



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 64 OF 2014**

**REPUBLIC**

**VERSUS**

**BENSON MUTUA MWANZIA ALIAS KATUA**

**RULING**

1. By Notice of Motion dated 17<sup>th</sup> December 2015, the accused who is charged with murder contrary to section 203 as read with section 204 of the Penal Code, seeks bail pending trial of the charge. The grounds of the application are set out in the application, namely, that the investigations are complete; accused is presumed innocent until proven guilty; the offence is bailable and the court has discretion in imposing conditions to ensure accused attends his trial; accused is not a flight risk; there is no compelling reason to deny bail; and the accused is not in a position to interfere with witnesses.

2. The Director of Public Prosecutions has filed a replying Affidavit by the Investigating Officer, No. 65776 CPL Frederick Miana, in which the seriousness of the charge and the likely penalty of death upon conviction as an incentive to abscond, and the likelihood of interference with witnesses as a compelling reason to deny the applicant bail.

3. In urging a likelihood of interference with witnesses as a compelling reason to justify denial of bail, within the meaning of Article 49 of the Constitution, Counsel for the Director of Public Prosecutions, Mr. Machogu, submitted as follows:

***“Paragraph 4 of the Affidavit the Investigating Officer, Cpl. Frederick Miana on interference with witnesses. Interference with witnesses go to the root of the Prosecution’s case and it is a compelling reason to deny bail until the said witnesses have testified. We have pointed out the 2 witnesses. The mother is aged 74 years. Elizabeth is a sister aged 54 year, according to the statements. If the accused is granted bail he will go back home where he resides in the same locality with the mother and sister. He will there contact with the 2 witnesses with a high likelihood of interference despite the fact that they have recorded statements. It will make the prosecution case harder by procuring witnesses or if they are availed they will already have been interfered with. I pray that bail application be denied until the two witnesses have testified. If the witnesses were all family members, an accused should be denied bail. The crucial witness is an eye-witness that is the sister Elizabeth.”***

4. In response, Counsel for the applicant emphasized the accused’s steady employment and permanent fixed abode and objected that the Investigating Officer had not explained the details of the relationship of the accused and the said witness, whether they are in good or bad relationship and pointed out that person may be related but in bad terms. He submitted that:

***“The mere relationship of accused to witnesses is not a sole reason for denying bail. Article 50 (2) (a) of the Constitution - an accused is deemed innocent until proved guilty. The Court can impose conditions and even monitor the conduct of the accused on bail.”***

5. I have considered the application for bail, the replying affidavit of the Investigating Officer and the submissions by Counsel.

6. All offences are bailable. The particular circumstances of the case may however demonstrate compelling reasons for denial of bail. The accused's steady employment and fixed abode supports a submission that he is not a flight risk. While I agree that the likelihood of an accused interfering with witnesses must be considered a compelling reason, the prospects of such interference must be shown to be real and not whimsical. While it might be easy to influence the testimony of child witnesses, it may not be so for mature and elderly persons. In this case, the witnesses involved are the mother and sister of the accused who are said to be 74 and 54 years old, respectively. Other than their filial and sibling relationship, it is not demonstrated any other bond or hold that the accused may exert on the witnesses so as to influence their decision to testify or the content of their testimony. The Prosecution's concern of interference is, however, understandable, if the sister is an eye-witness as stated by the Prosecution Counsel.

**7. I consider that the justice of the case requires that the accused be accorded bail with conditions that he shall not enter into any contact or communication, whether physically or otherwise, in person or by proxy with the witnesses; with leave to the prosecution to move for cancellation of the bail if the condition for non-contact is breached. The prosecution may also explore arrangements for witness protection under the Witness Protection Act as appropriate, if necessary.**

### **Orders**

8. Accordingly, for the reasons set out above, I grant the accused bail on the following terms:

- 1. The accused will execute a bond for his attendance at trial of his case in the sum of Ksh.500,000/-.**
- 2. The accused will provide two (2) sureties, for the same amount of Ksh.500,000/- each.**
- 3. The accused will not make any contact, physical or otherwise, personally or by proxy, with the witnesses named in this case, until after they have testified in Court or until further orders of the court.**
- 4. The accused will attend the Officer Commanding Police Station under whose territorial jurisdiction falls Nduu village, Matheini Location of Matungulu Sub-County of Machakos County, the area where the incident constituting offence charged herein is alleged to have occurred every 30 days.**

9. The prosecution is at liberty to move the Court for cancellation of the bail in the event of the accused making any contact with the witnesses with an attempt to interfere with the witnesses or influence their evidence in court.

**DATED AND DELIVERED THIS 15<sup>TH</sup> DAY OF MARCH 2016.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the presence of: -**

Mr. Muema for the Applicant

Mr. Machogu for the Respondent

Ms. Doreen - Court Assistant.