



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 8 OF 2018

(CONSOLIDATED WITH)

CRIMINAL CASE NO. 32 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

MARTIN MUTUNGA NDINDA.....1ST ACCUSED

JOSEPH WAMBUA MANYOLE.....2ND ACCUSED

JAMES NZAU KITAVI alias KITOKO.....3RD ACCUSED

RULING

1. By chamber summons dated 3RD June, 2019 and 10th April, 2019 indicated as being brought under Article 49(1) (h) of the Constitution and Section 124 of the Criminal Procedure Code. Counsels for the accused persons respectively 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 accused is not at flight risk and that there is no evidence connecting him with the offence. As for the 1st and 3rd accused it is claimed that they are low income earners and cannot interfere with the prosecution witnesses or the investigations. 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 deponed on 9th May, 2019 by Cpl Kennedy Cheramboss. The deponent averred that after the commission of the offence on the night of 12th and 13th February, 2018, the 1st accused was arrested on 13.2.2018, the 2nd accused on 17.2.2018 and the 3rd accused on 6.11.2018, and based on the conduct of the same after the commission of the offence, he was apprehensive that they were all flight risks. The deponent averred that there is one suspect who is at large and he feared that their release may make it difficult to arrest him. He averred that there are 2 witnesses who reside in the same village as the accused and that the accused are likely to interfere with investigations. He averred that the grant of bail is a matter of discretion that is subject to considering compelling reasons adduced by the prosecution.

3. The counsel for the 1st and 3rd accused submitted that that bail is a constitutional right and that the accused are innocent until proved guilty. He further submitted that the accused will adhere to the bond terms. Learned counsel for the 2nd accused submitted in support of the application that the 2nd accused ought to be released on bond and relied on the case of **Grace Kananu Namulo v R (2019) eKLR**. 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 there are witnesses yet to testify and there is apprehension that they may be interfered with, however the denial may be revised after the two witnesses have testified.

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 bond for the reasons stated in the respective affidavits.

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 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 affidavits on record that raised apprehension of the prosecution towards the grant of bail to the accused, there is need for an independent angle to the matter to enable 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 reports in respect of the accused persons 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:

- a. The County Probation officer is directed to prepare a pre-bail 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 30th day of September, 2019.

D. K. Kemei

Judge