



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**

**CRIMINAL CASE NO. 15 OF 2012**

REPUBLIC.....RESPONDENT

-VERSUS-

MOSES NDUNG'U.....1<sup>ST</sup> ACCUSED/APPLICANT

PETER WAINAINA NDUNG'U.....2<sup>ND</sup> ACCUSED

**RULING**

The accused persons were separately charged with the offence of murder contrary to section 203 of the Penal Code as read with section 204 of the Penal Code. As far as the charge against the 1<sup>st</sup> accused/ applicant is concerned, the particulars are that on the 18<sup>th</sup> day of August, 2010 at Gachatheini village in Kigumo district jointly with one before court and others not before court murdered James Muturo Gachuhi.

The person said to be before court and who together with the applicant murdered the deceased is the 2<sup>nd</sup> accused person.

By a Notice of Motion dated 25<sup>th</sup> march, 2013, the 1<sup>st</sup> accused formally applied to this court to be released on bail pending his trial. Upon perusal of the record, I have noted that the accused person made a similar application dated 17<sup>th</sup> October, 2011 and filed in the High Court registry at Nyeri on 21<sup>st</sup> October, 2011.

It would appear that by the time this case was transferred from Nyeri to Murang'a, this application had not been disposed of and therefore the proper course would have been to hear that application rather than file a fresh one.

Be that as it may, the state opposed the two similar applications filed in the two high court registries.

In the replying affidavit to the application that was filed in the registry at Nyeri, and sworn on 31<sup>st</sup> October, 2011, police constable Lawrence Owino swore that it would be appropriate to deny the applicant bail for the following reasons:

- a. The applicant hailed from the same village as the deceased;
- b. The applicant jointly with others known to members of the mungiki sect attacked and fatally injured the deceased;

- c. **The applicant is himself a member of the mungiki sect;**
- d. **There is the danger that the applicant will interfere with the key witnesses who happen to be parents of the deceased;**
- e. **The applicant fled to mpeketoni in Lamu after the commission of the crime and was only arrested after almost a year;**
- f. **The appellant was therefore a flight risk and was likely to abscond the trial if released on bail;**
- g. **There were other suspects at large who were likely team were up with the applicant and that it was in the public interest that the applicant remains in remand custody until his case has been heard and determined.**

**In the affidavit filed in response to the application filed in the registry at the High Court in Murang'a, police constable Richard Kipkorir Lobong, reiterated that the deceased's mother is a key witness in the case against the accused persons and if the applicant is released on bail she fears for her life having been injured by the same people when they killed her son.**

**Under article 49(1) (h) of the constitution every accused person including those charged with capital offences are entitled to be released on bail/bond on reasonable conditions pending their trial unless there are compelling reasons dictate otherwise. Mr Gacheru for the applicant submitted that bail is now a constitutional right and in his view there were compelling reasons demonstrated to deny the applicant bail. Counsel argued that the allegations in the replying affidavit by the state were not substantiated and ought to be dismissed.**

**Mr Njeru for the state opposed the application on the ground that bail is not an absolute right particularly where it is demonstrated that there are compelling reasons not to grant bail. According to him the deceased's mother was brutally attacked by the same people who murdered her son and being a witness in the case against them there was real danger on her life should the applicant be released on bail.**

**When the High Court sitting in Nyeri was faced with a similar application at the instance of the 2<sup>nd</sup> accused person, it considered the reasons proffered by the state and whether they amounted to what can be regarded as compelling reasons which would stand in the way of granting bail. At page 4 of its ruling the court said:**

***"...considerations that the courts must bear in in mind...when determining whether or not to allow bail in any case before the trial include but not limited to the likelihood that the accused person may not surrender himself for trial if released on bond. Whereas the burden is upon the state to prove these compelling (reasons) I am of the opinion that the fact that the appellant was away from the court's jurisdiction for one year after the commission of the alleged offence and whereas the same is presumed at this stage to be innocent until otherwise proved is a compelling reason enough to deny him bail at this stage as I note that the ,main consideration is whether the applicant will avail himself for trial and given his past conduct the scale is against bail being granted."***

**With that the court proceeded to dismiss the application for bail.**

**The circumstances obtaining in the refusal for bail in the application by the 2<sup>nd</sup> accused person also obtain in this application by the first accused person. The reasons given in the affidavits sworn by the state in opposing the application by the 2<sup>nd</sup> accused person are the same reasons given in opposition to the application herein by the 1<sup>st</sup> accused person. Of particular interest the deposition by the state that the applicant escaped from the court's jurisdiction in an attempt to avoid**

prosecution was not controverted. I agree with my brother, Justice Wakiaga that if there is a real likelihood that the applicant may abscond or fail to attend his trial, going by his past conduct, it will not serve any useful purpose to release him on bail. I have no reason to depart from the decision that the learned judge came to and deny the 2<sup>nd</sup> accused person bail in circumstances which are on all fours with the application herein. Accordingly, I do not find any merit in the applicant's application for bail and it is hereby dismissed.

Signed, dated and delivered in open court this 15<sup>th</sup> day of January, 2014

Ngaah Jairus

JUDGE