



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL CASE NO. 27 OF 2015

REPUBLICPROSECUTOR

VERSUS

1. NEWTON KARIUKI KINA ALIAS DUDUS.....ACCUSED

2. WINFRED WANYAGA RHODAHACCUSED

RULING

1. Counsel for both accused persons have applied by their notices of motion for bail pending their trial on charge of murder contrary to section 204 as read with 203 of the Penal Code (Cap 63) Laws of Kenya. They have brought their application under the provisions of Article 49 (1) (h) of the 2010 Constitution of Kenya and section 123(3) of the Criminal Procedure Code (Cap 75) Laws of Kenya.

2. The state has opposed the application of the second accused but has conceded that of the first accused.

3. The application of the first accused is anchored in his supporting affidavit dated 10th June 2016. His affidavit evidence is that he pleaded not guilty to the charge of murder and that the case is part heard. He has further deponed that he is a 26 year old businessman with a young family of one child and he is the sole breadwinner. According to him, his continued incarceration will be prejudicial, if at the end of the trial he will be acquitted. Furthermore, he has deponed that it is only fair and just that he be admitted to bail pending the hearing and determination of this case. Finally, he has deponed that he is a law abiding citizen with no previous criminal record and that he is ready and willing to abide by any terms of bail this court may impose.

4. In the light of his affidavit evidence and the proceeds from his sales, the issue to be considered are the terms of his bail. In doing so I am guided by the provisions of section 123 (2) of of the Criminal Procedure Code, which in terms provide that: ***“the amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.”*** In view of his affidavit evidence which I find credible, I hereby grant him bail/bond in the sum of Kshs 300,000/- with a surety of a similar amount. In doing so, I have taken into account that the first accused is a businessman who makes Kshs 5,000/- per month from selling clothes.

5. The position of the second accused is different. The second accused through Mr. Okwaro has filed the application for her release on bail pending the hearing and determination of her trial. Her application is supported by the grounds on the face of the motion and her supporting affidavit. The grounds in support of the application are as follows. First, the applicant is a mother of of a two year child who is with her in the remand prison. The second ground is that the applicant may be held in custody for along time before her case is heard and finalized. The third ground is that the child is suffering in custody because living conditions are not conducive to the child. The fourth ground is that the applicant is ready to abide by the

terms and conditions that the court may impose. The fifth ground is that it is only fair and just that she be granted bail pending the hearing and determination of this case.

6. In her supporting affidavit the applicant has deponed that she has been in custody since her arrest and before that, she was employed as a hair dresser on a commission basis and was earning an average of Kshs 3,000 per month. She has further deponed that she is a mother of a two year old child who is breast feeding and needs her care and attention. She has also deponed that she is likely to remain in custody for a long time before her case is heard and determined, which will expose the child to unnecessary suffering due to poor living conditions in prison.

7. The state through No. 89261 PC Leah Nzioka has filed an affidavit in opposition to the release of the second accused on bail. In her affidavit evidence, this police officer has deponed that the accused murdered the deceased outside Zebra bar within Embu township and fled to an unknown destination in Nairobi. As a result, the police conducted a search and the second accused was arrested at a hideout within Githurai 44 area in Nairobi. It is her further affidavit evidence that it was expensive and that it took the police more time to look for this accused whom she says knew very well that the police were looking for her. According to this police officer, the applicant is likely to interfere with witnesses if she is released on bail, as the witnesses are personally known to her.

8. Furthermore, this police officer has deponed that the second accused disappeared after committing this offence. It is her further evidence that if she is released on bail/bond, there is a likelihood that she will jump bail after taking into account that she had fled to an unknown destination in Nairobi after committing the offence.

9. Mr Okwaro for the second accused has submitted that there is no evidence that the second accused will interfere with the prosecution witnesses in particular the street boy, who is said to be a key witness. He further submitted that the second accused has a two year old child, who has now been forced to stay with her mother in prison. Additionally, he has submitted that the accused is ready to abide with any conditions that the court may impose in respect of his bail. His further submission is that the second accused is a hair dresser and used to work on commission basis and that she will not jump bail if released. He has further submitted that at no time was the second accused required to report to the police and failed to do so.

10. And finally, the state has not demonstrated as to how she will interfere with the witnesses pointing out that the deceased was her husband and that the second accused was free to move to any part of Kenya, whenever she wanted to do so.

11. Ms Mbae for the state has opposed the release of the second accused on bail. She has relied on the affidavit of PC Leah Nzioka. Her submissions are an elaboration of what the affidavit evidence of that particular police officer deponed to. According to her, the second accused is a flight risk and is likely to interfere with witnesses in particular a street boy who she states is a key witness. In respect of the child of the second accused, she submitted that there are adequate child care facilities at the prison.

12. I have considered the affidavit evidence of PC Leah Nzioka and that of the second accused. I have also considered the submissions of both counsel. I believe the affidavit evidence of the police officer that the second accused fled to an unknown destination in Nairobi following the alleged commission of this offence, from where she was arrested.

13. Additionally, I believe her affidavit evidence that it took police a long time to search for the second accused. I also believe her affidavit evidence that she is likely to interfere with the witnesses if released on bail. Interference with witnesses was recognized in *R v Joktan Mayende & 4 Others* being *High Court of Kenya (at Bungoma) in Criminal Case No. 55 of 2007*, as a ground of refusing bail under the 2010 Constitution of Kenya. In that case the accused was denied bail on the ground of interference with witnesses. In the circumstances, I find that the second accused is a flight risk and is likely to interfere with the witnesses if she is released on bail. These are compelling reasons within the meaning of Article 49 (1) (h) of the 2010 Constitution that militate against the release of this second applicant on bail pending the

hearing and determination of her trial. I therefore refuse to grant her bail.

14. The refusal of bail in respect of the second accused and the grant of bail to the first accused does not amount to discrimination under Article 27 (1) (2) and (4) of the 2010 Constitution, because the circumstances of the second accused are different from those of the first accused, although they are jointly charged with the murder of the deceased.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **14th** day of **JUNE 2016**

In the presence of Ms Muriuki holding brief for both Ms Njuguna and for the first accused and Mr Okwaro for the second accused.

Court clerk Njue

J.M BWONWONGA

JUDGE

14.07.16