



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**H.C.CR.C 41 OF 2015**

REPUBLIC .....PROSECUTOR/RESPONDENT

VERSUS

JAMES MUTUNGA MBALUKA ..... ACCUSED

**RULING OF THE COURT**

1. The **Chamber Summons** application before the court is dated and filed herein on 30<sup>th</sup> October 2015, by the Accused person. The application makes the following prayers:-

**i. That the Applicant herein James Mutunga Mbaluka be released on bond or bail, pending the hearing and determination of this case.**

**ii. That the court be pleased to set such reasonable conditions, as are just in the circumstances.**

2. The application is supported by the affidavit of the Applicant sworn and filed herein on 30<sup>th</sup> October 2015.

3. The Applicant's case is that he is entitled to bond or bail as a Constitutional right on such reasonable terms as the court may decree, and that under the **Constitution** he is deemed innocent until the contrary is proved. The Applicant also states that he shall abide by all the terms and conditions that may be attached to such bond.

4. The application for bond is opposed by the State vide a replying affidavit of **No. 82152 PC Benjamin Kulei** sworn on 19<sup>th</sup> November 2015. The deponent states that he is the Investigating Officer in this case thus properly seized of the facts in the matter and therefore competent to swear the affidavit. The deponent states that the Applicant is accused of murdering the deceased **Tabitha Singi** who is his grandmother; and that he believes that once the Accused person is granted bail, he may target one witness **John Mbaluka** who is his father and hence interfere with the smooth proceedings of the court. The deponent further states that since the witnesses in the case are people well known to Accused person, there is likelihood that he may interfere with them and this on its own is compelling enough for court to decline bail. The deponent states that after commission of the offence on 25/04/2015 at **Masinga Sub-County**, the Applicant went into hiding and was arrested on the 5/05/2015 at around 03.00 a.m. within **Masinga Sub-County** which was after about 10 days hence if released on bond there is likelihood that he may fail to attend court, and that although the offence of murder was bailable, the grant of bail is not absolute but a matter of discretion on the part of the court.

5. Parties filed submissions to the application which I have considered. In my view, the issues for

determination in the application are:-

**◆Whether the Accused may interfere with witnesses or whether he may abscond bond.**

6. This is so because it is no longer arguable whether an Accused person is entitled to bond or bail. The **Constitution at Article 49 (1) (b)** has made bail or bond a Constitutional right. It states:-

**“An arrested person has the right to be released on bond or bail on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released”.**

7. So, bond or bail can only be denied where there are compelling reasons to do so. It is a burden now placed upon the State to prove the existence of such compelling reasons. The prosecution occupies the position that the Applicant ought not to be released on bond or bail pending trial. To buttress that position, the Investigating Officer, one **PC Benjamin Kulei** depones that since the witnesses in this case are people well known to the Accused person, there is likelihood that he may interfere with them and this on its own is compelling enough reason for court to decline bail. The said **PC Benjamin Kulei** goes on to aver that after the commission of the offence on the 25/04/2015 at **Masinga Sub-County**, the Applicant went into hiding and was arrested on the 05/04/2015 around 3.00 a.m. within **Masinga Sub-County** which was after about ten (10) days hence if released on bond there is likelihood that he may fail to attend court.

8. The defence has trashed the State’s view. It is submitted for the Applicant that the views and/or statements by the Prosecution, as set out negate the very constitutional principle encapsulated in **Article 50 (2) (a) of the Constitution** that an accused person has a right to be presumed innocent until the contrary is proved. That the Applicant has been charged does not negate that presumption.

9. In **Republic –vs- Diana Salim Suleiman [2014] e KLR, Criminal Case No. 23 of 2014, Judge Mureithi**, confronted with an application similar with the one herein, stated as follows:-

**“As I understand it, the Constitutional provisions on bail under Article 49 (h) for the arrested persons ‘to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released’ is designed to give effect to the Constitutional rights to fair hearing under Article 50 (2) (a) ‘to be presumed innocent until the contrary is proved’.”**

10. In my view a constitutional right cannot be denied merely on the allegations that an accused person is likely to interfere with witnesses or that he is likely to abscond. These are all hypothetical scenarios. The prosecution must show some real possibility that the Accused person will interfere with witnesses or jump bond. Unfortunately, the prosecution cannot do this unless the Accused person is a repeat offender with a history to show that he may misuse the bond terms. A court of law has the responsibility to protect the constitutional provisions relating to the human rights of the Accused. The prosecution must wait for the Accused person to either interfere with witnesses or jump bail before it can use such evidence against an Accused person. Of course there will be cases, which are obvious to the court, that the Accused person(s) before the court are those that will interfere with witnesses or jump bail. The court will know such cases and treat them appropriately. In the instant case, the prosecution has not shown to this court any compelling reason as to why the Accused’s constitutional right should be denied. Accordingly therefore, the application for bond/bail is allowed in the following terms:-

11. The Accused/Applicant is herewith released on a personal bond of Kshs.300,000 and one surety of similar amount.

**Dated and delivered at Machakos this 20<sup>th</sup> day of September 2016.**

.....

**E. OGOLA**

**JUDGE**