



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE NO. 33 OF 2012**

**JAMES KIOKO MALUNGU.....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 21<sup>st</sup> September 2012 at Kaani village, Kaani sub-location in Machakos County he murdered Eunice Mbula Kioko. The Applicant pleaded not guilty to the offence and the hearing of the trial commenced with four prosecution witnesses testifying. The Applicant then brought to the attention of this Court that he had filed a Chamber Summons dated 16<sup>th</sup> July 2013 seeking bond. The Applicant's Advocates filed a further Notice of Motion dated 8<sup>th</sup> May 2014 seeking this Court to release him on bond or bail on such terms as it may deem fit and to issue directions as it deem fit and just in the circumstances.

The Applicant grounds for the application in the said Notice of Motion and a supporting affidavit he swore on 8<sup>th</sup> May 2014. The grounds are that the accused is a man of means and is not likely to abscond, and he is also family man. Further, that the applicant is only a suspect in the proceedings and remains innocent until proven guilty and that it is his constitutional right to be admitted to bail unless compelling reasons for not doing so are shown.

The Applicant averred that he is father of 4 children who are minors and are in school, and as the only bread winner for his family he is duty bound to remain in the jurisdiction of this court to take care of his old father and children who are alone at home and requires school fees . The Applicant's Advocate Kamolo & Associates, reiterated these grounds in submissions filed in Court dated 28<sup>th</sup> January 2016.

The Prosecution filed a replying affidavit in opposition to the application sworn on 7<sup>th</sup> August 2013 by PC Pius Ngila, a police officer attached to Machakos Police station crime office. The Prosecution's main grounds for opposing the application are that the accused person has been supplied with witness statements and is aware of the evidence against him as well as the weight of the prosecution case. Further ,that the accused person resides within Kaani Sub-location in Machakos District of Machakos County and this is the same residence where the prosecution witnesses reside, and that his release will pose a security threat to the prosecution witnesses which would prejudice the prosecution case.

It was also alleged that the accused attempted to commit suicide and as such he is a threat to his own life hence he should not be released on bond. Lastly, that considering the nature and seriousness of the offence, and the severity of the sentence provided for in law, there are compelling reasons to deny the applicant bail.

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, and the said report dated 28<sup>th</sup> October 2015 was availed to the court. After perusal of the same I note that the report states that the Applicant's family is supportive and his children need his assistance. It is also noted in the report that the accused is still on good terms with his in-laws, despite the fact that the deceased he is accused of killing was his wife. The report found the accused suitable and recommended that he be given favourable bond terms as the Court may deem fit.

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 principal, 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.

Five prosecution witnesses have already testified in this trial including the Applicant's child, and no evidence has been brought by the prosecution as to how the remaining witnesses will be interfered with by the Applicant. As regards the Applicant being a threat to his own life arising from an alleged attempt at suicide, no medical evidence was brought by the prosecution as to the Applicant's current state of mind to support this averment. The pre-bail report is also positive as to the Applicant's ability to meet any bond terms. I therefore find no compelling reason to deny the Applicant bail.

The Applicant's Notice of Motion dated 8<sup>th</sup> May 2014 is accordingly allowed and I admit the Applicant to bail pending trial on the following terms:

1. The Applicant shall execute a bond of Kshs. 500,000/= 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 15<sup>TH</sup> DAY OF MARCH 2016.**

**P. NYAMWEYA**

**JUDGE**