



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 48 OF 2015

REPUBLIC

VERSUS

PETER MUIA MAWIA.....ACCUSED

RULING

0. This is a ruling on a bail application by Notice of Motion dated 27th October 2015, in which it is urged that the Accused/Applicant has a fixed abode at Kivaani Location, Kivaani division of Kangundo District in Machakos County; is ready to abide by any terms of bail; and there are no compelling reasons for refusal of bail in terms of Article 49 of the Constitution. The Accused is facing a murder charge contrary to Section 203 as read with Section 204 of the Penal Code with particulars that on the 24th May 2015 at Kivaani Location in Kangundo Sub-county within Machakos County, jointly with others not before the Court, murdered Felix Mutinda Nthiani.
0. The application is opposed and by a Replying Affidavit of No. 60763 Cpl Churchill Luvisa sworn on 13th November 2015, the State primarily objects to the grant of bail on the grounds set out in paragraphs 5, 6 and 7 as follows:

“5. That the Defence has already been supplied with the witness statements hence aware who exactly will be testifying against the accused.

6. That the key prosecution witnesses come from the same area accused has been working for gain, and are well known to the accused who is highly likely to target and interfere with them thus interfere with the smooth proceedings in Court.

7. That I am yet to recover the murder weapons and arrest all the perpetrators of the cold blood murder and my efforts are likely to be thwarted if the accused is out on bond.”

0. Counsel for the parties – Mr. Muumbi for the applicant and Mrs. Saoli for the Director of Public Prosecution – made oral submission on their respective contentions and ruling was reserved. I have considered the application together with affidavits filed in support and in Reply together with the circumstances of the Accused, who told the court that he is 21 years and was waiting to join college having completed his Kenya Certificate of Education course in 2014 and who had his father to stand his surety.

The right to bail and factors to be considered

0. The right to bail is entrenched in the Constitution of Kenya 2010 as follows:

“49. (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.**”

0. The Criminal Procedure Code provides for consideration to be had by the Court in exercise of the power to grant bail as follows:

“123A (1) Subject to Article 49(1)(h) of the Constitution and notwithstanding section 123, in making a decision on bail and bond, the Court shall have regard to all the relevant circumstances and in particular—

(a) the nature or seriousness of the offence;

(b) the character, antecedents, associations and community ties of the accused person;

(c) the defendant's record in respect of the fulfilment of obligations under previous grants of bail; and;

(d) the strength of the evidence of his having committed the offence;

(2) **A person who is arrested or charged with any offence shall be granted bail unless the court is satisfied that the person—**

(a) has previously been granted bail and has failed to surrender to custody and that if released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;

(b) should be kept in custody for his own protection.”

0. The accused has a further right to the evidence to be presented against him under Article 50 (2) of the Constitution as follows:

“50. (2) Every accused person has the right to a fair trial, which includes the right—

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”

0. The Court is enjoined under Article 20 (3) of the Constitution to act such as to give effect to the constitutional rights in the Bill of Rights as follows:

“20. (3) In applying a provision of the Bill of Rights, a court shall —

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

0. The grant of the witness statements pursuant to the constitutional right cannot, in my view, be used as a ground to deny bail by suggesting likely interference with witnesses because the accused now knows who the person to testify against him are. If the supply of witness statements were coupled with a likelihood, as a result, to interfere with the witnesses were accepted as a compelling criteria for refusal of bail, no accused person who had taken his constitutional benefit to the Prosecution's evidence would ever make bail. This would subvert the Bill of Rights provision for the supply of prosecution's evidence ahead of the trial, in contravention of the Court's constitutional duty under Article 20 to give effect to rights.

0. For the ground of likelihood to interfere with witnesses to amount to a compelling reasons, there must be such evidence to support a real likelihood of interference in the nature of relationship or circumstances between the accused and the said witnesses as would indicate possibility of that accused exerting influence, direction or control over the said witnesses so as to demonstrate a real danger of interference and thereby affecting the DPP's capability to successfully prosecute the offence charged.

On the merits of the case

0. In the circumstances of this case, no evidence of any relationship or circumstances other than the fact of the possession by accused of information supplied to him in accordance with the Bill of Rights, has been adduced as would entitle the court to find that the accused is likely to interfere with the witnesses. In addition, there was no evidence of accused's bad antecedents or failure to comply with previous bail terms or that he needed to be held in custody for his own protection.
0. Moreover, the fact of pending investigations and non-recovery of the murder weapon might have been relevant as a bar to bail shortly after arrest on commission of the offence. Not so, close to one year after the commission of the offence allegedly on the 24th May 2015. Although, the Prosecution may present evidence any time before close of its case in the trial, the Accused's right to bail cannot be suspended indefinitely awaiting open-ended investigations as it would mean that the accused would never be granted bail until the close of the Prosecution's Case.

Orders

0. Accordingly, for the reasons set out above, I find that the prosecution has not demonstrated the existence of compelling reasons for denial of bail, I therefore grant the accused bail upon terms as follows:
 - a. **The accused will execute a bond to attend Court for his trial.**
 - b. **The accused will secure two (2) sureties in the sum of Ksh.500,000/ each.**
 - c. **The accused will every 30 days attend the Officer Commanding Police Station (OCS) within whose jurisdiction the offence is alleged to have been committed.**
 - d. **The accused will not, personally or by proxy, make any contact or communication, physically or otherwise, with any of the Prosecution witnesses during the pendency of the trial.**

DATED AND DELIVERED THIS 31st DAY OF MARCH 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Accused present in person

Ms. Moghoi for Mr. Machogu for the Republic/Respondent

Ms. Doreen - Court Assistant.