



No. 192/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 46 OF 2013

REPUBLIC .....PROSECUTION

VERSUS

CHARLES NDAMBUKI NTHIWA.....ACCUSED

RULING

1. The applicant who is charged with **Murder** has applied for bail pending trial. He was arraigned in court on the **2<sup>nd</sup> October, 2013**. He has been in remand awaiting trial for a duration of four (4) months.
2. In seeking the prayer sought, the Applicant advanced the ground that there are no compelling reasons to deter him from being released on bail and that he is languishing in the cells. In an affidavit in support of the application he depones that he is ready and willing to abide with the terms and conditions to be imposed by the court and vows to attend court whenever required.
3. In response to the application the State relied on a Replying Affidavit sworn by **No. 80950 P.C. Peter Yegon**. He depones that the accused resides within **Kinyaata Location in Yatta District** and is a resident of the area within which the witnesses reside. He was apprehensive that the accused could interfere with the witnesses which would be prejudicial to the prosecution's case. He brought the courts attention the fact of the violence and brutality meted out on the deceased. His release on bail according to the officer would pose a security threat to the witnesses.
4. Relevant factors I must take into account when considering this application are as follows:-
  - i. The nature of the charge
  - ii. The strength of the prosecution's case
  - iii. Whether the accused has a settled address.
  - iv. The likelihood of the accused interfering with police witnesses.
  - v. Whether the accused will turn up for trial.
5. It is trite law that the charge the accused faces is bailable, the right to bail is however not absolute such that the court must be cautious when it comes to exercising its discretion. The charge itself is serious because the sentence to be meted out is severe.
6. The accused is innocent until proven guilty therefore the strength of the prosecution's case which is yet to be demonstrated may not be worth considering. The accused has a settled address because the prosecution has alluded to the fact that he is a resident of the place inhabited by witnesses who will testify. This fact is confirmed by averments of the applicant that he has a family, children in high school and public universities and an ailing mother aged 90 years old.
7. The accused has promised to attend court whenever required. This is a primary consideration the court should bear in mind. The prosecution did not suggest that he was of flight risk. However,

the prosecution has expressed fear that the accused is likely to interfere with witnesses.

**Does this ground justify the court to exercise its discretion to deprive the accused of his freedom?**

8. The prosecution had a duty of adducing very compelling evidence to support such a contention. The affidavit deposed simply states that the accused resides in the same location with the witnesses. Hence the likelihood of interference with them. A perusal of the affidavit reveals a bare allegation not supported by any evidence. The prosecution did not justify why the court should exercise the discretion to deprive the accused of the liberty.
9. In my view no compelling evidence was adduced in support of the contention. In the circumstances, I will grant bail as prayed but impose conditions as follows ;-
  - To ensure the interest of justice is met, the accused shall not directly or indirectly contact prosecution witnesses.
  - In case he flouts the order, the Investigation Officer shall be at liberty to report to this court which will result into his bail being cancelled.
  - The accused shall be released on bond of **three (3) million shillings** with a surety in a similar sum.

10. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 31<sup>ST</sup> day of JANUARY, 2014**

**L.N. MUTENDE**

**JUDGE**