



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 12 OF 2019

REPUBLIC.....RESPONDENT

VERSUS

JAMES MUTINDA NDAVI.....1ST APPLICANT

SAMUEL MUINDI MUISYO.....2ND APPLICANT

DANIEL WAMBUA NDEE.....3RD APPLICANT

RULING

1. By notice of motions dated 29th April, 2019 and 8th May, 2019 indicated as being brought under Section 124 of the Criminal Procedure Code Act, Article 20, 21(1), 22(3) & (4), 49(1), (h), 50(2) and 259 of the Constitution, counsel for the applicants sought to move the court to grant the applicants bail pending the hearing of this matter. The applicants request that the Honorable Court grant them bail pending the hearing and determination of the case in that the offence of murder is bailable under article 49(1)(h) of the Constitution; that the applicants have a constitutional right to be released on bond/bail; that the applicants have a right to be presumed innocent. The applicants in their respective notices of motion also state that the witness statements reveal that the cause of death of the deceased person was due to mob justice and that they undertake to avail themselves to court as and when required, to abide by the conditions as set by the court for grant of bond/bail pending the hearing of the matter and not to interfere with the witnesses and any investigation in the matter.

2. The State opposed the application vide a replying affidavit that was deponed on 13th May, 2019 by No. 74786, Pc Timothy Sweta. The deponent averred that the accused persons are charged with murder and that the safety of the eye witnesses to wit; Jackson Kithome Ndunge, Paul Mwinyoo Kituku and Samuel Kithaka may not be guaranteed if the accused persons are granted bond before the conclusion of the matter. The deponent averred that the 3rd accused person holds a position of influence being the area assistant chief of Mbee Sub location, Kathiani Location, Kathiani Sub-County and that granting him bond may raise apprehension on the part of the victims and the witnesses. He averred that the release of the accused persons may make it difficult to arrest another suspect who is still at large. He averred that the grant of bail is a matter of discretion that is subject to compelling reasons and was subject to compelling reasons adduced by the prosecution.

3. The counsel for the applicants orally submitted in support of the application that the applicants be released on bond pending the trial and cited the provisions of Articles 50(2) and 159 of the Constitution. Counsel for the state in opposition to the application submitted that there are compelling reasons why the accused persons ought not to be released on bail as elicited on the replying affidavit and emphasized that there is likelihood of interference with the investigations and urged this court to reject the application. In rejoinder, counsel for the applicants submitted that the witness statements vindicate the accused persons who are innocent until proven guilty who ought to be released on bond.

4. The issue for determination is whether the court can grant the orders sought.

5. According to the charge sheet, the applicants were jointly charged with one count of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The applicants' case is that they are entitled to bail pending trial and that Article 49(1)(h) of the Constitution safeguards this right to bond or bail pending trial.

6. It is important to point out that grant of bail and bond is an exercise of discretion by a trial court. The Bail and Bond Policy guidelines of the Judiciary has proposed that the court may request for a bail report where it considers that it does not have sufficient information to make a fair and appropriate bail decision.

7. The Guidelines recommend that officers of the probation and aftercare service should prepare reports as soon as practicable but not later than two weeks from date of request. The argument has been that there is need to balance the grant of bail with the needs of the victims.

8. In this regard, this court had due regard to the replying affidavit on record that raised apprehensiveness of the prosecution towards the grant of bail to the accused persons in that the circumstances raised therein necessitate the court to make an informed decision as to whether

or not it is fair to grant or to refuse bail.

9. In the circumstances foregoing, having considered the application, it was the considered opinion of this court that officers of the probation and aftercare service should prepare reports in respect of each accused person to enable the court to make an informed decision. Accordingly, this court hereby stays the decision until the said report is availed to the court.

10. In view of the foregoing observations, I make the following orders:

a. The County Probation officer is directed to prepare a report and file the same by 4th June, 2019

b. The matter shall be mentioned on 4th June, 2019 for further orders

It is so ordered.

Dated and Delivered at **Machakos** this **28th** day of **May, 2019**.

D.K. KEMEI

JUDGE