



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CRIMINAL CASE NO. 15 OF 2015

MUMO NZIOKI

DAVID MBAI

MWANGANGI KAKUTI

MUTHUI KAKUTI

BRENSON MUEKE

JULIUS KYALO WAYUA.....APPLICANTS

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. By way of Notice of Motion dated 23rd March 2015, the applicants seek to be **released on bail pending trial**. The application is premised on grounds that there are no compelling reasons to disentitle the applicants from being granted bail that is their constitutional right; they are residents of Kaumba village of Katulani Division in Katulani District within Kitui County with fixed abode; they are not a flight risk; they have no intention of interfering with witnesses; the prosecution's case is based on mere suspicion and that applicants will suffer irreparable loss if held in custody until their case is determined.
2. In response thereto the state opposed their release on bail. In a replying affidavit sworn by No.96812 IP Mwangi Alex, it was deponed that some of the persons suspected to have murdered the deceased with the applicants are still at large; The accuseds are likely to interfere with witnesses and the smooth proceedings of the court; the witnesses are known to the accuseds therefore there may be some interference by the accused; and grant of bail in such a case is not absolute.
3. At the hearing of the application Mr. Maingi for the applicant submitted that there were absolutely no compelling reasons exhibited that would make the court deny the applicants bail.
4. Mr Machogu for the state/respondent on the other hand stated that the right to bail is qualified by compelling reasons. He called upon the court to consider the criteria that guides courts in granting of bail namely;

- **The nature of the offence**
- **The strength of evidence**
- **Gravity of punishment in event of conviction**
- **Likelihood of the accused person to interfere with witnesses**
- **Circumstances of evidence being suppressed.**

In particular he emphasized the fact that the accused persons know all witnesses therefore it was likely that they may interfere with them.

5. The accused persons are charged with the offence of murder that is bailable unless there are compelling reasons that requires them to be incarcerated.

Factors for consideration in such an application have been restated in various cases. In the case of **Mogotsi and another vs the state 1990 BLR 142 (HC)** the following facts were found to be relevant that should be taken into account.

- a. **The nature of the charge**
- b. **The character of the accused**
- c. **Failure of the accused to surrender to bail on previous occasions**
- d. **The accused must have settled address.**
- e. **Whether the sureties are independent or are likely to be indemnified by the accused.**
- f. **The likelihood of the accused interfering with police witnesses.**

6. It has been stated now and again that the primary consideration is the accused's attendance of his trial. Murder is a serious charge. The sentence to be meted out is death which could be an incentive for the accused persons to abscond. However it has not been suggested that the accused herein are a flight risk.

7. At this stage it would be difficult to tell the strength of the prosecution's case as no evidence has been adduced. It has been deposed and not disputed that the accused person have a fixed abode, whether or not they may be able to indemnify the surety will be an issue between them and their sureties.

8. Though not a primary consideration, if the accused persons are likely to interfere with the witnesses is a matter not to be disregarded. The state was therefore under a duty to demonstrate by way of affidavit evidence the likelihood of the applicants to tamper with witnesses who will testify.

The discretionary power conferred upon this court must be exercised judiciously taking into consideration the accused person rights who are presumed innocent at this stage.

9. In the instant case in paragraph 4 and 5 of the affidavit the investigating officer stated thus:-

“That I still believe that once the accused persons are granted bail, they may target witnesses and hence interfere with the smooth proceedings of the court.

That since the witnesses in this case are people well known to the accused persons, there is a likelihood that they may interfere with them and this on its own is compelling enough for court to decline bail.”

The fact that the accused person know witnesses is not good reason to have a person incarcerated. It should have been demonstrated that the accused/applicants had the propensity of interfering with witnesses. This having not been done I have absolutely no reasons to deny them bail.

10. I therefore grant each accused/applicant bond of 5 million with a surety in a like sum.

11. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 20TH day of MAY 2015.

L.N. MUTENDE

JUDGE