



**REPUBLIC OF KENYA**

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

**HIGH COURT CRIMINAL CASE NO. 7 OF 2016**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**CHRISTOPHER MULEI MUTUA.....ACCUSED**

**RULING ON BAIL**

1. The accused was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**, the particulars of which was that on the 13<sup>th</sup>/14<sup>th</sup> day of January, 2016 at Pipeline Area in Embakasi within Nairobi County murdered **JACINTA NDINDA MUTUA** in count one and **JOY MUENI** in count two.

2. He pleaded not guilty to the charges and by an application dated 1/02/2016 moved the court to be admitted to bail pending trial and by a Ruling dated 19<sup>th</sup> May 2016 the court declined to release the Applicant on bond and held as follows:-

***“Given the close relationship between the accused person and the possible prosecution witnesses, it is clear to me that if released on bond the accused will be in contact with the said witnesses either physically or emotionally and having taken into account the provisions of Section 10(1) (b) of the Victims Protection Act 2014 I am satisfied that there are adequate compelling reasons advanced by the State to enable the court deny the accused person his right to bail/bond at this stage.” (Emphasis added)***

3. On 29/05/2018 the trial of the accused commenced before me and so far the court has recorded the evidence of seven (7) prosecution witnesses and the cause is scheduled for further hearing on 17/22/10/2019.

4. By an application dated 8/02/2019 the Applicant under Certificate of Urgency filed an application for review of the earlier orders denying him bond and substitute the same with an order admitting him to bail on the grounds that he had spent more than three (3) years in custody since the arrest and there had been change of circumstances during the trial since key witnesses for the prosecution had already testified before court and he therefore did not pose a threat to them.

5. The application was supported by his affidavit wherein he deponed that he had already spent more than three (3) years in custody and the period was likely to extend due to the fact that the prosecution had not completed examining their witnesses. It was contended that there was a change of circumstances during the trial since key witnesses for the prosecution had already testified. It was stated that he had demonstrated exemplary conduct from the date of the alleged offence and had expressed his remorse over the incident and had fully co-operated with the investigators and shall therefore not interfere with witnesses.

6. The court ordered for further Pre-bail report wherein it was stated that the accused was willing to abide by the conditions ordered by the court and that his uncle who was a farmer in Makueni County was ready to bail him out. On the Victim Impact Statement it was stated that the deceased was twenty five (25) years old at the time of her demise and was in a relationship with the accused which led to the birth of a child, the deceased in the second count. It was stated that whereas the accused and the family of the victims hail from neighbouring villages and had expressed reservations on the accused earlier release, the accused family had confirmed his fixed abode as Embu Prison Quarters where his brother works and resides.

**SUBMISSIONS**

7. The prosecution submitted that there had not been change of circumstances to enable the court review the earlier order. It was submitted that the court had heard witnesses in this cause and therefore the accused should remain in custody. On behalf of the defence it was submitted that key prosecution witnesses had testified before the court and that the accused had not made any attempt to interfere with witnesses. It was reinstated that he had been in custody for more than three years.

**DETERMINATION**

8. From the proceedings herein, it is clear that the court has heard the evidence of seven (7) prosecution witnesses including those who were related to the victims and the trial is at its tail end. It is the legal position that change of circumstances is one of the grounds upon which the court may review the order denying an accused person bond as the court always reserves for itself powers to revisit the issues of bond not only in the interest of the accused but for the society at large. In the Supreme Court of India case of **GULABRAO BABURAO DEOKAR V STATE OF MAHARASTRA & OTHERS, Cr. Appl. No. 2113 of 2003** cited in **MASROOR v STATE OF UTTAH PRADESH & ANOTHER [2009] 14 SCC 286** it was stated:-

*“There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the Courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.”*

9. The court’s jurisdiction to review orders on bond was captured by Muriithi J. in the case of **REPUBLIC v DIANA SULEIMAN SAID & ANOTHER [2014] eKLR** where the Judge had this to say:-

*“10. With respect, I do not agree that the review of bail on the ground of changed circumstances, or changes in the circumstances of the case, including circumstances of the accused, witnesses, victims or the society affected by alleged crime is a strange phenomenon. I would say our courts do it every day when we sit to consider renewed applications for bail such as when volatility on the ground is established to have ceased or for the cancellation of bail on account of accused’s refusal to attend court while on bail, when sureties withdraw or for other reasons.*

*11. The changed circumstances test is one of common sense that where the circumstances of the case are so altered that compelling reasons are disclosed for the refusal of bail or for review of terms thereof . . .”*

10. In this cause the only change of circumstances advanced by the Applicant is that the prosecution witnesses have now testified but it must be noted that once the court has substantially heard a matter, one of the compelling reasons which the court has to take into account as per **Bail/Bond Policy Guidelines 4.9 (b)** is the strength of the prosecution case, where it is stated that where the prosecution witnesses have testified and the accused person is aware of the weight of the prosecution’s case against him or her, it is presumed that such a person has an incentive to abscond and should therefore be denied bail. See **REPUBLIC v MARGARET NYAGUTHI KIMEU [2013] eKLR**.

11. Having heard substantial evidence of the prosecution witnesses, it is clear that the accused now know the case against him and there might be temptation on his part to abscond from the court thereby defeating the course of justice. I have taken into account the Pre-bail report which confirms that the Accused and the victims hails from neighbouring villages and that the accused has not provided a permanent alternative place of abode save for his brother’s place of work which has not been confirmed by affidavit or other means and whereas the Accused is still presumed innocent a at this stage, I have come to the conclusion that no change of circumstances has been advantaged by the Applicant to enable the court review the order denying bail.

12. It is in the best interest of justice and society where the Accused and victims hails from that he be in custody until the conclusion of the trial. The upshot of this Ruling is that I find no merit on the application dated herein which I hereby dismiss. It is so ordered.

**Dated, delivered and signed at Nairobi this 26<sup>th</sup> day of September, 2019.**

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Ms. Gikonyo for the State*

*Mr. Faraji for the accused*

*Accused present*

*Court Assistant: Karwitha*