



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 69 OF 2015

PIUS KIKUNGU JOHN.....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 the night of 27th and 28th June 2015 at Katikomu village, Wautu sub-location Wautu Location in Kilungu sub-county in Makueni County with others not before the court he murdered Anthony Nthia Mukavi. The Applicant pleaded not guilty to the offence and thereafter filed a Notice of Motion dated 7th December 2015 seeking to granted bond/ bail pending the hearing and determination of his case.

The Applicant's grounds for the application are that he has a permanent place of abode and is hence not a flight risk; he is a of high moral standing and law abiding; he is presumed innocent; he is ready and willing to abide by the terms set by the Court; and that there are no compelling reasons not to release him on bond. The Applicant in his supporting affidavit sworn on 7th December 2015 further averred that he is the first born in a family of 9 children and has two aged parents, and the grant of bond will enable him take care of his siblings and parents. Further, that he does not live near the alleged victim nor witnesses of the alleged offence, and is unable to and has no intention of interfering with witnesses if released on bond.

The Applicant's learned counsel, B.K.Kyalo Advocates, filed submissions in Court dated 25th January 2016 wherein he cited the decision in **R. vs William Mwangi wa Mwangi (2014) e KLR** for the argument that it is for the state to show compelling reasons exist to justify denial of the constitutional right to bail. Reliance was also placed on the decision in **R vs Gerald Mutuku Nyalita (2015) e KLR** for the positions that the severity of sentence only calls for stricter terms of bond and not refusal of bail, and that to demonstrate a likelihood of interference with witnesses, a close family, filial or other relationship that creates and environment of control and influence of the witness by the accused person must be shown.

The Prosecution filed a replying affidavit in opposition to the application sworn on 12^h January 2016, by CI Charles Njinju, the investigating officer in this trial attached to Kilome Police Station. The Prosecution's main grounds for opposing the application are that two of the crucial witnesses, Brenda Adembwa and Juliana Ndinda live within the same locality as the Applicant namely Wautu Location within Makueni County, and there is a possibility that he may interfere with them if released on bail.

Further, that in the event of conviction, the Applicant will face the death penalty and this is an incentive

for him to abscond. It was also stated the severity of the sentence provided for in law is a compelling reason as to why the Applicant should not be released on bail. The prosecution in addition relied on a bundle of the witnesses statements that it availed the Court.

I have considered the pleadings and submissions by the Applicant and prosecution. The Court also requested for a pre-bail report from the Probation Service which it has considered. The said report dated 16th February 2016 states that the Applicant is well known to the local administration, has close community ties, fixed place of abode and is a low flight risk. The report indicates that the Applicant is the only son working in his family and the parents depend on him to support them and his siblings. Further, that the community is not hostile to the Applicant and the family of the deceased is not opposed to his release, but would prefer to have talks about it with the accused's family first. The report states that the family seeks lenient terms as they own a 3-acre land with no title deed.

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. In the case of **Nganga vs Republic (1985) KLR 451**, the learned judge (Chesoni J. -as he then was) stated that in exercising its discretion to grant bail to an accused person under the Constitution and the relevant provisions of the Criminal Procedure Code, the court has to consider various factors as follows:-

“Admittedly, admission to bail is a constitutional right of an accused person if he is not going to be tried reasonably soon, but before that right is granted to the accused there are a number of matters to be considered. Even without the constitutional provisions...generally in principle, and, because of the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted bail, unless it 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 courts of justice**

...The primary purpose for bail is to secure the accused person's attendance at court to answer the charge at the specified time. “

The issue in this application then 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.

I have perused the witness statements of the witnesses the prosecution says may be interfered with by the Applicant. No reason has been given by the prosecution as to why the said witnesses may be interfered with, and no indication as to any proximity either geographical or familial the said witnesses have with the Applicant, that could raise the possibility of interference. The probation report is also favourable to the Applicant, and shows that he has close community ties and is considered a low flight risk. In the circumstances, I find that no compelling reason has been shown as to why the Applicant should be denied bail, and the Applicant's Notice of Motion dated 7th December 2015 is allowed. I accordingly admit the Applicant to bond pending trial on the following terms:

1. The Applicant shall execute a bond of Kshs. 350,000/= with one surety of similar sum.
2. The surety for the Applicant will be approved by the Deputy Registrar of this court.
3. The Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until the case is heard and determined.
4. The Applicant shall be required to attend court for the remainder of the trial without fail.

5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and surety called to account.

It is so ordered.

DATED AT MACHAKOS THIS 22ND DAY OF MARCH 2016.

P. NYAMWEYA

JUDGE