



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 52 OF 2014**

**LESIT, J**

**REPUBLIC.....PROSECUTOR**

**-VERSUS -**

**SALOME WANJIKU KUNGU.....1<sup>ST</sup> ACCUSED**

**TOM CHEGE MBITHI alias RASTA.....2<sup>ND</sup> ACCUSED**

**RULING**

1. The accused persons are a mother and son respectively. They face one count of **murder** contrary to **Section 203** of the **Penal Code**. It is alleged that the two jointly with another not before the court murdered **GEORGE MBITHI MWAURA** on the night of the 22<sup>nd</sup> and 23<sup>rd</sup> June 2014.

2. The accused have filed a Notice of Motion application in which they seek to be released on bail pending their trial. The application is dated 20<sup>th</sup> March 2015. The grounds of the applications are on the face of the application. For the application by the first accused (Salome) the grounds are:

**1) That the Applicant is aged 52 years and her continued stay in prison whereas she suffer from ulcers and hypertension affects her and with the longevity of time having passed whereas in remand the applicant continues to be disadvantaged;**

**2) That the applicant continued detention in custody affects the social affairs she was earning a living from as her property gets wasted due to her unavailability and rental income derived from the premises remains unpaid and not demanded.**

**3) That prior to the applicant’s remand in custody she had built rental houses that she derives income from and being of an advanced age they were the only source of her livelihood;**

**4) That it is in the interest of justice and in the best interests of the accused and socio-well-being that she be admitted to bond/bail pending trial.**

The application by the 2<sup>nd</sup> accused (Tom) is premised on the following grounds:

**(1) That the applicant was charged with the offence of murder on 9<sup>th</sup> October 2014 which is pending before this honourable court.**

**(2) That the matter is scheduled for hearing on sometimes in September this year as ordered by the honourable Judge.**

**(3) That the applicant is not going to interfere with the witnesses the prosecution intends to call at the hearing and from the time of arrest to date the applicant has not interfered with them in any way whatsoever.**

**(4) That since the applicant have a known fixed abode he is not likely to abscond or get away from this Honourable Courts jurisdiction and the applicant will regularly and timely attend court as and when required to do so.**

**(5) That it is in the interest of justice and in the best interests of the accused and socio-well-being that he be admitted to bond/bail pending trial.**

4. Each of the accused has filed a supporting affidavit whose contents I have considered.

5. Mr. Mathenge urged the application on behalf of the accused persons. Counsel urged that the accused persons had a fixed abode and were unlikely to abscond. Counsel urged that since their arrest in June 2014 no complaints of interference with witnesses have been made.

6. Mr. Mathenge argued that the 1<sup>st</sup> accused was 52 years with a health condition. He urged that she had a grandchild she was looking after whose life is at stake. Mr. Mathenge urged the court to ignore a statement of a witness annexed to the replying affidavit sworn by the investigating officer.

7. Ms. Mwaniki, learned Prosecution Counsel represented the State and opposed bail. Counsel relied on the replying affidavit. She urged that there are vulnerable witnesses aged 70 years, 9 years who would be intimidated if the accused were released on bail. Counsel urged that one of the other witnesses was an employee of the 1<sup>st</sup> accused and likelihood of interference was high. Counsel urged court to deny bail.

8. There is a replying affidavit to this application. it is sworn by one of the investigating officers in this case. The gist of his affidavit is to the effect is that the key witnesses in this case are either directly related to the accused persons or were their employees. The officer deposes that the witnesses are of different ages, one the mother of the deceased who is aged considering that the deceased is 50 years old, and one aged 9 years old. The other is an employee of the 1<sup>st</sup> accused. The officer deposes that the likelihood of the accused interfering with these witnesses was very high.

9. The court also sought Pre-bail Reports on the accused persons from the Probation. The same have been filed. The gist of the reports are to the effect that the community where both accused come from have lived in fear since the incident; that they are hostile towards both accused and apprehensive of their safety if accused are released. The Probation Officer was of the view that the accused may not be safe if they went back to live in their homes.

10. The Probation Report also shows that the family of the deceased is yet to come to terms with the death of their kin and are still hurting. The officer felt that if accused are released the community may contemplate a revenge mission. The family of the deceased are said to be apprehensive that the accused may interfere with witnesses.

11. I have considered the application for bail and submissions by both counsels. The principles to apply in an application of this nature were set in the case of Nganga vs. Republic 1985 KLR 451 where Chesoni, J as he then was held:

**“ 1. The court, in exercising its discretion to grant bail to an accused person under section 123(1) or (3) of the Criminal Procedure Code (cap 75), should consider the following factors:**

**(a) In principle, because for the presumption that a person charged with a criminal offence is innocent until his guilt is proved, an accused person who has not been tried should be granted**

**bail unless it is shown by the prosecution that there are substantial grounds for believing that:**

- (i) The accused will fail to turn up at his trial or to surrender to custody;**
- (ii) The accused may commit further offences; or**
- (iii) He will obstruct the course of justice.**

**a.)The primary consideration in deciding whether or not to grant bail to an accused person is whether the accused is likely to attend trial. In making this consideration, the court must consider;**

- (i)The nature of the charge or offence and the seriousness of the punishment to be awarded if the applicant is found guilty;**
- (ii)The strength of the prosecution case;**
- (iii)The character and antecedents of the accused;**
- (iv)The likelihood of the accused interfering with prosecution witnesses.**

**Where more than one person are jointly charged with a criminal offence, the case of each accused person must be examined on its own facts and this applies also to an application for bail in which each accused person's application is to be considered on its own facts, circumstances and merit."**

12. The paramount consideration in an application for bail pending trial under **Article 49(1)(h)** of the **Constitution** is whether there are compelling reasons to deny accused bail. In the case cited above the court is of the view that bail should not be granted in several circumstances set out there under. These include the likelihood of the accused failing to turn up at his trial or to surrender to custody; the likelihood that the accused may commit further offences, or he will obstruct the course of justice. The likelihood of the accused interfering with prosecution witnesses.

13. The Pre-Bail Reports on both the accused persons and the replying affidavit by the investigating officer all show the same thing. That the accused persons are likely to interfere with the key witnesses in this case. The Investigating Officer in particular has demonstrated that the key witnesses are vulnerable witnesses by virtue of their (advanced and youthful) ages. The other key witness was an employee of the 1<sup>st</sup> accused. The likelihood of interference with these witnesses is therefore not imagined but real.

14. The counsel for the accused has argued that the 2<sup>nd</sup> accused is old and sickly. There is no allegation that her medical condition cannot be handled while in prison. Furthermore she is not so old as to be incapacitated and therefore cause hardship too others; or have any difficulties due to her condition.

15. Having considered this application, I find that there are compelling reasons to deny both accused bail for reason of likelihood of interference with witnesses. The application is therefore declined.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY, 2015.**

**LESIIT, J**

**JUDGE**