



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CRIMINAL CASE NO. 106 OF 2014

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

EDWARD EMUSINGE NANDUKULE.....1ST ACCUSED

JOEL KIMATHI KILAKU.....2ND ACCUSED

RULING

1. The accused persons **EDWARD EMUSINGE NANDUKULE** and **JOEL KIMATHI KILAKU** have brought a Notice of Motion application dated 30th January, 2015 in which the accused persons seek an order as follows:

- 1) That this honourable court be pleased to review its Ruling made herein on the 23rd day of December 2014.
- 2) That the Applicants herein be granted reasonable cash bail or in the alternative bond upon conditions that are just.

2. The application is perused on the following grounds:

- 1) *That in this case there are six witnesses all of whom are crucial witnesses to the case given the peculiar circumstances in which the alleged offence occurred.*
- 2) *That the deceased herein died on the 30th of October 2014 a whole six days after his alleged encounter with the accused persons herein and not on the 24th of September 2014 as alleged by the prosecution.*
- 3) *No antecedent incidences or instances have been alleged or demonstrated to the court where or when the accused's have attempted to or have interfered with any of the prosecution witnesses.*
- 4) *It therefore follows that the allegations made by the prosecution to the effect that the accused applicants will interfere with witnesses are mere apprehensions and insinuations.*
- 5) *That the applicants herein have since been interdicted from the disciplined*

forces and stripped of all the powers, privileges and benefits bestowed upon disciplined officers.

6) That the accused persons herein are therefore neither in a position of power nor with the authority to enable them to interfere with any of the witnesses herein.

7) That it is in the interest of justice that the application herein is allowed.

3. The application is supported by two affidavits sworn by **EDWARD EMUSINGE NANDUKULE** and **JOEL KIMATHI KILAKU** respectively. The gist of the affidavit by the first accused is that the 1st accused has been interdicted from the police force; that since the court was concerned with the fear occasioned to the key witness on account of the accused position, there was now no more reason to fear and therefore the application should be granted. The 1st accused delves into the arena of evidence which is not appropriate to discuss in this application.

4. The 2nd accused in his affidavit also states that since the sole reason given to deny him bail was the fear the key witness had on account of his position in the police force, there was no more reason to fear as the accused had been interdicted from his job as he could no longer enjoy the powers he had before.

5. The accused persons were represented by Mr. Muchiri and Mr. Wabale. Mr. Muchiri urged the application on behalf of the accused persons. In his brief submissions, Mr. Muchiri submitted that he relied on the affidavits of the accused persons. He also cited a case from Meru court by this court **Rep. Vs Mabea [2004] Eklr.** Counsel also relied on the Pre Bail Reports on the accused filed by the Probation, on the courts request.

6. The State was represented by Ms Maari. Counsel did not oppose the application for bail for either of the accused persons.

7. I have carefully considered this application and the submission by the accused counsel. The State has not opposed the application.

8. The Pre bail Report by the Probation paints a good picture of the accused. He is a family man with a wife and children. He has strong family ties being the eldest in his family. He is an ardent follower of his church. The local administration in his home County was full of praise for him. There was no opposition to his release except from a victim of this crime and a key witness to the prosecution case. The PO indicates that this witness lives in fear since the offence occurred and that the fear will be greater if the accused are released on bail as she is well known to them. The PO also mentions that the investigating officer was apprehensive of interference with his key witness by the accused if they are released on bail.

9. The 2nd accused too is a family man with a wife and child. He is recorded to be a member of a local church where he comes from and where he attends whenever at home. The report indicates that the key witness in this case has lived in fear since the incident in the subject of this case and said fear will be heightened if the accused are released. The accused has good reputation from administrators from his County and strong family ties.

10. I have considered the application by the accused person. The accused had made a similar application earlier. It was declined on account the prosecution having only one key witness and being known to the accused persons, the great temptation to interfere with them if granted bail. The other reason I gave is fact the incident the subject matter of this case had occurred only two months earlier and therefore too soon for the victims of this crime to have recovered.

11. It has been seven months since this incident. Whether that is a long enough period for the victims of this case to recover sufficiently is a matter that would require an enquiry. That is an enquiry I expected

the Probation Officer to do by interviewing the victims of this crime. However that was clearly not done and the only person interviewed apart from the accused family, friends, and acquaintances both from home and office was the investigating officer of this case. That was a serious omission. Not to mention that the Investigating officer had the added advantage to file a n affidavit, a privilege he clearly did not take up.

12. Even though the Report looks a little loop sided, I still have sufficient information from it. There is a clear indication that at least one victim of this crime lives in fear since this incident. She is the only key witness. The source of the fear is fact she is well known to the accused persons.

13. With the advent of the Witness Protection Act, witnesses of criminal cases have rights and expectations which the Legislature has recognized by enacting this law. I do not wish to delve into the actual provisions in the Act and what they provide. However I do recognize that a witness should not be exposed to any form of intimidation, especially where they have taken a step to disclose their fears to the investigating officer. The key witness indicated the reasons of her fears. The mere fact the State has not invoked the Witness Protection processes do not mean that this court should close its eyes as if there is no issue. The court should be a neutral arbiter of justice. Where there are issues of concern, the court should not fail to do what it can legally do, so long as it acts within the law.

14. It is my view that the key witness in this case needs this courts assurance that it appreciates the concerns she has raised. It is my firm belief that the application for bail for both accused should be differed until such time the key witness gives her testimony, or until any other orders of the court.

15. The accused application(s) for bail is thus differed as herein above stated.

DATED AT NAIROBI THIS 28TH DAY OF MAY, 2015.

LESIIT, J

JUDGE