



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL CASE NO. 56 AS CONSOLIDATED WITH**

**CRIMINAL CASE NO. 58 OF 2015**

**JOSEPH MUSYOKA MBITHI.....1<sup>ST</sup> APPLICANT**

**AMOS MUYA KIMENGEI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

The 1<sup>st</sup> and 2<sup>nd</sup> Applicants were charged with two counts of murder contrary to section 203 as read with Section 204 of the Penal code. They are the first and second accused persons respectively in the consolidated criminal case herein. It was alleged that on 10<sup>th</sup> September 2014 at Mbuvo village of Kathonzweni District in Makueni County, they murdered Albanus Maingi Mwendo and Patricia Syombua. They pleaded not guilty to the offence. After taking of the plea, the 1<sup>st</sup> Applicant filed a Notice of Motion dated 6<sup>th</sup> August 2015 and the 2<sup>nd</sup> Applicant one dated 25<sup>th</sup> November 2014, seeking to be granted bail pending the hearing and determination of this criminal case. The two applications were consolidated for hearing and determination together.

The Applicants urged their grounds for the application in the said Notices of Motion, and in supporting affidavits sworn by the 1<sup>st</sup> Applicant on 6<sup>th</sup> August 2015 and by the 2<sup>nd</sup> Applicant on 25<sup>th</sup> November 2015. These grounds are that they both have permanent places of abode at Kanthiitu village, Kituluni sub location, Mbuvo location, Kitise division, in Kathonzweni district, and are hence not a flight risk. Further, that they are law abiding citizens, have pleaded not guilty to the charges preferred against him and do not have previous criminal records or convictions. The Applicants also pledged that they will attend court whenever required to do so or when the need arises, and abide by all the conditions that this Court may order or impose on them.

The Applicants averred that the grant of bond/bail will enable them take care of their aged parents who depend on them, and to prepare adequately for their defence. They also deponed that they do not live near the alleged victims of the alleged offence, and will be unable to interfere with witnesses if released on bail/bond, neither do they intend to do so. Lastly, the Applicants stated that there are no compelling reasons not to admit them to bail and that no prejudice shall be occasioned upon any of the parties if the orders sought are granted.

The State opposed the 1<sup>st</sup> and 2<sup>nd</sup> Applicants' applications in replying affidavits both sworn by PC Dennis Masaki on 7<sup>th</sup> September 2015 and 16<sup>th</sup> March 2015. The deponent is the Investigating Officer in

this criminal case, and he stated that the Applicants are charged with the offence of murder which is a serious offence, and in the event of conviction will face the death penalty. Therefore, if granted bail they have an incentive to abscond.

Further, that the prosecution has supplied the Applicants with witness statements indicating the witness particulars, and they may interfere with crucial witnesses who emanate from the same location with the Applicants. The Respondent averred that though the offence of murder is now bailable, the grant of bail is not absolute but a matter of discretion on the part of the court, and that there are compelling reasons as to why the Applicant should not be released on bail.

The counsel for the Applicants, Mr. Kimeu, made submissions in court at the hearing of the application on 28<sup>th</sup> September 2015 as did Mr. Machogu, the counsel for the State.

I have considered the pleadings and submissions by the Applicants and State. I note that Article 49 (1) (h) of the Constitution permits the release of any arrested person, including persons charged with a capital offence, on bail/bond pending trial unless there are compelling reasons not to do so. In the case of **Republic –vs- David Nyasora Nyamongo – Criminal Case No.90 of 2010** (unreported) in the High Court sitting at Kisii, Makhandia J (as he then was) stated:-

**“At the end of the day however whether or not an accused should be admitted to bail, is largely a matter of discretion of the court to be exercised in terms of the constitution, the law applicable, taking into account the gravity of the offence, the risk of absconding, the risk of influencing witnesses, the overriding consideration of granting bail which is whether the accused will turn up for the hearing of his case once granted bail. Again, the court must bear in mind the other principal purpose for the granting of bail which is to reinforce the cardinal principle of criminal law that an accused is presumed innocent until the contrary is proved. Therefore unless there are compelling reasons for not doing so pending such trial, the accused ought to be released on bail.”**

