

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 48 OF 2014

ESTHER NDUKU MUTISO.....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 7th and 8th August 2014 at Mwambani village, Kikule sub-location of Masinga Sub-County within Machakos County, she murdered Josphat Kimina. The Applicant pleaded not guilty to the offence. The Applicant subsequently filed an application by way of Chamber Summons dated 17th December 2015 seeking to be released on bond or bail, pending the hearing and determination of her criminal case and upon such terms and conditions as this Court may deem just in the circumstances.

The Applicant urged her grounds for the application in an affidavit she swore on 17th December 2015 wherein she stated that it is now a constitutional right for an arrested person to be released on bond or bail on reasonable conditions pending the charge of trial, and that there are no compelling reasons that would work against her release. Further, that she is presumed innocent until proved guilty under the Constitution. The Applicant undertook to abide by the terms and conditions that may be imposed by this Court. These grounds were reiterated in the Applicant's written submissions dated 8th April 2016, that were filed by her learned counsel Kaluu & Co. Advocates. Reliance was placed on Articles 49 (1)(b) and 50 (2)(a) of the Constitution and the decision in **R. vs Diana Salim Suleiman (2014) e KLR** in this regard.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 21st March 2016 by PC Joseph Nganga, the investigating officer in the Applicant's criminal case. The deponent stated that the applicant once granted bail may target and interfere with a key witness being her daughter aged 12 years, one Eunice Mwendu Kimina. Further, that the Applicant has been supplied with the witness statements and may interfere with the witnesses who are people well known to her. It was also averred that the Applicant will face a hostile environment from the community, as there was an attempt to lynch her once she was suspected of murdering the deceased who was her husband.

The learned Prosecution counsel, Ms. Rono submitted at the hearing of the application on 12th April 2016 that they were wholly relying on the replying affidavit, as well as a Government Analyst's Report and exhibit memos which were availed to the Court and Applicant's counsel.

I have considered the said pleadings by the Applicant and Prosecution. I am of the view that the Government Analyst's Report report and exhibit memos relied upon by the prosecution are matters of evidence and are only relevant once found to be admissible, at the time of determination of guilt after the trial. They are therefore not relevant in an application for bond or bail.

The Court also requested for a pre-bail report from the Probation Service, and the said report was filed in Court on 8th April 2016. After perusal of the same I note that the Applicant's family is supportive, and her parents are willing to assist her secure bond terms and ensure that she abides by the bond terms. The

Applicant's parents and the chief of her home area also consider the applicant to be a person of good conduct. However, I note that the deceased's family, who are the Applicant's in-laws, object to her being given bond terms and stated that she is no longer welcome in their homestead. The deceased's family are also the ones taking care of the children the Applicant had with the deceased.

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. 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.

The Prosecution in this regard has argued that a key witness in the trial will be the Applicant's young daughter, and alleges that she may be interfered with by the Applicant. The Applicant did not controvert this averment. I find that given the relationship between the Applicant and said witness in terms of their close familial relation, and the physical and emotional dependancy that ordinarily exists between a parent and his children, there is a possibility of interference. It is thus in the interests of justice that the said witness first testifies before the Applicant is released on bail and/or bond. This finding is reinforced by the probation report that the child is in the custody of the deceased's family who are hostile to the Applicant.

The Applicant shall however thereafter be at liberty to renew her application for bail and/or bond. The said witness, Eunice Mwendu Kimina, shall be called as the first prosecution witness at the next hearing date.

The Applicant's Chamber Summons dated 17th December 2015 is accordingly denied for the foregoing reasons, however the Applicant is at liberty to make an oral application after the said witness has given her testimony.

It is so ordered.

DATED AT MACHAKOS THIS 24th MAY 2016.

P. NYAMWEYA

JUDGE