



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 50 OF 2015

TIMOTHY NDOLO NGULU.....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 27th May 2015 at Mathunthini village, Kathiani Sub-County within Machakos County he murdered Titus Musyoka Ngulu. The Applicant pleaded not guilty to the offence, and subsequently filed a Chamber Summons dated 30th October 2015 seeking this Court to release him on bond or bail on such conditions as are just in the circumstances.

The Applicant grounds for the application are in a supporting affidavit he swore on 30th October 2015. The grounds are that under the Constitution an accused person has the right to be presumed innocent until the contrary is proved and to be released on bond/bail on reasonable conditions pending his trial, unless there are compelling reasons not to. The Applicant averred that there are no compelling reasons that would work against his release on bond or bail, that he is the sole breadwinner of his family, and that he shall abide by any terms and conditions that the Court may impose.

The Applicant's Advocate, Kaluu & Co Advocates filed submissions dated 16th February 2016 on the application pursuant to this Court's direction. Reliance was placed in the said submissions on Article 49 of the Constitution and the decisions in **R vs Diana Salim Suleiman (2014) e KLR** and **Job Kenyanya Musoni vs R (2012) e KLR** to reiterate the position that an accused person is presumed innocent until contrary is proved, and that the fact that the Applicant has been charged does not negate the presumption. Further, that the Court has a duty under the Constitution to protect and promote the fundamental rights and freedoms guaranteed to accused persons.

The Prosecution filed a replying affidavit in opposition to the application sworn on 20th November 2015, by IP Joseph Kariuki, an investigating officer in this trial attached to Kathiani Police Station. The Prosecution's main grounds for opposing the application are that the accused person has been supplied with witness statements, and that all the prosecution witnesses and Applicant are members of the same clan, are neighbours and reside at the same locality, and there is a high possibility of witnesses being inflicted with fear if they come into contact with the Applicant. It was also alleged that the Applicant went into hiding after the commission of the offence and was arrested at Masii.

Further, that if convicted, the severity of the sentence provided for in law, which is death, may lead to temptation on the part of the Applicant to abscond if he is released on bond. The prosecution also 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. I have also perused the witnesses statements availed to the Court. 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 note from the witnesses statements that the person the Applicant is accused of killing is his brother, and that three of the witnesses are closely related to the Accused person, namely his wife Ruth Mbithe Ndolo, his mother Esther Kalekye and his sister-in-law, Jane Mbula Musyoka, who is the wife of the deceased. There is therefore a possibility that the willingness and/or ability of the witnesses to give evidence may be interfered with by the release of the Applicant, given their close relation and proximity.

I therefore find that a compelling reason exists to deny the Applicant bail as there is a likelihood of this trial being obstructed which is not in the interest of a free and fair trial. It is thus in the interests of justice that the said key witnesses first testify before the Applicant is released on bail and/or bond. The said witnesses shall be called as the first set of prosecution witnesses at the next hearing date. The Applicant shall thereafter be at liberty to renew his application for bail and/or bond.

The Applicant’s Chamber Summons dated 30th October 2015 is accordingly denied for the foregoing reasons, however the Applicant is at liberty to make an oral application after the said witnesses have given their testimony.

It is so ordered.

DATED AT MACHAKOS THIS 21ST DAY OF MARCH 2016.

P. NYAMWEYA

JUDGE