



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 7 OF 2018**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**SIMON MUTHUI KITULA ..... ACCUSED**

**R U L I N G**

1. **Simon Muthui Kitula**, the Accused, is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**. On being arraigned in Court he denied the information as framed and through the firm of **Ngala Mulonzya & Co. Advocates** he applied to be released on bail pending trial. His argument was that there were no compelling reasons to hinder his release on bail. In the reply to the application, the State through learned State Counsel, **Mr. Mamba** deponed an affidavit opposing the release of the Accused on bail. He deposed that the Accused was likely to interfere with witnesses who were to testify in the case and that he had not demonstrated that he was likely to keep bail terms if released.

2. At the hearing the learned State Counsel stated that he had liaised with the Investigating Officer and established that there was no compelling reason that required the Accused person's incarceration. Consequently he was released on bond of **Kshs. 2,000,000/=** with a surety in a similar sum on the **3<sup>rd</sup> May, 2018**.

3. On the **27<sup>th</sup> day of June, 2018, No. 110784 P C Shalton Lemiso**, the Investigating Officer in the matter deponed an affidavit where he averred that following the release of the Accused on bond he was interfering with witnesses.

4. That the Accused has threatened to commit a further offence therefore he was not only a threat to the Prosecution witnesses but also to himself.

5. In response the Accused filed a Replying Affidavit where he deposed that from the time of his release he has never talked to any witness except his biological mother, **Nzangi Kitula** whom he resides with. That none of the witnesses have made a report to the police. That letter from the Chief relied upon by the Investigation Officer talked of threats made to one **Ngao** who is not a witness in the case and that the threats were allegedly made at a time when he (the Accused) was in remand. That threats alleged to have been made to **Ndewa Muniyithya** who is not a witness per the letter are stated to have been made before his arrest. That both **Ngao** and **Ndewa Muniyithya** are his friends and customers at his pub therefore the allegations are not true. That the allegations have been made by **Mwendwa Kyenza** an uncle of the Deceased who has even threatened his Advocate demanding that he withdraws from representing him and that he is somehow related to the Prosecution witnesses, persons that he respects a lot.

6. It was the submission of **Mr. Mamba** learned State Counsel that on being released on bail the Accused was required to keep terms of bond by not interfering with witnesses and not issue threats. That the Accused was heard saying that he would not die in prison as he would buy his way out. That arrangements have been made for his elderly witnesses, they pay **Kshs. 3,000/=** for security. That the police cannot guarantee witnesses' security.

7. In response **Mr. Ngala**, learned Counsel for the defence urged that the application was brought with malice on the part of the family of the Deceased who are related to the Accused who has not talked to them from the time of his release from prison. That no reason had been advanced to warrant the cancellation of the bond. That the Accused understands consequences of not abiding with bail terms. He alleged that **Mwendwa Kyenza** the uncle of the Deceased had also threatened him.

8. I have considered averments in the respective affidavits and the rival submissions of both Counsels. It is important to note that bail is a constitutional right unless there are compelling reasons requiring incarceration of the Accused (**See Article 49(1)(h) of the Constitution**).

This fact was stated by **Chesoni, J.** (as he then was) even before the promulgation of the current constitution where he said thus in **Nganga vs. Republic (1985) KLR 451**:

*“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the Accused, there are a number of matters to be considered. Even without the constitutional provisions..... generally in principle and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless there are substantial grounds for believing that:*

- a) The accused will fail to turn up at trial or to surrender to custody, or;*
- b) The accused may commit further offences;*
- c) He will obstruct the cause of justice;*

*The primary purpose for bail is to secure the accused person’s attendance to court to answer the charge at the specified time....”*

9. A person may be denied bail if there is a likelihood of interfering with witnesses. In such a case the Prosecution would be expected to present strong evidence of the likelihood of interfering with Prosecution witnesses.

10. It has been alleged that the Accused on being released on bail has violated conditions of bond set by interfering with Prosecution witnesses.

11. I have perused a statement by one **Ndewa Munyithia** annexed to the affidavit sworn by the Investigation Officer, dated **20<sup>th</sup> June, 2018** where she alleges that on **4<sup>th</sup> January, 2018** she encountered the Accused herein who told her that it was being alleged that he killed **Kitusa**, he would kill an older person from the family and proceeded to buy her a soda. There is also a letter dated **23<sup>rd</sup> March, 2018** by **Phillis M. Wambua**, the Assistant Chief **Ngungi – Mui Location, Mwingi East** who alleged that she received a report on **8<sup>th</sup> January, 2018** from one **Ndewa Munyithya** that the Accused stated that they were alleging that he killed **Safari** but should now expect a bigger person. Then on the **23<sup>rd</sup> March, 2018** **Mutindi Kyenza’s** daughter reported that her brother, **Ngao** had been warned to either “shut up” or be “shut”. And that unknown people had been loitering in their farm at night.

12. It has been alleged and not denied that these people are not witnesses in the case. I do note that these allegations came up before the Accused was arraigned in Court on the **29<sup>th</sup> January, 2018** and while in custody as he was released on **31<sup>st</sup> May, 2018**. Other than attaching the statement and letter to the affidavit, the Investigation Officer has not stated that investigations were carried out to establish the truthfulness of the matter. Especially so, considering the fact that threats to kill is an offence punishable in law.

13. Therefore no new circumstances that came up after release of the Accused on bond have been demonstrated. Cancellation of bail should be ordered if there are very strong grounds adduced that prove that there has been interference with the course of justice. It should have been demonstrated that it was the Accused loitering in the homestead of the family of the Deceased and further created law and order problems which were hazardous to the peaceful living of the individuals and that he misused the liberty granted to him by terrorizing the witnesses.

14. The Prosecuting Counsel having stated that there were no compelling reasons requiring the Accused person’s incarceration this Court was only concerned with ensuring that the Accused turned up for trial which is the main consideration when an Accused is to be released on bail. The conditions attached by the Court was for the Accused person to avail a surety in a sum of **Kshs. 2,000,000/=** and he did avail a suitable surety. He has not failed to turn up for trial therefore he has not failed to discharge his duty.

15. It was stated that the Accused is related to the Deceased’s relatives although the degree of relationship was not disclosed. All this Court has to ensure is that the relationship between the Accused and potential witnesses does not undermine the interest of justice. This would include ensuring that the Accused who is still innocent until proven otherwise is also not prejudiced. In the premises I find it necessary to review the bail terms by imposing further conditions thus:

- (i) The Accused’s bond is enhanced to **Kshs. 3,500,000/=** with a surety in a similar sum, and,
- (ii) He shall not come into contact with any witness.

16. It is so ordered.

**Dated, Signed and Delivered at Kitui this 28<sup>th</sup> day of August, 2018.**

**L. N. MUTENDE**

**JUDGE**