

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 40 OF 2015

REPUBLIC.....PROSECUTOR

VERSUS

JOHANA MUNYAO MWENI.....ACCUSED

RULING

Johana Munyao Mweni, referred to in this ruling as the accused, has moved this court by way of a Notice of Motion dated 21st April 2015 and filed on 22nd April 2015. The application is anchored on Article 49 (1) (h) of the Constitution of Kenya 2010. He is seeking to be admitted to bail pending the hearing and determination of this case. The accused is charged with murder contrary to section 203 read with section 204 of the Penal Code. He is accused of killing Rose Wairimu Ngugi on 7th April 2015 at Kamulu in Njiru District within Nairobi County. He is represented by Mr. Muraguri, advocate.

The grounds in support of the application are found on the face of the application as well as on the supporting affidavit sworn by the accused on 21st April 2015. The grounds in support are that the case will take a long time to be determined and this may cause considerable hardship to the accused; that he will not abscond and will attend court until the case is determined; that he is in gainful employment with the Nairobi County Government as a Revenue Officer and that he will comply with the conditions and terms of the bond that the court will set.

In his oral submissions, Mr. Muraguri told the court that murder is now a bailable offence and that the burden of proof to show compelling reasons lies with the prosecution. Counsel submitted that from the emerging jurisprudence on the issue of bail, having strong evidence is not a compelling reason because an accused person is always presumed innocent until there is proof to the contrary; that the prosecution claim that the accused cannot raise sureties because he is an orphan but this is a matter for the accused to deal with once bail has been granted. On the issue that he will interfere with witnesses counsel submitted that the statements attached showing the accused has threatened witnesses cannot be used to deny him bail. Counsel submitted that the accused resides in Ruai in a house registered in his name and he is a Kenyan citizen and therefore he will not abscond.

Counsel submitted the following authorities to support the application: **Republic v. Danson Mgunya & Another [2010] eKLR**; **Republic v. Aboud Rogo Mohamed & Another, Criminal Case No. 793 of 2010** and **Republic v. Jaktan Mayende & 3 Others [2012] eKLR**. In the first two cases the court found no compelling reasons had been advanced and granted the accused bail. In the third case (**Jakton Mayende**) the fourth accused was denied bail after the court found there were compelling reasons advanced by the prosecution in that the fourth accused had physically accosted one of the witnesses on account that the witness was going to testify in the case. The court found that was interference with witnesses.

The application is opposed by the state. The grounds in opposition are found in the replying affidavit sworn by SGT Dishon Obulu Ababu the investigating officer. SGT Ababu deposes that bail is not an absolute right and can be denied where compelling reasons exist; that the accused has not provided his place of abode and given his statement that he is an orphan he will not get a surety who knows him well to guarantee court attendance; that there is strong evidence on record and therefore the accused is a flight

risk; that he is likely to interfere with witnesses and that on the day he was arrested he threatened Levis Murigi Ngugi and James Muchoki who are relatives of the deceased by telling them that he would follow them after being released on bail; that the deceased and the accused worked at the same place and he may be attacked if released on bail. The prosecution attached two handwritten statements by Levis Murigi Ngugi and James Muchoki as evidence of threats by the accused.

I have considered the application, the grounds in support and the opposition by the prosecution. I have also read the statements by the two witnesses. These are alleged threats at the time of arrest. This case is distinguishable with the **Jakton Mayende** case above. In that case the fourth accused was denied bail after the court found that accosting a witness is a compelling reason. However, in that case evidence was adduced in court. The witness had been physically assaulted by the accused person. In this case, the threat is alleged to be by way of uttered words to the effect that the accused knew where Levis Murigi Ngugi lived and he (accused) will send young men to deal with him firmly. The two witnesses who recorded these statements did not testify to allow cross examination. However, it is my view that threatening a witness is a serious matter and cannot be ignored by the court.

Granting or declining to grant bail is the prerogative of the court after taking into account all relevant factors. Strong evidence is not a compelling reason. The laws of this country presume an accused person innocent until proof to the contrary is presented. The conditions for bail set by the court are meant to ensure attendance of an accused person in court this being the paramount consideration.

After my careful consideration of this matter I am of the view that the accused should remain in custody until after the witnesses he is alleged to have threatened have testified. Once this is done, then he is at liberty to seek a review of this application. I therefore decline to grant this application at this stage. It is so ordered.

Dated, signed and delivered this 25th day of May 2015

S. N. MUTUKU

JUDGE