



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

**CRIMINAL CASE NO. 27 OF 2012**

**REPUBLIC .....RESPONDENT**

**VERSUS**

**KIOKO KITILI MWONGELA .....1<sup>ST</sup> ACCUSED**

**DAVID MUSEMBI NYAMAI .....2<sup>ND</sup> ACCUSED/APPLICANT**

**R U L I N G**

The Applicant, **David Musembi Nyamai**, who is the 2<sup>nd</sup> Accused herein faces the charge of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Cap 63), Laws of Kenya**.

The particulars of the offence are that on the night of 30<sup>th</sup> and 31<sup>st</sup> day of July, 2012 at **Mumani village, Ngai Sub-location, Kithungo Location** within **Mbooni West District** in **Makueni County**, jointly murdered **Gerald Muoki Mutava**.

The Applicant was arraigned in court on the 15<sup>th</sup> of August 2012. The Applicant pleaded not guilty. The Applicant applied for bail vide the application dated 5/10/2012. The application is supported by the affidavit sworn by the Applicant.

The grounds set out in the said application are that the Applicant is self employed and is his family's bread winner. That the Applicant is a person of high moral standing and a person with a permanent place of abode and is not likely to abscond. The Applicant has averred that he has a Constitutional right to be admitted to bond unless if there are compelling reasons. According to the Applicant, there are no compelling reasons why he should not be admitted to bail. The Applicant is willing to abide by any conditions set by the court.

The application is opposed to as per the replying affidavit sworn by the Investigating Officer.

According to the Investigating Officer, the Applicant faces the charge of murder and has already been supplied with witnesses' statements and is therefore aware of the weight of the prosecution evidence against him. That the Applicant is a resident of **Mbooni** area where the prosecution witnesses also reside. That violence and brutality was visited on the deceased who was a witness in **Criminal Case No. 191/2012** at **Makueni Law Courts** where the 1<sup>st</sup> accused, **Kioko Kitili** was a suspect. The Investigating Officer's averment is that his belief is that the deceased was killed in order not to give evidence in the said case. The Investigating Officer also expressed his fears that the Applicant may interfere with witnesses. He also stated that the severity of the sentence the offence of murder attracts is an incentive for the Applicant to abscond.

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.”**

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.

My concern in the case at hand is paragraph No. 7 of the affidavit in reply which states as follows:-

**“That the deceased was a witness in assault case court file No. 191/2012 and a police file No. 431/127/2012 at Makueni Law Courts where the accused Kioko Kitili was the suspect. It is believed they jointly killed the deceased in order not to give evidence in the case.”**

The averment that the Investigating Officer believes that the deceased herein was eliminated to silence him from testifying in another case is not rebutted. The allegation is a serious one that in my view amounts to a compelling reason not to release the Applicant on bail. Bearing the said averment in mind, the fear of witnesses being tampered with cannot be said to be far-fetched.

With the foregoing, the application is unmeritorious and is dismissed.

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**B. THURANIRA JADEN**

**JUDGE**

**Dated and delivered at Machakos this 22<sup>nd</sup> day of July 2013.**

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**B. THURANIRA JADEN**

**JUDGE**