



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE NO. 8 OF 2016**

**TOM MUTISO MUTISYA.....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 16<sup>th</sup> January 2016 at Kwa Koko village, Kithimani Location Yatta Sub-county within Machakos County, he murdered Pauline Mumbua Mutuku. The Applicant pleaded not guilty to the offence. The Applicant subsequently filed an application by way of a Notice of Motion dated 23<sup>rd</sup> May 2016 seeking to be admitted to bond/bail pending trial. The said application was supported by an affidavit sworn on the same date by Joun Ndungwa Kimeu, the Accused's Advocate.

The grounds for the application are that the Applicant is the sole breadwinner in his family and was solely responsible for the upkeep of his elderly parents, sisters and brothers before his arrest, and that his continued incarceration will be prejudicial and incompatible with his constitutional rights. Further, that the Applicant has a strong defence and there are no compelling reasons for his continued detention and that he is willing to abide by any terms set by the Court.

The learned counsel for the Applicant, J.N. Kimeu & Co Advocates filed written submissions dated 20<sup>th</sup> June 2016, wherein they relied on the supporting affidavit, and urged that it is entrenched in the Constitution that an accused person is presumed innocent until proven guilty, and has a constitutional right to be released on bond /dail unless there are compelling reasons for denial of the same. It was submitted in this regard that the the Prosecution has not advanced and/or demonstrated any compelling reasons for denial of bond/bail in this case, and that their allegation that the Applicant may interfere with potential witnesses is mere speculation. Reliance was placed on various judicial decisions in this regard.

The Prosecution opposed the Applicant's application in a replying affidavit sworn on 6<sup>th</sup> June 2016 by PC Boniface Owuor, the investigating officer in this criminal case. The deponent stated that the Applicant is accused of murdering his wife, and that if he is granted bail he may target one key witness, being Bellamy Mutie who is his son, and who was at the scene of the murder. Further, that the witnesses in this case are people who are well known to the Applicant, and there is the likelihood that he 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 Applicant to abscond and is thus a compelling reason to deny him bail.

The learned Prosecution counsel, Ms. Rita Rono, filed written submissions dated 28<sup>th</sup> June 2016 and reiterated the averments in the said replying affidavit. It was submitted that the Court should, when considering an application for bail/bond made pursuant to Article 49(1)(h) of the Constitution, also consider the circumstances surrounding the offence and its gravity, and that interference with witnesses is a compelling reason within the meaning of the said Article. The prosecution counsel also cited various judicial decisions in support of these arguments.

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.

I am of the opinion after perusing the witnesses statements availed to the Court that the arguments presented by the Prosecution merit consideration. I note in this regard that one of the witnesses namely BellamyMutie is a 11 year old minor and a son of the Applicant. There is thus the possibility that the Applicant may interfere with this witnesses for reason of their familial proximity, physical and emotional closeness and the minor's dependency on the Applicant.

I therefore find that a compelling reason exists to deny the Applicant bail at this stage, and that it is in the interests of justice that the said witness first testifies before the Applicant is considered for release on bail and/or bond. The said witness shall be called as the first prosecution witness, and the Applicant is thereafter at liberty renew his application for bail and/or bond.

The Applicant's Notice of Motion dated 23<sup>rd</sup> May 2016 is accordingly denied for the foregoing reasons.

It is so ordered.

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

**P. NYAMWEYA**

**JUDGE**