



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL CASE NO. 22 OF 2015**

**REPUBLIC.....PROSECUTOR**

*Versus*

**ISAAC KARIUKI KITHINJI.....ACCUSED**

**RULING**

1. Counsel for the accused has applied for bail pending trial in respect of murder contrary to Section 204 as read with Section 203 of Penal Code (Cap 63) Laws of Kenya.
2. The application which is dated 3.11.2015 is brought under certificate of urgency and was filed pursuant to the enabling provisions of Articles 49 (6) and 51 (1) of the 2010 of the Constitution of Kenya.
3. The application is supported by the supporting affidavit of the accused dated 3.11.15. According to his affidavit, the applicant has stated that he is charged with murder and that he is presumed innocent until proved guilty. He has further stated that he has high chances of acquittal in respect of the murder charge.
4. Furthermore, he has stated that he will abide by the bail terms if he is admitted to bail. Additionally he states that he will attend court faithfully as and when required to do so until the date of judgment and sentence.
5. In addition to the foregoing the applicant has stated that murder is aailable offence under the 2010 Constitution of Kenya. And finally, he has stated that, the case against him is likely to take a long time before it is heard and finally determined.
6. The state has opposed the release of the accused on bail. In its opposition the state has relied on the affidavit evidence of No. 37917 PC Patrick Kariuki, a police officer attached to CID Embu.
7. According to this police officer, the accused while in remand prison, he met Balisio Muriithi Nyaga and Peter Mwaniki Njagi who were robbery remandees from his home area. The accused told them that if he is released on bail, he will make sure that he will kill all prosecution witnesses including his uncle Salesio Murima Nyaga, Nicholas Gichovi Kithinji and his sister Jane Wanjira. He further stated that his sister has taken over his coffee plantation following his arrest.
8. The above police officer has stated that if the accused is released he is likely to interfere with witnesses and commit more crimes. This he states will also put the life of the accused in danger.

**THE APPLICABLE LAW**

9. According to the 2010 Constitution in Article 49 (1) (H) a person who has been arrested has a right to be released on bail or bond on reasonable conditions pending a charge or trial unless there are compelling reasons against the release of such person.
10. It is clear that the right to be released on bail is a constitutionally guaranteed right. It is also clear that all offences areailable under the 2010 Constitution of Kenya. The Constitution requires that persons who are arrested are released on bail unless there are compelling reasons that militate

- against their release.
11. The reasons for this constitutional provision is that every person, who is charged with an offence in court is constitutionally presumed to be innocent in terms of Article 50 of the Constitution. It follows from this presumption of innocence such a person should not lose his freedom rightly.
  12. In considering whether or not a person should be released on bail or bond a court is required to exercise its discretion judicially. A major consideration in matters of bail is whether or not accused will attend his trial if he is released on bail or bond. Once it is shown that an accused is likely to attend his trial if released on bail, he should be released on bail or bond unless there are conditions that militate against his release.
  13. Once such militating factor is interference with witnesses. It has long been recognized that an accused who interferes with witnesses cannot qualify to be granted bail. In ***Panju v R (1973) E.A. 282*** the High Court held that where an allegation of interference with witnesses is used as a ground of opposing release on bail, the prosecution must produce evidence. This was the practice under the independence Constitution of 1963. The requirement to produce evidence to support an allegation of interference with witnesses is in principle good law. The reason being that a decision of a court must be based on evidence.
  14. In ***R v Joktan Mayende & 4 Others the High Court (at Bungoma) in Criminal Case No. 55 f 2007*** the accused person therein was denied bail on the ground of interference with witnesses. That decision was based upon the provisions of Article 49 (1) (b) of the 2010 Constitution.

### **EVALUATION OF THE AFFIDAVIT EVIDENCE FINDINGS AND THE LAW**

15. I have considered the affidavit evidence of the police. I believe the evidence of the police that the accused person threatened to kill all prosecution witnesses if released on bail. I find that these threats to kill witnesses amount to a compelling reason that militate against the release of the accused person.
16. Furthermore, I find in evidentiary terms that the hearsay evidence relied upon by No. 37917PC Kariuki is admissible for purposes of proving that the accused threatened to kill all prosecution witnesses if he is released. In terms of Order 18 of the 2010 Civil Procedure Rules and the decided cases governing the admissibility of affidavit evidence, the evidence of the above police officer has met those requirements. He has disclosed the sources of his information.
17. It is in these circumstances that the cases of ***Panju v R supra***, is distinguishable from the instance case. In ***Panju v R***, no evidence was produced in support of the allegations that the accused therein was interfering with witnesses.
18. In the light of the constitutional provisions and the principles set out in the foregoing cases, I find that the prosecution has met the threshold that militate against the release of the accused on bail pending conclusion of his trial. The application of the accused on bail pending the determination of his trial is hereby refused.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this.. 7<sup>th</sup> day of **DECEMBER .2015**

In the presence of Ms Manyal for State

Ms. Muriuki for accused

Court clerk Mr Nyaga

**J.M BWONWONGA**

**JUDGE**

**7.12.15**