



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 83 OF 2010

REPUBLIC RESPONDENT

VERSUS

- 1. JOSEPH MUSEMBI MUTUKU**
- 2. WILLIAM KYALO KISUNA ... ACCUSED/APPLICANTS**

RULING

1. The Applicants, **Joseph Musembi** and **William Kyalo Kisuna**, have applied for bond pending the hearing and determination of their murder trial.
2. According to the affidavit in support, the Applicants hail from **Mweini Division, Nzau District** and they have been in custody for two years. That they are in gainful employment and are the sole bread winners of their family. The Applicants undertake to abide by the terms and conditions of bond and also not to interfere with witnesses.
3. The application is opposed. The Investigating Officer, **Benjamin Makau** in his replying affidavit has stated that the Applicants who hail from the same locality with the prosecution witnesses have been supplied with witness statements and there is a likelihood that the Applicants will interfere with witnesses. That in the event of a conviction, the accused persons will face a death penalty, which on its own is an incentive to abscond.
4. I have considered both the application and the reply to the same. **Section 49 (1)** of the **Constitution** states as follows:-

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending the charge or trial unless there are compelling reasons not to be released.”

5. However, the court has discretion to grant or refuse bail depending on the circumstances of each case. The court is required to take into consideration settled principles of the law when determining whether or not to grant bail pending the hearing of a criminal case or pending the hearing of an appeal. The principles to be considered by this court in determining whether or not to grant bail were set out in **Mwaura v Republic (1986) KLR 600**. The said principles include the following; the nature of the offence, the strength of the evidence, the character or behavior of an accused and the seriousness of the punishment to be meted if the accused is found guilty. The primary underlying consideration is whether the accused will turn up at the appointed place and time for his trial. The court further held that in the exercise of its discretion, if certain exceptional circumstances personal to the accused exist which when weighed against the risk of the accused absconding, the balance will tilt in favour of granting bail. Another factor that the court will consider is whether the accused will interfere with witnesses if he is released on bond.
6. The State has not given any compelling reasons why the Applicant should not be released on bond. Compelling reasons should not be a matter of conjecture, guesswork or speculation. Being supplied with statements of prosecution witnesses is a matter of right guaranteed by the

- Constitution** under **Article 50 (2) (j)**. The provision for death sentence cannot be used against the Applicant as that would negate the Constitutional guarantee for bail in capital offences.
7. There are no reasons given in support of the assertion that the Applicant is likely to interfere with witnesses e.g. have they threatened or accosted any witness or tried to dissuade or compromise any witness against testifying?
 8. With the foregoing, I allow the application. The Applicants may each be released on a Kshs. 2 Million personal bond with one surety of a like sum.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 26th day of June 2014.

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B. THURANIRA JADEN

JUDGE