



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 55 OF 2015

FELIX MUNYAO KIOKO.....1ST APPLICANT

JOEL MUNYAO MBUVI.....2ND APPLICANT

JONATHAN WAMBUA KIIO.....3RD APPLICANT

JORAM MULWA NZAU.....4TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The 1st, 2nd, 3rd and 4th Applicants were charged with murder contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on the night of 13th and 14th June 2015 at Kwa Munuve area along Miumbuni-Misuuni Road in Mitaboni Location, in Kathiani Sub-county within Machakos County, they murdered Joseph Mulela Sendi. The Applicants pleaded not guilty to the offence. The Applicants subsequently filed separate applications to be released on bail/bond pending trial. The 1st Applicant's application was by way of a Notice of Motion dated 15th January 2016; the 2nd Applicant's by way of a Notice of Motion dated 8th October 2015; the 3rd Applicant filed a Chamber Summons dated 18th January 2016; while the 4th Applicant's application was by way of a Notice of Motion dated 7th August 2015. All the Applicants also filed affidavits in support of their respective applications.

All the Applicants relied on the ground that they are presumed innocent until proved guilty, the offence they are charged with is bailable under the Constitution, and there is no compelling reason why he cannot be released on bail.. The 1st Applicant in addition stated that he takes care of his elderly mother, his dependants are undergoing hardship, and that he undertakes peasant farming on his farm and is not a flight risk. The 2nd Applicant averred that he is the only bread winner of his family and his child is lacking parental care. The 3rd Applicant's pleading was that his parents are deceased and he is the one who supports his younger brother. Lastly, the 4th Applicant stated that he has a permanent place of abode, does not live near the victims of the offence and the grant of bail/bond will enable him take care of his aged parents.

The above grounds by the Applicants were reiterated by their learned counsel being Muema & Associates Advocates for the 1st Applicant, Kamolo & Associates for the 2nd Applicant, and Mutinda Kimeu &

Company Advocates for the 4th Applicant in written submissions filed in Court dated 18th February 2016, 21st January 2016 and 18th January 2016 respectively. The learned counsel for the 4th Applicant in addition cited various judicial authorities on the meaning of compelling reasons and submission that the prosecution had failed to give any compelling reasons why the 4th Applicant should not be given bail.

The Prosecution opposed the Applicants' application in a replying affidavit sworn on 15th September 2015 by C.I. George Kipkoros, a police officer currently attached to Kathiani Police Station, and the investigating officer in this criminal case. The deponent stated that the Applicants had been supplied with the witness statements, and that the 4th Applicant resides in Mumbuni sub-location within Kathiani sub-county, where the prosecution witnesses also reside and/or conduct business. It was averred that the 4th Applicant may thus interfere with the witnesses. The prosecution relied on the bundle of the witness statements which it availed to the Court.

It was also stated that the Applicants' lives might be in danger if they are released on bail since the members of the society are still bitter about the death of the deceased. It was further argued by the prosecution that considering the severity of the sentence provided by law for the offence of murder, which is the death penalty, this was a compelling reason to deny the Applicants bail.

I have considered the pleadings and arguments made by the Applicants and prosecution. I also requested the Probation Service to prepare and file pre-bail reports on the 1st to 4th Applicants, which reports were filed in Court on 11th May 2016.

The applicable law on bail/bond pending trial is Article 49 (1) (h) of the Constitution, which 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 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 the 4th Applicant may interfere with the witnesses who are his neighbors. No particulars or details of these witnesses and their proximity with the 4th Applicant were given by the prosecution. The Court is therefore not in a position to determine whether the 4th Applicant will be in a position to influence or in any other manner interfere with the said witnesses.

This finding notwithstanding, I note that the pre-bail reports on all the four Applicants are not positive and do not recommend their release on bond/bail. In particular for the 1st, 2nd, and 4th Applicants, it is reported that they are a threat to the prosecution witnesses and have a history of criminal activities. The family of the victim also raised fears for their own safety if the Applicants are released on bond.

The 3rd Applicant was however found to have positive behavioural antecedents, was hard working and law abiding prior to the alleged offence. The local administration however fears for his security as well as that of all the other Applicants if they are released on bond/bail, due to public hostility arising from the offence they are accused of committing.

It is however the responsibility of the State to provide security to its citizens, and the safety of accused persons if released on bond/bail cannot be put forward by the State as a compelling reason. However, threats to witnesses and the victims is a serious consideration for the Court to take into account, as it will impact on a fair trial and the attainment of justice.

Arising from the foregoing findings, it is my view that it is only the 3rd Applicant who can be admitted to bail/bond pending trial, and I hereby do so on the following terms:

1. The 3rd Applicant shall execute a bond of Kshs. 500,000/= with one surety of similar sum.
2. The surety for the 3rd Applicant will be approved by the Deputy Registrar of this court.
3. The 3rd Applicant will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until the case is heard and determined.
4. The Applicant shall be required to attend court for the remainder of the trial without fail.
5. In default of orders 1, 2, 3, and 4 hereinabove, the bond shall be cancelled immediately and sureties called to account.

The applications by the 1st, 2nd and 4th Applicants are however denied, as the probation report shows compelling reasons why they should not be released on bond/bail pending trial.

It is so ordered.

DATED AT MACHAKOS THIS 8TH JUNE 2016.

P. NYAMWEYA

JUDGE