The issue in this application then is whether there are compelling reasons why the Applicants should not be released on bail and if so, what are those compelling reasons and who carries the burden of satisfying the court with regard to the existence of such reasons. In **Republic –vs- Danson Ngunya & another [2010] e KLR**, Makhandia J, (as he then was) stated that if the State wants the accused deprived of his right to be released on bond, then the State must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.

In the instant applications, the State submitted that the Applicants emanate from the same location and district as the witnesses, and they may interfere with the investigations and witnesses. Further, that the applicants are facing the possibility of a death penalty and may therefore take flight once they are released on bond. The counsel for the Applicants on the other hand submitted that bail is a constitutional right and that the State had not given any evidence of any witnesses who come from the same location as the Applicants, neither had it demonstrated that the Applicants are a flight risk.

The State did not bring any evidence of the witnesses that may be interfered with by the Applicants, and the names and/or location of the said witnesses. I therefore found it prudent to call for a pre-bail report to provide the court with independent information which could assist it in reaching a fair determination of the Applicants' prayers that they be admitted to bond pending trial. The pre-bail reports dated 29<sup>th</sup> October 2015 were filed in Court by the Probation Service on the same date.

I have perused the pre-bail report on the 1<sup>st</sup> Applicant. It is noted therein that the 1<sup>st</sup> Applicant does not know any of the prosecution witnesses and/or the deceased. Further, that he lives far away from the victims. However, that the community members from the victim's locality are angry and tense because of the offence, and the local administration fears that if the Applicant is granted bond it may aggravate the matter, and may pose a safety risk to the 1<sup>st</sup> Applicant.

The pre-bail report on the 2<sup>nd</sup> Applicant is to the effect that the said Applicant knows the victims who are business people in a nearby market, and that he has a history of good conduct in the community. However, the local administration is apprehensive that the release of the Applicant could flare up emotions of the public due to the brutality of the offence involved, and since there are more suspects still at large. Further, that the environment is not conducive for the release of the 2<sup>nd</sup> Applicant as his safety will be at risk.

I therefore find that no material has been placed before me which suggests that if admitted to bond pending trial, the Applicants are likely to interfere with potential witnesses. There is also no evidence to prove that the Applicants are a flight risk, and the pre-bail reports indicated that both Applicants have fixed places of abode with close community ties, and their respective families are ready to help them secure bond and ensure they attend Court.

I am also of the opinion that any accused person released on bail should have his or her constitutional rights secured and protected, and that the Applicants should not be remanded and not granted bail only for reasons of their own safety, security and good. No member of the public or any other person should try them or punish them, as this can only be done by a competent court with appropriate jurisdiction.

Balancing and considering all the facts and circumstances of this application, and bearing in mind that the constitutional right to bail is now available to any person regardless of the offence committed, I find no compelling reason to deny the Applicants bail. This Court's only concern is that there are reasonable conditions upon which the Applicants can be released on bail to secure their attendance in court.

I accordingly allow the Applicants' Notices of Motion dated 6<sup>th</sup> August 2015 and 25<sup>th</sup> November 2014, and admit the Applicants to bail pending their trial on the following terms:

1. Each of the Applicants shall execute a bond of Kshs. 500,000/= with two sureties of similar sum.
2. The sureties for each Applicant will be approved by the Deputy Registrar of this court.
3. The accused will attend mentions before the Deputy Registrar of the High Court, Machakos once every month until the case is heard and determined.
4. The Applicants shall be required to attend court for the remainder of the trial without fail.

It is so ordered.

**DATED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF OCTOBER 2015.**

**P. NYAMWEYA**

**JUDGE**