



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE NO. 16 OF 2016**

**MUTUNGA MUSEMBI.....1<sup>ST</sup> APPLICANT**

**MUTUKU MUTUA.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The Applicants are the 1<sup>st</sup> and 2<sup>nd</sup> Accused Persons herein and are charged with murder contrary to section 203 as read with Section 204 of the Penal code. It is alleged that on 14<sup>th</sup> March 2016 in Kivukuni village, Utaati Sub-location, Ukia Location, within Makueni County, they jointly murdered Onesmus Mutuku Kikweo and Joyce Mutiwa Kinyili. The Applicants pleaded not guilty to the offence. The Applicants subsequently filed an application by way of a Notice of Motion dated 5<sup>th</sup> May 2016 seeking to be admitted to bond/bail pending trial.

The Applicants urged their grounds for the application in the said Notice of Motion, supporting affidavits sworn by each Applicant on 5<sup>th</sup> May 2016 and a supplementary affidavit sworn by both Applicants on 16<sup>th</sup> June 2016. The grounds are that the Applicants both have a permanent place of abode at Nziu Location at Makueni County and do not live near the victims of the alleged offence and are unable and have no intention of interfering with the witnesses. They asserted that the investigation officer had not given any particulars or details of the witnesses who are alleged to live within their proximity. The Applicants also averred that they are law abiding citizens and do not have any previous criminal records, and that the fact that they are facing the death penalty is not a compelling reason to deny them bail. The Applicants undertook to abide with the terms and conditions set by the Court.

The learned counsel for the Applicants, Mutinda Kimeu & Company Advocates, filed written submissions on the application dated 15<sup>th</sup> June 2016 wherein reliance was placed on Article 49(1)(h) of the Constitution for the right to bail/bond. Reliance was also placed on various judicial decisions including in **R vs William Mwangi wa Mwangi, (2014) e KLR** and **R. vs Gerald Mutuku Nyalita & Another, (2015) e KLR** for the position that the prosecution had failed to discharge its onus of demonstrating that there are compelling reasons to deny the Applicant's bail and that the overriding consideration is for the Court to ensure the accused person attends trial.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 10<sup>th</sup> June 2016 by Cpl Amina Almasi, a police officer currently attached to DCI Makueni and the investigating officer in

this criminal case. The deponent stated that the Applicants have been supplied with the witness statements and there is the likelihood and temptation that they may tamper with witnesses who are in their neighbourhood. 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 Applicant to abscond and is thus a compelling reason to deny him bail. The learned Prosecution counsel, Ms.Mogoi Lillian, relied on the said replying affidavit.

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 1<sup>st</sup> and 2<sup>nd</sup> Applicants, which reports were filed in Court on 16<sup>th</sup> June 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 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 note that the prosecution has not given any particulars as to the witnesses likely to be interfered with by the Applicants, and the details of their relationship and/or proximity. I also note that the probation report also stated that the local administration from where the deceased persons hailed from are apprehensive about the security of the prosecution witnesses, and allege that the Applicants were arrested as they posed as investigating officers tracing the prosecution witnesses. However, again the particular prosecution witnesses at risk were not identified, and there is now a law and mechanisms in place for the protection of any such witnesses who may be at risk. The probation report otherwise noted that the Applicants are of good character and of a low flight risk.

It is also a cardinal right of an accused person under the Constitution that they are presumed innocent until proved guilty, and the fact that the sentence meted on the Applicants will be severe in the event that they are found guilty does not affect their right to be granted bail on account of their presumption of innocence.

I therefore find that no compelling reason exists to deny the Applicants bail/bond at this stage, and the Applicants' Notice of Motion dated 5<sup>th</sup> May 2016 is allowed.

I accordingly admit the 1<sup>st</sup> and 2<sup>nd</sup> Applicants to bail/bond pending trial on the following terms:

1. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants shall each execute a bond of Kshs. 350,000/=, and shall each provide one surety of similar sum.
2. The sureties for the 1<sup>st</sup> and 2<sup>nd</sup> Applicants will be approved by the Deputy Registrar of this court.
3. The 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Applicants shall not have any contact with, or in any other manner interfere with the prosecution witnesses in this case.
5. The 1<sup>st</sup> and 2<sup>nd</sup> 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 1<sup>st</sup> and 2<sup>nd</sup> Applicants' bond shall be cancelled immediately and their sureties called to account.

It is so ordered.

**DATED AT MACHAKOS THIS 3<sup>RD</sup> AUGUST 2016.**

**P. NYAMWEYA**

**JUDGE**