



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CRIMINAL CASE NO. 106 OF 2014

LESIT, J.

REPUBLIC.....PROSECUTOR

-VERSUS -

EDWARD EMUSINGE NANDUKULE.....1ST ACCUSED

JOEL KIMATHI KILAKU.....2ND ACCUSED

RULING

1. The accused persons, **EDWARD EMUSINGE NANDUKULE** and **JOEL KIMATHI KILAKU** filed Notice of Motion application dated 21st November 2014. Both have been consolidated and are being considered together.
2. Both accused seek bail pending the hearing and determination of their case. In the alternative they ask the court to make any other order it deems fit in the circumstances.
3. The applications are premised on similar grounds namely:
 1. The applicant is presently remanded at Industrial Area Remand Prison pending trial in the High Court Criminal case no. 106 of 2014.
 2. The applicant is entitled to the Constitutional Fundamental right to bail pending trial.
 3. The Applicant is entitled to the Constitutional Fundamental right of presumption of innocence.
 4. The applicant believes in his innocence and is ready to stand trial to prove his innocence and will therefore not skip bail and/or run from the jurisdiction of this honourable court.
 5. The applicant is ready and willing to comply with all the requirements demanded of him by this court if bail is granted.
4. Each accused has shown an affidavit in support of their respective application which I have considered.
5. The State has filed a replying affidavit which is sworn by the Investigating Officer CPL Churchil Owilli dated 8th December 2014. In that affidavit the officers deposes that the key witness was

intimidated and has since been traumatized due to the manner in which the deceased died. The officers avers that if accused are released, the key witness may be scared to testify.

6. CPL Owilli avers that the key witness is well known to the accused persons having driven around with them for over two hours and that if the accused are released, they will easily be able to trace her.

7. Mr. Wabane for the accused persons urged that the 1st accused is a family person with young children and an unemployed wife and other family members also depends on him.

8. In regard to the 2nd accused Mr. Wabane submitted that he has a young child and that he takes care of aged parents and a mentally challenged sister and other siblings. Counsel urged that both accused have no reason to abscond.

9. Ms. Megoma for the State opposed bail. Learned Prosecution Counsel reiterated the content of CPC Owilli's affidavit and urged the court to remember right to bail under the constitution was not absolute. Counsel urged that the accused were GSU officers manning a road block and that they tortured the deceased to death in the presence of the key witness. Counsel urged that the key witness is likely to be intimidated if the accused are leased for fear she may be harmed.

10. I have carefully considered the applications for bail pending trial by both accused. It is now well settled that every person charged with a criminal offence, however punishable is entitled to bail under Article 49(1)(h) of the Constitution. The only rider being that bail may be declined if there are compelling reasons not to grant bail.

11. Mr. Webale for both accused has relied on four cases which he has provided namely;

Rep. vs. John Kahindi Kansa

Rep. vs. Collins KepropTubei

Rep. vs. Musili Derwock Kittieme

Rep. vs. Abel Moranga Nchore

12. I have considered each of them in **Rep. vs. Musili & Anor. (2012) eKLR**, Mwilu, J as she then was, granted bail to the accused persons who were both police officers. The accused in this case are police officers. I find this case is distinguishable from the above cited case for two reasons.

13. First in the cited case ten witnesses had testified and there were 49 witnesses to go. The court found that the allegation that the accused police officers would interfere with witnesses needed to be supported by antecedents of the accused.

14. In the instant case, no witnesses have so far testified. Besides, this case has one key witness who is a civilian. From facts given by the investigating officer the witness is well known to the accused person as they were together for over two hours.

15. I find two things about this case. The fact there is one key witness in the case, and given the circumstances of this case, the temptation for the accused persons to interfere with that witness is very high. The temptation that interfering with the key witness would fatally affect the prosecution case is one I feel may drive the accused persons to attempt to do in all the circumstances of the case.

16. Secondly the mere granting of bail to the accused less than two months after the offence was committed will be intimidating enough to the prosecution's key witness. It is likely to send the wrong message to the witness and may lead to the witness developing cold feet to come and testify.

17. Unlike the cited case, this case has only one key witness, the incident occurred barely two months

ago and so the incident is still fresh in the mind of this witness who is said to be suffering from trauma from it. Finally the likelihood of interference is real and cannot be ruled out.

18. Having considered this application, I find that there are compelling reason to decline bail. Accordingly, the application is dismissed.

DATED AT NAIROBI THIS 23RD DAY OF DECEMBER, 2014.

LESIIT, J.

JUDGE.