



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAJIADO**  
**CRIMINAL CASE NO. 32 OF 2015**

REPUBLIC.....PROSECUTION

-Versus-

DAVID MAKALI MUTISO.....1<sup>ST</sup> ACCUSED

EMMY MUSIMBI.....2<sup>ND</sup> ACCUSED

**RULING**

1. The two accused persons, namely **David Makali Mutiso** and **Emmy Musimbi** are charged jointly with the offence of murder contrary to section 203 as read with **section 204** of the Penal Code.
2. The accused pleaded not guilty to the charge. Through their legal representative an application was filed by way of notice of motion under **Article 49(1) (h)** of the Constitution of the Republic of Kenya.
3. It is for orders that the applicants be granted bail pending the hearing and determination of the criminal charge against them.
4. The application and supporting affidavits sets out the following grounds in support;
  - (a) *That it is the accused persons constitutional right to be admitted to reasonable bail/bond terms.*
  - (b) *That both accused persons are citizens of the republic of Kenya.*
  - (c) *That both accused persons are in gainful employment within Kajiado County.*
  - (d) *That both accused persons are parents.*
  - (e) *That both accused persons have references from their church and local administration.*
5. At the hearing Mr. Ochieng advocate represented the accused while Mr. Akula learned Senior Prosecution Counsel represented the Director of Public Prosecutions. Both counsels filed written submissions.
6. At the hearing counsel for the accused relied on the grounds set out in the body of notice of motion and supporting affidavit. He further submitted and urged the court to apply the provisions of **Article 49 (1) (h)** of the Constitution of Kenya with provisions on the rights of accused persons. Counsel urged the court in his submissions to be guided by legal principles elucidated in the cases of **WATORO VS.**

**REPUBLIC 1991 KLR 220, ALEXANDAR MBURU WANJIKU VS. REPUBLIC CR. NO. 3 OF 2013, DANSON MGUNYA KASSIM & SHEEBWANA MOHAMMED VS. REPUBLIC 2008 KLR**

7. In the said cases the court held inter alia: that the primary consideration in bail application is whether the accused person will turn up for his trial on time and date scheduled.

8. The learned Senior Prosecution Counsel submitted and objected to the application by accused persons to be released on bail. He cited the cases of **ABRAHAM IRUNGU MAINA VS. REPUBLIC 2014 eKLR** where the court in declining bail stated as follows:

***“Compelling reasons as alluded to in Article 49 (1) (h) of the Constitution must be stated, described and explained. If based on belief, the justification or basis for that belief must be demonstrated or shown. Sometimes this may call for more than oral submissions. We note that the applicant’s circumstances are rather fluid. His abode is uncertain and the occupation is the kind that can be relocated elsewhere in short notice. We are not certain that these two exert enough influence upon him to ensure he comes to court should he skip bail.”***

See also the case of **REPUBLIC VS. MILTON KABULIT & 60 OTHERS CRIMINAL REVISION CASE NO. 115 OF 2008, HASSAN MAHATI OMAR & ANOTHER VS. REPUBLIC [2014] eKLR** by Hon. Achode J. the court stated that:

***“I have considered the nature of the charges, the gravity of the punishment in the event of a conviction. Ordinarily, where the charges against the accused are serious and the punishment prescribed is heavy, there is more probability and incentive to abscond.”***

9. He prayed that the accused persons be denied bail on the grounds that they have not fled abode in court jurisdiction; nature of the offence and lack of permanent gainful employment.

10. I have already taken note that this application was brought under **Article 49 (1) (h)** of the Constitution which provides:

***“ where an accused person is arrested in respect of criminal offence he has a right to be released on bond or bail, by the court on reasonable conditions pending a charge or trial.....***

***unless there are compelling reasons.....”***

**Article 50 (2) (a)** provides that every person is presumed innocent until the contrary is proved.

11. The circumstances under which a court may grant bail to an accused person charged with a serious offence like murder are widely misunderstood in Kenya. Although the legal principles and rules arrived the granting of bail to murder suspects are relatively strict even after the new Constitution 2010, courts right to balance the rights of the accused and public at large.

12. A court is not supposed to withdrawal or reduce grant of bail merely in order to punish the accused, or to demonstrate disapproval of alleged crime committed by accused. To do so would amount to a form of detention without trial. The broad bond and bail policy in Kenya contemplates the interest of justice ‘test’.

13. The test according to me can legitimately include; that the accused will endanger a particular individual, or public at large, a risk that accused will commit a serious offence, a risk that the accused will interfere with witnesses and evidence, a risk that he will abscond and most importantly that he will not turn up for trial of his/her case.

14. The important provide throughout examining this test is that there has to be a probability that such a risk will materialize before conclusion of a trial. These are facts to be weighed by the court in deciding whether interest of justice test is at stuck in releasing accused person in bail.

15. Applying these factors to a question in the current case whether bail should be granted to the accused persons charged with murder. The question to consider is not whether based on the argument presented by the prosecution counsel and counter argument by the legal counsel representing the accused persons. What is of primary importance is whether the accused persons have provided evidence of exceptional circumstances that would demonstrate to the court they do not pose:

**(a) A flight risk.**

**(b) A threat to other members of public.**

**(c) That they may not interfere with witnesses or investigations and**

**(d) Mostly importantly they will attend defence trial without being detained in prison.**

16. In exercise of its discretion to deny or grant bail this court will have regard to all the particular facts and circumstances of each particular case as currently presented before me. I have carefully considered the application and submissions by both counsels. The legal principles and factors to be taken into account in the court exercising discretion to allow or decline to release accused persons in bail. However in the circumstances of this case I find that there is a compelling reason to continue to detain accused persons in custody. These include the gravity of the offence, the risk to their own security, given the fall that family of the accused is yet to come to terms to the loss. The likelihood of the second accused to flee from the jurisdiction of the court.

17. The social inquiry by the probation officer clearly indicated that accused persons have no fixed abode within Kajiado Sub-County. The court was also not presented with sufficient material regarding the physical address or residence at the family home located in Nandi and Makueni respectively.

18. In the circumstances of this case weighing one fact after another and guiding principles on grant of bail do decline to release any of the accused on bail at this stage. The accused persons at liberty to apply for review at a later stage in the course of the proceedings.

19. All in all I make the following orders;

(a) Application for bail declined at this stage.

(b) The case be set down for hearing on a priority basis.

(c) Hearing on 16.3.2016.

(d) Case conference 26.2.2016.

(e) Normal mention to confirm compliance and case management events on 7.1.2016.

***Dated and delivered at Kajiado on 14/12/2015.***

**R. NYAKUNDI**

**JUDGE**

**Representation:**

Mr. Akula for the prosecution

Mr. Ochieng – Counsel for the accused

Court Assistant P. Mateli

**FURTHER ORDER**

Witness summons to issue to all witnesses listed for the prosecution. The particulars be provided by the Senior Prosecution Counsel to the Deputy Registrar for action.

**R. NYAKUNDI**

**JUDGE**

**14/12/2015**