



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CRIMINAL CASE NO. 56 OF 2018**

**THE REPUBLIC.....PROSECUTION COUNSEL**

**VERSUS**

**FREDERICK MANGALA MUHANJI.....ACCUSED**

**RULING**

1. The accused is charged with the offence of murder contrary to section 203 of the Penal Code, as read with section 204 of the Penal Code, Cap 63, Laws of Kenya. The particulars of the offence allege that on 15<sup>th</sup> September 2018 at Irobo Village, Museno Sub Location within Kakamega County, he murdered Frederick Majanga Lukhutsu. He pleaded not guilty to the charge.

2. After plea was taken, the accused made an oral application, through his advocates, Mr Shivega and Mr Ondieki, to be released on bail. He argued, in the main, to have a right to be admitted to bail and that there are no compelling reasons for his not being so admitted to bail pending trial. The state, through Mr Juma, the prosecuting counsel, opposed the application on four grounds – the seriousness of the offence and the punishment to be meted out in the event of conviction, the accused person being a flight risk, that the accused being a person of no known abode, and that he was likely to interfere with the witnesses. He relied on averments deposed in an affidavit on record sworn by Julius Ikaala Chimwani on 25<sup>th</sup> September 2018.

3. Pre-trial bail is now a constitutional right for all offences. This is by virtue of Article 49 of the Constitution of Kenya, 2010. The right to bail is, however, not absolute. Bail is granted at the discretion of the court. According to Article 49 of the Constitution of Kenya, 2010, it may be denied where there are compelling reasons. Section 123 of the Criminal Procedure Code is to the same effect.

4. The principles for determining applications for bail have been stated in a number of cases, among them being *Nganga vs. Republic* (1985) KLR 451 and *Mazrui vs. Republic* (1985) KLR 279. It was stated in these two that in principle, generally and because of the presumption of innocence, an accused person should be granted bail, unless it is shown by the prosecution that there are substantial grounds for believing that: (a) the accused will fail to turn up at his trial or to surrender to custody, or (b) the accused may commit further offences, or (c) he will obstruct the course of justice, and (d) the accused would lose more by absconding. What constitutes compelling reasons does not appear, from the decisions made after the Constitution 2010 came into force, such as *Republic vs. Godfrey Madegwa & 6 others* (2016) eKLR, which was cited to me by the accused, to depart in any material way from the principles stated in the cases that I have cited here above.

5. As mentioned here above, the state has objected to the release of the accused on bail. It is noted that the offence facing the accused is a serious one, the killing of another person. It attracts a penalty of death. The stiff penalty is often an incentive to persons accused of murder to abscond. However, not sufficient material has been placed before me to convince me that the accused is likely to be so motivated. I note after the incident, he made a report of it to the police. He had the option of taking flight, and thereby forcing the police to look for him, but he did not run away. The other consideration is whether the accused may commit other offences while on bail. Again, there are no adverse reports on this score. Nothing has been placed on record to suggest that the accused person is generally a person with criminal inclinations or tendencies, and no record of any past incidents of his brush with the law was placed before me.

6. There is also no material to suggest that the accused person would be inclined to obstruct justice by interfering with witnesses or intimidating them. The deponent of the affidavit mentioned above, who is listed as a prosecution witness, alleges that certain threats were directed at him by the accused on divers dates prior to the incident the subject of these proceedings. There is no proof of the very serious alleged threats deposed in that affidavit was provided. The said threats are of the kind that require that the person to whom they were directed reports to the police or other state authorities. The fact that that no reports were ever made to the authorities takes force away from the alleged seriousness of the purported threats. It has not been suggested that the accused, while in custody, has attempted to interfere, through other individuals, with the prosecution witnesses. It has also not been said that the state has not completed its investigations. In any event, the law currently provides for witness protection, and it is the duty of the state to place any of its witnesses, who are vulnerable, in the witness protection programme.

7. On whether the accused is a person of no fixed abode, I have noted from the record that he is alleged to be in a land dispute with the family of the deceased. Such a disputant cannot, in my view, be said to be a person whose abode is unknown. The material on record paints the picture of a person who is well-known in the locality. He is not a stranger to the other players in the matter. I am not persuaded that the police would face any difficulty locating his whereabouts should he be required by the court after his admission to bail. In any event the claim that he has no fixed abode is made by a civilian, and not the police whose duty it should be to trace the accused should the court require his presence. It is not lost to me that in cases of this nature it is the investigating officer who would swear an affidavit to oppose release of an accused person on bail, it should never be the role of a prosecution witness to swear such an affidavit.

8. Having considered the matters set out above, I am not persuaded that compelling reasons exist to warrant the accused herein being denied bail. I find that this is a suitable case for grant of bail to the accused person. He is hereby admitted to bail. He shall be released from remand custody upon executing a bond of Kshs. 2, 000, 000.00, supported by two sureties of like amount. The bond shall be liable to cancellation

should the accused threaten or interfere with witnesses while out on bond, or fail to attend court whenever he is required so to do, or leave the jurisdiction of this court without prior leave of the court.

**DELIVERED DATED AND SIGNED AT KAKAMEGA THIS 28<sup>th</sup> DAY OF September 2018**

**W MUSYOKA**

**JUDGE**