



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 85 OF 2010

REPUBLIC RESPONDENT

VERSUS

1. JOSEPH MUTUA KIMANZI
2. JOSEPH MUSYOKA MUVENGEI
3. STEPHEN MUTHUI KAMONZO ACCUSED/APPLICANT

RULING

1. The Applicant, **Stephen Muthui Kamonzo** (3rd Accused), is charged jointly with two others with the offence of murder contrary to **section 203** as read with **section 204** of the **Penal Code (Cap 63), Laws of Kenya** on two counts.
2. The Applicant pleaded not guilty and has applied for bond pending the hearing and determination of the case. The Applicant averred in the affidavit in support of the application that he is married with five children and that he is the sole bread winner of his family. That the Applicant has a fixed place of abode in **Kavuvwani Location, Mwingi Division, Mwingi Central District in Kitui County** where he is self employed as a farmer and also carries out sand harvesting. The Applicant undertakes to abide by the terms of bond imposed by the court and not to interfere with the prosecution witnesses. The Applicant has further pointed out that he was arrested in November 2010 and has been in remand custody since then despite the right to release on bond/bail as enshrined in the Constitution.
3. The application was opposed by the State. The Investigating Officer, **Cpl. Mutiso Nyamai** in his replying affidavit sworn on 22/7/2013 contended that the Applicant has been supplied with witness statements and is therefore aware of the weight of the prosecution case. That the Applicant comes from the same locality with the prosecution witnesses and there is a likelihood that the Applicant may tamper with the prosecution witnesses. That the brutality meted out on the deceased persons may pose a security threat to the prosecution witnesses. That in the recent past, many criminals in the area where the Applicant comes from have been executed by members of public and the Applicant may not be safe as he was arrested by the same members of public before he was brought to court. It was further argued that the seriousness of the offence and the severity of the sentence provided for by the law is on its own an incentive for the Applicant to abscond and at the same time provides compelling reasons why the Applicant should not be released on bail.
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. I have considered the application and the reply to the same. I have anxiously considered the averments in paragraph No 5 and No. 8 of the replying affidavit which state that in the recent past many released criminals within the area where the accused persons come from have been executed by members of the public and that it would not be safe for him out there, since he was arrested by members of the public before he was brought to court. I had referred this case for a pre-bail report in view of the above averments. The pre-bail report dated 6/11/13 in conclusion states:-

“The community where the offence was committed is hostile and had threatened to avenge the deaths of their relatives. So the safety of the accused is not guaranteed. The witnesses also fear for their safety as it is alleged that anyone who identifies the gang dies mysteriously. Based on the above therefore, the accused person is not suitable for favourable bond terms.”

7. The pre-bail report therefore confirms the assertions by the Investigating Officer. It is apparent that the release of the Applicant may pose a risk to himself and that the prosecution witnesses may also not feel secure.
8. In my view these are compelling reasons that militate against the release of the Applicant on bond. The application is therefore rejected. I have noted the delay in the hearing of this case. The Applicant was arraigned in court on 15/12/10. I therefore, direct that this case be given a hearing date on priority basis.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 19th day of December 2013.

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B. THURANIRA JADEN

JUDGE