



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CRIMINAL CASE NO. 15 OF 2010

REPUBLIC RESPONDENT

VERSUS

MICHAEL WAMBUA MUTUA ACCUSED/APPLICANT

RULING

1. The Accused, **Michael Wambua Mutua**, was arraigned in court on 23/2/2010 for the offence of murder contrary to section **203** and **204** of the **Penal Code**.
2. On 6/11/2012 the accused filed an application for bail/bond pending trial. According to the affidavit in support, it is averred that the investigations are now complete. That there are no compelling reasons why the accused cannot be released on bond. The accused is ready to abide by any conditions set by the court. The accused has further stated that he is a person with a fixed place of abode and will turn up for his trial and will not interfere with the prosecution's witnesses. The accused has acknowledged that he has been under treatment at Mathare Mental Hospital for mental illness and has now been now certified fit to stand trial. The accused has averred that he will continue with the treatment while out on bond.
3. In opposition to the application, the Investigating Officer, **PC Michael Kilongosi** swore a replying affidavit. The application is opposed on the grounds that the accused has already been supplied with witness statements and is therefore aware of the weight of the prosecution witnesses. That the accused hails from the same locality with the prosecution witnesses and there is a likelihood of accused interfering with the witnesses. It is also contended that the offence the accused is charged with attracts a severe sentence which may give the accused the 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 reasons given by the State in objecting to bail do not in my view amount to compelling reasons as envisaged under **Article 49 (1)** of the **Constitution**. Compelling reasons is not a matter of guesswork, conjecture or speculation. It means the State must give strong and convincing reasons.
7. The possibility of interference with prosecution witnesses ought to be supported by cogent evidence. The supply of witness statements to the Applicant and the fact that the offence of murder attracts a death penalty should not be used against the Applicant otherwise the same would negate the **Constitution** provision for issuance of bail in capital offences.
8. Although the accused was certified fit to proceed with his case as per the psychiatrist's report dated 23//8/2011, the accused requires monitoring by at least two people who are close to him who can ensure that he attends court and is continuing with further medical treatment as stated in his affidavit. I therefore order that the probation office do file a pre-bail report before I proceed to give the bail terms.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 30th day of October 2013.

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B. THURANIRA JADEN

JUDGE