



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 14 OF 2019
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

PKP alias K.....1ST ACCUSED

BEATRICE KIAMBI KALII.....2ND ACCUSED

TIMOTHY DAUDI MULI.....3RD ACCUSED

MBUVI KILUNDO alias PAPA.....4TH ACCUSED

RULING

1. By a notice of motion dated 16th May, 2019 indicated as being brought under Article 49(1)(h) of the Constitution counsels for the applicants sought to move the court to grant the applicants bail pending the hearing and determination of this matter. The applicants request that the Honorable Court grant them bail pending the hearing and determination of the case because the 2nd and 3rd accused are husband and wife with five children who are minors and require their parents and they have two aged parents who depend on them; and that the 1st accused is a single mother who has three children and that she is not at flight risk. 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 they seek that the application be allowed.
2. The State opposed the application vide a replying affidavit that was sworn on 27th May, 2019 by 63424, Pc Isaac Tunoi. The deponent averred that after the commission of the offence, the members of the public wanted to lynch the 1st accused who took off in her vehicle to an unknown location and after her arrest her property was destroyed and that she is an influential business person who is likely to interfere with some of the other eye witnesses. The deponent 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 1st accused orally submitted in support of the application that denial of bond will make the 1st accused suffer as a single parent. Counsel for the 2nd and 3rd accused submitted that the replying affidavit by the investigating officer only relates to the 1st accused and hence the 2nd and 3rd accused ought to be released on bond. There were no submissions on the part of the 4th accused. 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 indicated by the fact that the accused persons property was destroyed which is an indication of anger by the community and emphasized that there is need for a probation report so that the ruling in respect of the application do take it into consideration.
4. The pre-bail reports were duly availed and are dated 25th July 2019. 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 bond for the reasons stated in the respective affidavits and

submissions by their learned counsels.

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. In this regard, the officers of the probation and aftercare service department at Machakos have prepared reports in respect of the accused persons to enable the court make an informed decision. The said reports are quite comprehensive.

8. In the said report, the Probation Officer found that the 1st accused is a 57 year old mother of grown children and that the family was hesitant to secure bond terms for her but a nephew agreed to use his logbook. According to the report, the 1st accused's family members are willing to accommodate her at her Wamuyu home because the community members are still bitter and swore not to have her back in the community by all means. The local administration fear for her safety in the community and the community members are still baying for her blood. The 1st accused is reported to be HIV positive and suffering from ulcers.

9. According to the report the 2nd accused dropped out of school due to lack of school fees and that the family indicated readiness to secure bond for her. The community did not have any negative reports about her character and the administration is not opposed to her being granted bail. She is a 32 year old mother of five children who attend school.

10. The report indicated that the 3rd accused is a 47 year old man who divorced his first wife and was engaged to the 2nd accused. The family members are willing to secure his bond and described him as a person of good character. The local administration cannot guarantee his security for they fear that community members may turn on him though they noted that he has a fixed place of abode and that at Wamunyu area the local administration noted that the 3rd accused poses no risk to anyone in the area.

11. According to the report, the 4th accused dropped out of school due to poor grades. An interview with him indicated that he had low mental capacity and that his father is ready to secure bond for him using the family title deed though there is no indication that they had any other property to secure his release on bond. Community members are not bitter with him due to his mental status.

12. Mercifully, the persons with a clean bill of health are the 4th accused and the 2nd accused. According to the said report, the community have no hard feelings towards them.

13. The 1st and 3rd accused have negative reports. However the places that they intend to relocate to seem to be rather safe for them. However the said report creates a fearful environment for the 1st accused as the community members are still bitter with her and are still baying for her blood. Her relatives intend to relocate her to Wamunyu area and undertake to ensure that she does not set foot in the village.

14. On his part **Miss Mboya**, learned counsel for the 1st accused submitted that the 1st accused is ready and willing to abide by the bond terms while the prosecution counsel submitted that the 1st accused's life is in danger from the wrath of the villagers.

15. I have considered the circumstances in which the offence was committed and the effect on the family of the deceased and the community. I have also considered the Probation Officer's Report as well as the oral mitigation made before me as well as the position adopted by **Mr. Machogu**, the learned prosecution counsel. As stated above, and as posited by **Ms Mboya**, the Probation Report is not of much assistance as regards the 1st accused person's safety after release. While the attitude of the victim's family is understandable, her incarceration may have a negative effect on her health and her advocate has guaranteed her willingness to abide by the bond terms to be imposed by the court. It transpired that the 1st accused's property was vandalized and destroyed after the incident and she has had to lodge complaints with the police while in custody. It would be fair and just that she be released on bond pending trial so as to enable her follow up on her complaint.

16. Taking into account all the circumstances of this case, I see no reason to deny the accused persons bail. However this only relates to the 1st, 2nd and 3rd accused persons as the 4th accused is yet to take plea due to issues regarding his mental status. The said 4th accused's circumstances will be addressed afterwards and he shall in the meantime remain in custody pending further orders. In the premises I hereby grant bond to the 1st, 2nd and 3rd accused persons on the following terms:

- i. Each of the 1st, 2nd and 3rd accused persons be released on a bond of Kshs. 1,000,000/= plus one surety of a similar amount.**
- ii. That the sureties shall be approved by the Deputy Registrar of this court.**
- iii. That the accused persons must attend all mentions and hearing dates as may be fixed from time to time during the**

pendency of this case or when required by the court unless such attendance is dispensed with by the court.

iv. That the accused persons should refrain from contacting or in any way interfering with the witnesses in this matter, failing to which the bail and/or bond will be cancelled and they together with their sureties called to account.

It is so ordered.

Dated and delivered at Machakos this 1st day of August, 2019.

D.K. Kemei

Judge