



REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CRIMINAL CASE NO. 70 OF 2015

JOSEPH KIOKO MUTHOKA.....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 12th and 13th August 2015 in Kuwait village, Milaani sub-location, Ndithini Location in Masinga sub-county within Machakos County, he murdered Robert Maweu Mutwanthei. The Applicant pleaded not guilty to the offence. The Applicant subsequently filed an application by way of a Notice of Motion dated 14th October 2015 seeking to be granted bond with the alternative of cash bail pending the hearing and determination of his case.

The Applicant urged his grounds for the application in the said Notice of Motion, and a supporting affidavit and further affidavit he swore on 14th October 2015 and 15th February 2016 respectively. The grounds are that he has a permanent place of abode in Milaani Location, Ndithini in Masinga Sub-County of Machakos County, and that he has lived in peace with the victims of the alleged offence and has no intention of interfering with the witnesses if released on bond/bail, including the witnesses who are his children. Further, that he is of a law abiding citizen of high moral standing with no previous criminal convictions, and will abide by any terms and conditions set by the Court.

The Applicant also averred that he has five children and one wife who depend on him for upkeep, and that he is presumed innocent, the offence of murder is now bailable, and there are no compelling reasons not to be admit him to bond/bail.

The learned counsel for the Applicant, B.M Mungata & Co Advocates, filed submissions dated 15th February 2016 wherein reliance was placed on Article 49 of the Constitution and sections 123A and 124 of the Criminal Procedure Code for the right to be released on bond and/or bail. It was also submitted that the security of all citizens is the responsibility of the state which should also protect the Applicant.

The judicial decision in **Felity Sichangi Nyongesa vs Republic,(2014) e KLR** was cited for the position that interference with prosecution witnesses is a compelling reason only when evidence that the accused person has or can interfere with the witness is adduced. Further, that the Court should be guided by the decision in **George Kamau Ndung'u & 3 Others vs Republic (2013) e KLR** that a balance should be struck between the presumption of innocence and the seriousness of an offence.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 1st March 2016 by IP Frederick Alata, currently the Officer Commanding Masinga Patrol Base, and the investigating officer in this criminal case. The deponent stated that the Applicant has been supplied with the witness statements, and is aware of the evidence against him and particularly that two of the prosecution witnesses namely Bernard Muhoka Kioko and Albanus Mulwa Kioko are his sons, and that there is a likelihood that he may interfere with them if released on bail.

The prosecution also alleged that if the Applicant is released on bond his life may be in danger since members of the public wanted to lynch him prior to his arrest. Further, that taking into account the seriousness of the offence he is charged with and the severity of the sentence of death the offence attracts, the Applicant will have an incentive to abscond and there are thus compelling reasons why he should not be released.

The learned Prosecution counsel, Rita Rono, filed submissions on the application on 8th March 2016, wherein she relied on the decision in **Watoro vs Republic (1991)** for the position that the seriousness of the offence has a bearing on the grant of bails, and on the decision in **R. vs Titus Nyamau Msita Katitu (2015) eKLR** for the argument that interference with witnesses is a compelling reason within the meaning of Article 49 (1)(h) of the Constitution.

The parties at the hearing of the Applicant's application relied on the pleadings and submissions filed. The Court also relied on a pre-bail report on the Applicant which it had requested from the Probation Service, which report was filed in Court on 15th February 2016. The issue in this application therefore 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 agree with the Applicant's submissions that it is the state to secure the safety of the Applicant in the event he is released on bond. In addition, the pre-bail report indicates that the Applicant is not a flight risk and that his family and that of the victim have reconciled and live in harmony. Further, that the community is also not opposed to his release on bail. I am also convinced that the seriousness of the offence the Applicant is charged with is not sufficient reason to deny him bail, in the absence of other factors that may make him not attend trial.

The only arguable ground presented by the Prosecution was that the Applicant may interfere with the witnesses who are his children, and this is for the reason of the familial proximity and physical and emotional closeness that ordinarily exists between a parent and his children, and the influence that a parent may exert over a child due to the child's dependency. There is thus the possibility of interfering with the said witnesses.

I therefore find that a compelling reason exists to deny the Applicant bail at this stage, and that it is in the interests of justice that the witnesses who are the Applicant's children first testify before the Applicant is considered for release 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 can thereafter renew his application for bail and/or bond.

The Applicant's Notice of Motion dated 14th October 2015 is accordingly denied for the foregoing reasons, however the Applicant shall be at liberty to make an oral application after his children have given their testimony.

It is so ordered.

DATED AT MACHAKOS THIS 21st DAY OF APRIL 2016.

P. NYAMWEYA

JUDGE