



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 5 OF 2017**

**REPUBLIC ..... PROSECUTOR**

**versus**

**ISAAC MATHENGE MAINA ..... ACCUSED**

**RULING**

**1. ISAAC MATHENGE MAINA (Mathenge) is charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. He pleaded not guilty and his trial commenced on 28<sup>th</sup> June 2017.**

2. Mathenge's learned counsel Mr. Mutembei applied for bail pending trial. He referred to the investigating officer (I. O.) affidavit and pre bail probation report, both of which were negative towards the bail application. Mr. Mutembei in respect to both affidavit and report argued that they were not based on actual fact but on hypothetical fact. He argued that bail is a fundamental right provided under the highest law of the land, the constitution and should not be denied on facts which have no backing. Mr. Mutembei emphasized, as had been noted in the probation report, that Mathenge had no prior conviction and that there was no evidence Mathenge tried to flee after the offence was committed. That Mathenge had dependants namely Nyaguthii and Francis Maina, whose ages are unknown.

3. The Principal Prosecution counsel Mr. Tanui opposed the bail application relying on the affidavit of the I.O. In that affidavit the I.O. deponed that Mathenge is a potential flight risk. That he was arrested in Nyeri while attempting to escape.

4. I have considered the pros and cons to the application for bail. The constitution under **Article 49(1)(h)** itemizes one of the rights of an arrested person is the right to be released on bond or bail pending trial on reasonable conditions. That right however has a caveat to the effect that such right to bail may be curtailed by compelling reasons. One reason that would be compelling is failure of an accused person to attend his/her trial. This is what was stated in the case **NGANGA V REPUBLIC MISC APPLICATION 178/81** viz:-

***“The primary purpose of bail is to secure the accused person's attendance at court to answer the charge at the specified time. I would, therefore agree with Mr. Karanja that the primary consideration before deciding whether or not to grant bail is whether the accused is likely to attend trial. In consideration whether or not the accused will attend his trial the following matters must be considered:-***

***(a) The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty where the charge against the accused is more serious and punishment heavy there are more probabilities and incentive to abscond, whereas in case of***

***minor offence there may be no such incentive.”***

5. The I.O by his affidavit, which was not controverted by Mathenge, stated that after the alleged offence was committed Mathenge took flight and was arrested 5 days later in Nyeri. The prebail probation report indicated that Mathenge had no fixed abode. Further the report indicated that the community where Mathenge lived before the offence was committed is not welcoming the prospects of his released. One would have to be a visitor from outside Kenya, unaccustomed to the Kenyan ways of life, no to know that there is always the real danger of a suspect being mob justiced in the belief that his or her release on bail is tantamount to an acquittal. The fact the community where Mathenge last resided is unwelcoming to his release must therefore be viewed in the light of the perception a community has when one is granted bail.

6. The combination of the negative factors which were set out in the I.O’s affidavit and the probation report leads me to find that there is compelling reasons to deny Mathenge bail pending trial. The application is denied. The trial of this case shall continue as previously set on 20<sup>th</sup> September 2017.

**DATED AND DELIVERED AT NANYUKI THIS 2<sup>ND</sup> DAY OF AUGUST 2017.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue

Accused: Isaac Mathenge Maina .....

For Accused .....

For the State: .....

**COURT**

Ruling delivered in open court.

**MARY KASANGO**

**JUDGE**