



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL CASE NO. 23 OF 2016

STEPHEN KIMONDIU NZUE.....1ST APPLICANT

JAMES MUTUA MWEI.....2ND APPLICANT

BONIFACE MUSEMBI MUTUA.....3RD APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The 1st, 2nd and 3rd 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 7th and 8th May 2016 at Muangini river in Ukusyini village, Kaskeu Division, Mukaa sub-county within Makueni County, they murdered Francis Muteti Mwei. The Applicants pleaded not guilty to the offence. The Applicants subsequently filed an application by way of a Notice of Motion dated 22nd June 2016 seeking to be admitted to bond/bail pending trial. The said application was supported by affidavits sworn on the same date by the 1st, 2nd and 3rd Applicants respectively, and by further affidavits sworn by the said Applicants on 20th July 2016.

The grounds for the application are that the Applicants are presumed innocent until proven guilty, and that there are no compelling reasons not to release them on bond/bail. The 1st Applicant in addition averred that he is a primary school teacher and his job, which is his sole source of income, is at risk if he continues to abscond his duties. He attached a copy of his payslip. The 2nd Applicant averred that the prison environment and diet is not favourable to him due to his old age, and he has continued to suffer since his arrest. The 3rd Applicant on his part averred that he is a family man and the sole breadwinner of his family, which has continued to suffer since his arrest.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 6th July 2016 by Cpl. James Kimatu, the investigating officer in this criminal case. The deponent stated that the 1st and 3rd Applicants are nephews, and the 2nd Applicant a brother to the deceased, and are likely to interfere with a key witness being Josephine Mbithe, who was the wife of the deceased. Further, that the Applicants have been supplied with the witnesses statements, and that the witnesses in this case are people who are well known to the Applicants and are their relatives, and there is the likelihood that they may interfere with them. 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 may be an incentive for the Applicants to abscond and is thus a compelling reason to deny him bail.

The Applicants in response all undertook not to interfere with the Respondent's witnesses, with the 1st Applicant stating that he is a primary school teacher at Wathini Primary School which is approximately 10 kilometres from where the said Josephine Mbithe and other witnesses stay. Further that the said witness had since relocated to Nairobi. The 2nd Applicant also stated that he works as a watchman in Machakos County while the witnesses live in Makueni County.

The learned counsel for the Applicants, J.K. Mwalimu & Co Advocates filed written submissions dated 20th July 2016, wherein it was argued that the right to be released on bail or bail on reasonable conditions is a constitutionally guaranteed right arising from the constitutional provisions that an accused person is presumed innocent until proven guilty, unless there are conditions that militate against the release.

Further, that when an allegation of interference with witnesses is used as a ground for opposing the release of an accused person on bail, the prosecution must provide evidence which it had not done, and reliance was placed on the decision in **R. vs Jokyan Mayende & 3 Others, Bungoma HCCrC No 55 of 2009** in this regard. It was submitted by the Applicants that the mere fact that a witness is known to the accused does not mean that the accused will interfere with that witness.

The learned Prosecution counsel, Ms. Mogoi Lillian, relied on the replying affidavit and witness statements availed to the Court and the Applicants.

The issue before the Court therefore is whether the Applicants should be released on bail and/or bond and if so, on what terms. 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 question to be asked therefore in this application therefore is whether there are compelling reasons why the Applicants 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 am of the opinion after perusing the witnesses statements availed to the Court that the arguments presented by the Prosecution merit consideration. It is not disputed that one of the witnesses, Josephine Mbithe is a relative of the Applicants, being their sister-in-law and aunt respectively. I note in this regard that the 1st Applicant has alleged that the said witness has since moved to Nairobi, which allegation was not addressed and/or denied by the prosecution. The 2nd Applicant also states that he does not work near the said witness, which averment was not controverted by the prosecution. The physical proximity of the said witness to the Applicants has therefore not been established, and the ground given by the prosecution therefore does not qualify to be a compelling reason.

The Applicants' Notice of Motion dated 22nd June 2016 is accordingly allowed. I admit the 1st, 2nd and 3rd Applicants to bail/bond pending trial on the following terms:

1. The 1st, 2nd and 3rd Applicants shall each execute a bond of Kshs. 500,000/=, and shall each provide one surety of similar sum.
2. The sureties for the 1st, 2nd and 3rd Applicants will be approved by the Deputy Registrar of this court.
3. The 1st, 2nd and 3rd Applicants shall attend mentions before the Deputy Registrar of the High Court, Machakos once every month until the case is heard and determined.
4. The 1st, 2nd and 3rd Applicants shall not have any contact with, or in any other manner interfere

with the prosecution witnesses in this case.

5. The 1st, 2nd and 3rd Applicants shall be required to attend court for the remainder of the trial without fail.

6. In default of orders 1, 2, 3, and 4 hereinabove, the 1st, 2nd and 3rd Applicants' bond shall be cancelled immediately and their sureties called to account.

It is so ordered.

DATED AT MACHAKOS THIS 30TH AUGUST 2016.

P. NYAMWEYA

JUDGE