



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE NO. 78 OF 2015**

**M W .....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicant was charged with murder contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on 1<sup>st</sup> October 2015 at [*particulars withheld*] in Athi River Sub County within Machakos County, he murdered P W. The Applicant pleaded not guilty to the offence. The Applicant subsequently filed an application by way of Chamber Summons dated 9<sup>th</sup> November 2015 seeking to be released on reasonable bail/bond upon such terms and conditions as this Court may deem just and expedient to impose, pending the hearing and determination of this case, and for such orders as the ends of justice may require.

The Applicant urged his grounds for the application in the said Chamber Summons which are that he is by law presumed innocent till proven guilty, and that it is in the interest of justice that this application be granted as he will suffer irreparable harm having stayed in custody before the determination of his case.

The Applicant in his supporting affidavit sworn on 9<sup>th</sup> November 2015 stated that he is a self-employed businessman and his rural home is Busia County. Further, that his wife and three (3) children who are minors are totally dependent on him, together with his parents who are peasant farmers. The Applicant undertook to avail himself in court whenever required to do so without fail, and to comply with such conditions as the court may deem fit and just to impose. It was his averment that there are no compelling reasons which would work against his release on bond or bail, and pleaded with the Court to for affordable bond /bail terms.

The Prosecution opposed the Applicant's application in a replying affidavit sworn by PC Wilfred Katana on 3<sup>rd</sup> December 2015. The deponent is the Investigating Officer in this criminal case, and he stated that the applicant is accused of murdering the deceased P W (a minor) who was his son, and that the offence was committed at night when only the accused, his wife and the deceased were in their house.

Further, that the only key eye witness in their murder case is the wife to the accused person, and that if the Applicant is released on bond at the moment, he is highly likely to interfere with the said key witness and thereby defeat the cause of justice. The deponent averred that it would be prudent to have the said key eye witness testify first before the issue of bond bail can be considered by this Court.

The learned counsel for the Applicant, Mr. Kituku, and the learned Prosecution counsel, Mr. Shijenje, submitted at the hearing of the application on 9<sup>th</sup> November 2015 that they were wholly relying on the pleadings filed. I have considered the said pleadings by the Applicant and Prosecution. Article 49 (1) (h) of the Constitution permits the release of any arrested person including persons charged with a capital offence on bail/bond pending trial, unless there are compelling reasons not to do so.

The issue in this application therefore is whether there are compelling reasons why the Applicant should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons. In **Republic –vs- Danson Ngunya & Another [2010] e KLR**, Makhandia J, (as he then was) stated that if the state wants the accused deprived

of his right to be released on bond, then the State must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

The Prosecution in this regard has argued that the key witness in the trial will be the Applicant's wife and alleges that she may be interfered with by the Applicant. The Applicant did not controvert this averment. I find that given the relationship between the Applicant and said key witness and possibility of interference, it is in the interests of justice that the said witness first testifies before the Applicant is released on bail and/or bond. The Applicant shall thereafter be at liberty to renew his application for bail and/or bond. The said witness shall be called as the first prosecution witness at the next hearing date.

The Applicant's Chamber Summons dated 9<sup>th</sup> November 2015 is accordingly denied for the foregoing reasons, however the Applicant is at liberty to make an oral application after the said witness has given her testimony.

It is so ordered.

**DATED AT MACHAKOS THIS 21<sup>ST</sup> JANUARY 2016.**

**P. NYAMWEYA**

**JUDGE**