



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO 45 OF 2015

REPUBLIC.....APPLICANT

VERSUS

ANTONY KYALO NDAKA.....1ST ACCUSED

MICHAEL KITHEKA MUTUA.....2ND ACCUSED

RULING

1. The 2nd accused has applied for release on bail upon reasonable terms pointing out that his co-accused in this consolidated charge is out on a bond Ksh.500,000/- with one surety. The Prosecution has opposed the bail application by the 2nd accused on the principal ground that the accused is flight risk alleging that “upon commission of the offence in 18th day of May 2015 the 2nd accused went into hiding and was arrested on the first day of January 2016.” The prosecution urged the court to strike a balance between competing interest of the public and that of the 2nd accused to be released on bond and order that the matter be set down for speedy hearing rather than release the accused on bail.

2. Of course, bail is personal to the particular accused person and the accused cannot insist on being released or being released upon the same terms as his co-accused. The circumstances of one accused person may call for refusal of bail or bail upon different terms from those imposed on his co-accused. However, generally, unless there are special circumstances, accused persons in the same case should be released and upon same terms of bail.

3. In this case, the 2nd accused is alleged to have gone into hiding upon the commission o of the offence until he was arrested some 7 months later. However, this fact of his having committed the offence is subject of the pending trial and it cannot be taken to be proved that the accused committed the offence and went into hiding. As held by Porter, J. in *Watoro v Republic*, (1991) KLR 281, 284:

“[It] is important for the Court to bear in mind, and the reason for the caution to remember the presumption of innocence, is that it would be wrong to leap to the conclusion that the accused was guilty merely because he had been charged and decide the bail application on that basis.”

4. The primary consideration in the grant or refusal of bail is whether the accused will turn up for the trial of his case. In the circumstances of this case, the allegation of his having gone into hiding is not supported by detailed affidavit showing, say, attempts at tracing the whereabouts of the accused and the number of visits to his home or his likely places of abode or work in an attempt to apprehend the accused to justify a conclusion that the accused had gone into hiding.

5. I consider that the 2nd accused should in the absence of any exceptional circumstance with respect to him be released upon the similar terms as the 1st accused for whose release on bail the DPP did not object. Accordingly, the 2nd accused is granted bail pending trial upon terms that –

- a. **The accused will execute a bond of Ksh.500,000/-**
- b. **The accused will provide one surety of the same amount.**
- c. **The accused will every 30 days attend the Officer Commanding Police station within whose jurisdiction lies the area of Iiaani Market, Iiaani sub-location, Kivaa location of Masinga sub-County of Machakos County where the offence charged herein is alleged to have occurred.**

6. For clarity, the DPP's representative will attend the hearing for bond surety approval for the accused's surety.

DATED AND DELIVERED THIS 28TH DAY OF APRIL 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Kimeu for the Accused/Applicant

Mrs. Saoli for the Republic/Respondent

Ms Doreen - Court Assistant.