



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 18 OF 2016

REPUBLIC..... PROSECUTOR

VERSUS

J. Z. K. ACCUSED

R U L I N G

1. **J. Z. K.**, a minor aged **17 years** is charged with the offence of **Murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code (Cap. 63), Laws of Kenya**. Particulars of the offence are that on the **20th day of June, 2016** at **[particulars withheld]** in **Matinyani Location, Matinyani Sub-county** within **Kitui County** he murdered **Beatrice Mbuli Ngumbau** (Deceased).

2. By a Notice of Motion dated **22nd day of November, 2016** he seeks to be released on bail pending trial.

3. The application is premised on grounds that the minor is a pupil at **[particulars withheld] Primary School**, Standard 8 who is destined to sit for examination while in remand. Consequently he wants to repeat Standard 8 so that he can do the examination after getting proper care and guidance from his teachers and family. That his parents and other relatives are very supportive and positive that they will ensure that the minor attends court.

4. In response, the Investigation Officer Number **1053367 P C Bernard Odoo** disputed the allegation that the Applicant is a pupil at **[particulars withheld] Primary School**. He deponed that if released on bail the Applicant is at risk of being harmed by members of public who wanted him lynched and if released to his family members they would be in danger as his grandmother, one **RN** was assaulted by members of public who thought she was harbouring the Applicant. He concluded by stating that the Applicant should be remanded in custody for his and the family's safety.

5. At the hearing **Ms. Mati** for the Applicant argued that he is entitled to bail, he has a place of abode as he resides with his grandparents at **Matinyani** and being a child he deserved to lead a normal life like any other child. However, she brought to the attention of the court the fact that the family of the Deceased had threatened the family of the Applicant which in her view was an attempt to pre-empt the court process.

6. In reply, the learned State Counsel, **Mr. Wanjala** opposed the application. He submitted that there was nothing to suggest that the Applicant was a pupil and he was at risk of being attacked by members of the community. To protect him the police removed him from **Matinyani** to **Kitui Police Station**.

7. In reply **Ms. Mati** stated that indeed the security of the Applicant and his family were paramount in determining the whole issue.

8. In the interest of justice the court sought the opinion of the father of the Applicant, **Jackson Kitoo Nzomo** who was of the view that although Counsel for the Applicant applied to have him released on bail, if released his life was in danger as even the grandmother of the Applicant cannot stay at her home following threats by the family of the Deceased.

9. Following a court order, the Probation Officer carried out a social inquiry and found that the environment at home was hostile and not conducive for the Applicant to go back home. His life and that of his grandmother were at risk. His grandmother was assaulted by villagers. She sought protection of the police who rescued the Applicant from being lynched.

Article 49(1)(h) of the **Constitution of Kenya, 2010** provides thus:

“(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The duty is therefore upon the Respondent to demonstrate the presence of compelling reasons that should require the Applicant to be incarcerated pending trial.

10. In the case of **Watoro vs. Republic 1991, KLR 220** it was stated that the paramount consideration in bail is whether the Accused person will turn up for trial. In the case of **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria S.C. 20A/2006** the criteria of reasons that may amount to compelling reasons were considered:

- The nature of the charges.
- The strength of the evidence which supports the charges.
- The gravity of the punishment in the event of conviction.
- The previous criminal record of the accused if any
- The probability that the accused may not surrender himself to trial.
- The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.
- The likelihood of further charges being brought against the accused.
- Detention for the protection of the accused.

11. The Applicant herein being a minor ought to be released on bail. However the Prosecution has emphasized the fact of his security being at stake. Indeed it is admitted by the Applicant's Counsel that the security of both the Applicant and his family members is at risk as members of the community wanted to lynch them.

The social inquiry carried out confirms that fact. The Applicant lived with his grandmother prior to the act. His grandmother has been compelled to move away from her home because of threats to her life. The question to be posed is: Where will the Applicant stay if released? It can therefore not be asserted that he has a place of abode.

12. Having considered the application I find that the Respondent has demonstrated existence of a compelling reason that requires the Applicant to be incarcerated pending trial. In the result the application for bail is dismissed.

13. It is so ordered.

Dated, Signed and Delivered at Kitui this 31st day of January, 2017.

L. N. MUTENDE

JUDGE