



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 34 OF 2018**

**IN THE MATTER OF ARTICLE 49 AND ARTICLE 50 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 123 OF THE CRIMINAL PROCEDURE CODE**

**THE STATE.....PROSECUTOR**

**VERSUS**

**ALPHONCE MUTHINI.....ACCUSED**

**RULING**

1. By chamber summons dated 9<sup>th</sup> April, 2019 indicated as being brought under Article 21(1), 49(1) (h) of the Constitution counsel for the applicant sought to move the court to grant the applicant bail pending the trial herein. The applicant requests that the Honorable Court grant him bail pending the hearing and determination of the case because he has a constitutional right to be released on bond/bail; that he undertakes to avail himself 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 case and he believes no compelling reasons which would work against his release on bail or bond because investigations have already been completed.

2. The State opposed the application vide a replying affidavit that was deponed on 9<sup>th</sup> May, 2019 by No. 72450, Cpl Kennedy Cheramboss. The deponent averred that the accused person was arrested in Taita Taveta and yet the offence was committed in Machakos therefore the accused's person's conduct after the commission of the offence creates an apprehension that he may abscond from the jurisdiction of the court if granted bond. The deponent averred that the safety of the accused in his community may not be guaranteed because the community members are still bitter with him and further that the accused is likely to interfere with the key witnesses. He averred that the grant of bail is a matter of discretion that is subject to compelling reasons adduced by the prosecution.

3. The counsel for the applicants orally submitted in support of the application that there is no report by any village elder that the life of the accused may be in danger. 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 court to deny the application. Learned counsel for the state maintained that the villagers burnt down accused's house and hence his security is at stake and that the bond be denied for his own security.

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

5. According to the charge sheet, the applicant was 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 he is entitled to bail pending trial and 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 at page 25 to 26 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, including the following instances:

- a. *Where there is doubt on the information on the accused person relating to the grant of bail; or*
- b. *Where the prosecution objects to bail, with plausible reasons; or*
- c. *Where the accused person has been granted bail but fails to meet bail terms and seeks review of those terms; or*

d. Where the victim of the crime contests the grant of bail or applies for review of bail conditions; or,

e. On the court's own motion where it deems necessary.

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 apprehension on the part of the prosecution towards the grant of bail to the accused persons for 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 is the considered opinion of this court that officers of the probation and aftercare service should prepare a report in respect of the accused person to enable the court make an informed decision. Accordingly, this court hereby stays the decision until the said report is availed to the court.

10. In the result the following orders are made namely:

*a. The County Probation officer is directed to prepare a report and file the same in court.*

*b. The matter shall be mentioned in two weeks for further orders.*

It is so ordered.

**Dated and delivered at Machakos this 27<sup>th</sup> day of June, 2019.**

**D.K. KEMEI**

**JUDGE**