein, **Amos Omondi Arego**, is charged with murder contrary to **section 203** as read with **section 204** of the **Penal Code**. It is alleged that he murdered **Calnix Ouma Adero** on the 4th July 2011 at Nyachebe Beach, Kasgunga Sub Location, Gembe West Location in Mbita District of Homa Bay County in the Republic of Kenya. He denied the charge. He now wants this honourable court to release him on bond pending the hearing and determination of his case.

2. Mr. Omonde Kisera, counsel for the accused relied on the provisions of **Article 49 (1) (h)** of the **Constitution of Kenya** in trying to persuade the court to grant bond to the accused. Mr. Kisera argued

that the provisions of **section 123** of the **Criminal Procedure Code** are now null and void in view of the Constitutional provisions which make murder a bailable offence. Reliance was placed on Kisii High Court Criminal Murder Case No.56 of 2010 in which Honourable Makhandia, J. granted bail to the accused pending trial.

3. For some reason that the state counsel could not explain, there was no response to the application, in spite of being afforded an opportunity on more than one occasion to do so. This therefore means that the accused's application was unopposed.

4. The success or failure of this application turns on what this court makes of the provisions of **Article 149 1) (h)** of the **Constitution**. Under the said provisions, an accused person has a right to be released on bond or bail, on reasonable conditions pending a trial unless there are compelling reasons not to be released. The state has the duty to show to the court that there are **NO.258** compelling reasons why the accused in this case cannot be released on bond. In times gone by, and more specifically before the promulgation of the Constitution of Kenya on 27th August 2010, the offence of murder was not bailable. Today, bail is a constitutional right, so that the provisions of **section 123** of the **Criminal Procedure Code** have been rendered subject to the Constitutional provisions although the Criminal Procedure Code is yet to be amended to bring it in line with the new constitutional dispensation. I can safely say that **section 123** of the **Criminal Procedure Code** is inconsistent with the Constitution of Kenya to the extent that it forbids bail to a person who is arrested on allegations of having committed the offence of murder.

5. As stated earlier, the burden is on the prosecution to make a strong case as to why bail/bond should be denied to an accused person, and if the state had responded to this application, it would have given the **NO.258** court an opportunity to gauge how the interests of the accused can be weighed against the interests of for example the family of the deceased and the society at large. For there is no doubt that as much as the rights of an accused must be protected, the rights of the family of the deceased who have lost a loved one must also be considered in equal measure, for every right has a corresponding obligation.

6. In the present case, if the accused is eventually found guilty and convicted, he will be sentenced to suffer death as by law established. With this in mind, it may be that once the accused is released on bond, he will want to abscond in order to avoid the hangman's noose. This is why, even in the absence of a statement from the State, this court has to weigh the competing interests in this case, namely those of the accused vis-à-vis those of the larger society and to determine whether greater good would result if the accused is released or if he is **NO.258** not released. Another factor to consider is whether the accused is likely to interfere with witnesses if he is released on bond. What about the accused's own safety" Will he be safe mingling with people who may feel hurt because of what they believe the accused has done" Will the victims want to revenge by lynching" These are some of the issues that must occupy the mind of the court as it seeks to protect the rights of the accused person, remembering that victims of crime have rights too.

7. The purpose of granting bail is to secure the attendance of the accused in court from the safety of his own home environment. In the instant case, this court has not had the benefit of hearing about the other side of the accused's application from the state. In his submissions, Mr. Kisera said little, only mentioning that the accused was ready and willing to abide by any conditions that may be imposed by this court. **NO.258**

8. In the circumstances, I find that the prosecution has not shown that there are compelling reasons why the accused's application should not be granted. Accordingly, I allow the application and order that the accused is to be released on his own personal bond of Kshs.1,000,000/= with two sureties of similar amounts to be approved by the Deputy Registrar of this court. Upon his release, the accused shall attend court for the mention of his case once a month until the case is heard and determined. The first such mention shall be on the 1st day of December 2010.

9. It is so ordered.

Ruling dated and delivered at Kisii this 1st day of November, 2011

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. Omonde Kisera (present) for Accused

Mr. Gitonga (present) for State

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.



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