



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CRIMINAL CASE NO 94 OF 2014

REPUBLIC.....DPP

VERSUS

MUSA KINYUA Alias OBTU..... ACCUSED

RULING

1. **Musa Kinyua** (*the accused person herein*) who was charged with the offence of murder contrary to **Section 203 as read with section 204 of the Penal Code** has applied to be released on bail pending the hearing of the case.
2. The prosecution filed an affidavit sworn by the Investigating Officer **No. 112769 PC Ken Mutethia** deposing that the accused person and the family of the deceased come from the same area and if the accused is released he may interfere with or intimidate the witnesses.
3. He deposed further that the incident is still fresh in the minds of the family of the deceased and that the community wanted to lynch him. According to him, releasing the accused would endanger the lives of the community members.
4. The deponent stated that bail, although it as a constitutional right is not absolute right. He therefore urged the court to find that there are compelling reasons to deny the accused person bail as he may interfere or intimidate prosecution witnesses.
5. Article 49(1)(h) of the Constitution provides that:-

“An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.”

6. Accordingly, the accused person may be denied bail where there are compelling reasons. Nevertheless, the burden of proving compelling reasons is on the prosecution.
7. In **JOKTAN MAYENDE & 3 OTHERS V R BUNGOMA HCCRC NO. 55 OF 2009** where the Court stated that:

“The phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond. Bail should not therefore be denied on flimsy grounds but on real and cogent grounds that meet the high standard set by the constitution.”

8. In considering whether compelling reasons exist, important considerations as stated in the case of **REPUBLIC v MGUNYA & ANOTHER** include: -
 - i. **The nature of charge.**
 - ii. **The strength of the evidence which supports the charge.**
 - iii. **The gravity of the punishment in the event of conviction.**
 - iv. **The previous criminal record of the accused if any.**
 - v. **The probability that the accused may not surrender himself for trial.**

- vi. **The likelihood of the accused interfering with witnesses or that he may suppress any evidence such as incriminating him.**
- vii. **Likelihood of further charges being brought against the accused.**
- viii. **The probability of a finding of guilt.**
- ix. **Detention for the protection of the accused.**
- x. **The necessity to procure a medical or social report pending the disposal of the case.**
- xi. **Accused persons own safety, security and protection – REPUBLIC V KIMUNYA.**
- xii. **If the accused person is likely to pose public danger by being released on bail.**
- xiii. **If by releasing the accused on bail public confidence in the administration of justice will be dismissed.**
- xiv. **The character antecedents, associations and community ties of the accused person.**

9. Applying the above test of the law, the investigations officer's averments are to the effect that:

- i. *The accused and the victim family come from the same area, thus, possibility of interference or intimidation of witnesses;*
- ii. *The community members wanted to lynch him and that releasing him would put their lives in danger; and*
- iii. *The incident is still fresh in the minds of the victim family.*

10. These averments are serious and required apt substantiation. They were however left at very high level of generalization.

11. The allegation on the possibility of the accused interfering with witnesses was not supported by evidence. Succinct evidence is needed to show actual or perceived threat to interfere with witnesses. Or show that particular witnesses are in or of such vulnerability as to infer possibility of interference or intimidation by the accused, say, children or parents or spouses or employees of the accused. It was upon the prosecution to tender in evidence to convince the court that the accused was likely to interfere with witnesses as was stated by Justice Korir in **REPUBLIC v DWIGHT SAGARAY & 4 OTHERS [2013] eKLR, High Court Criminal Case No. 61 of 2012 Milimani** thus:-

“For the prosecution to succeed in persuading the court on this criteria, it must place material before the court which demonstrate actual or perceived interference. It must show the court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the accused and witnesses; close familial relationship between the accused and witnesses among others. ... at least some facts must be placed before the court, otherwise it is asking the court to speculate.”

12. Accordingly, I find that on a balance of probabilities there exists no compelling reasons that justify the denial of bail in this case.

13. The purpose of bail is to allow the accused to enjoy his liberty whilst ensuring he attends the trial. There is nothing to show that the accused will not attend court.

14. However, in determining reasonable terms, it is imperative to consider that the accused is charged with the offence of murder where which carries the maximum sentence of death. I also do note that the accused and the victim family come from the same area. I do not also wish to downplay the security risk to the accused as well as the members of the public. Accordingly, I order that the accused be released on a cash bail of Kshs. 100,000 or a personal bond of Kshs. 200,000 with one surety of like amount. Further, the accused should not make or have any contacts with the prosecution witnesses or potential prosecution witnesses, or engage in any act or acts that tend to interfere with or intimidate prosecution witnesses or potential prosecution witnesses. Should he breach any of these terms his bond is liable to cancellation by the court. It is so ordered.

Dated, signed and delivered at Narok through Teams Application this 23rd day November 2020

F. GIKONYO

JUDGE