REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Case 9 of 2012

REPUBLIC …….PROSECUTOR

VERSUS

1. PETER MUTHUI MUSAU

2. PHILIP MACHARIA WAITITU ……..……ACCUSED

RULING

The accused, **Peter Muthui Musau** and **Philip Macharia Waititu** are charged with murder contrary to section 203 as read with section 204 of the Penal Code. It is alleged that the applicants on 18th February, 2012 at Hermatton Teachers College Trading Centre, Koma in Matungulu District within Machakos County jointly murdered **Catherine Wagaitie Mugi**. The applicants entered a plea of not guilty and their trial was scheduled for 29th May, 2012.

On the said date however, the trial did not take off. In the meantime, the applicants under a certificate of urgency filed an application for bail pending trial on 3rd May, 2012. The application was brought under articles 20(1) (2) (4), 21(c), 22(3) & (4), 39(1), 49(1) (h) and 50(2) (a) of the Constitution of Kenya. The grounds in support thereof were that;-

- ***The applicants were arrested on 5th March, 2010 and charged with the offence of murder and have been currently held at Machakos Government of Kenya Prison***
- ***The applicants categorically deny having committed the offence charged***
- ***The applicants were brought to court on 9th March, 2012 for plea taking which was done accordingly and the applicants denied the charge and the matter was fixed for hearing on 29th May, 2012.***
- ***The offence of murder is bailable under the constitution of Kenya, 2010 and applicants have a qualified constitution right to be released on bond or bail upon reasonable conditions.***
- ***The applicants have a constitutional right to be presumed innocent herein until the contrary was proved***
- ***There were no compelling reasons for the applicant not to be released on bond or bail pending the hearing and determination of the case herein as-***

i) They will attend court when required to do so to its conclusion

ii) They were binding Kenyan citizens who have no past criminal records.

iii) They had young families, with a wives and they were the sole bread winners of that family since their wives were house wives.

iv) The applicants had no intention to live the country when released on bond.

v) It was in the interest of justice that the orders sought herein be issued.

In support of the application, the 1st applicant swore an affidavit on his own behalf and on behalf of the other applicant. Where pertinent, he deponed that they were employees of Hermattan Teachers Training College in Matungulu District where, the deceased was the Principal. On 18th February, 2013 at about 7a.m they found her lying on the ground bleeding. They in the company of others took her to Kangundo hospital, where she was pronounced dead. They recorded statements where upon they together with her husband were arrested and later charged. They were law abiding citizens, undertook to attend, court if released on bail, they were sickly, offence charged was bailable and finally, that there were no compelling reasons for them to be denied bail.

The State opposed the application. Through an affidavit sworn by **Cpl Peter Murithi** the investigating officer in the case, the State stated that the applicants since being charged with the offence had been supplied with witness statements. Therefore they were aware of the evidence against them as well as the weight of the prosecution case. The applicants were students at Hermattan Teachers College, where the deceased was a principal. The State was therefore apprehensive that the applicants may interfere or tamper with witnesses and in the process prejudice its case. The offence was serious carrying with it a death penalty in the event of conviction. The sentence on its own was an incentive for the applicants to abscond. Though the offence was bailable, the grant of bail was nonetheless not absolute but a matter for the discretion of the court. Finally, the State deponed that considering the serious nature of the offence and the severity of the sentence, this court should find that these were compelling reasons as to why the applicants should not be released on bail.

When the application came before me o 15th June, 2012 for *interpartes* hearing, learned counsel for the applicants and State Counsel respectively consented to canvassing the application by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

It is trite law that the right to bail under article 49(1)(1) (h) of the Constitution is qualified by compelling reasons. It is upon the State to demonstrate the existence of such reasons. The reasons may include, the nature of the charge, the strength of the evidence in support of the charge, the gravity of the punishment in the event of conviction, the previous criminal record of the accused if any, the probability that the accused may not surrender himself for trial, the likelihood of the accused interfering with witnesses or suppress the evidence, that may incriminate him, likelihood of further charges being brought against him, the probability of a guilty verdict and detention for his own protection.

The State in opposing the application has relied on the fact that the offence charged is serious carrying with it a death penalty in the event of conviction. This was likely to act as an incentive for the applicants not to surrender themselves for trial. If anything, they will be tempted to escape. The State too believes that the applicants are likely to interfere with the witnesses having been supplied with witnesses statements and being in the know of the strength of State's case.

Having carefully considered the application, rival affidavits and submissions on record, I am satisfied that the application has merit. Ofcourse the applicants are entitled to bail on reasonable terms pending trial, unless there are compelling reasons not to be so released. The burden to show compelling reasons against release if any lies with the State and in the absence of such, the applicants are entitled to bail as of right. In my view, the State has not demonstrated to my satisfaction compelling reasons why the applicants should not be released on bail. Yes, the offence may be serious. However, that *perse* cannot be a hindrance to the grant of bail. It is pure speculation by the state that because of the seriousness of the

offence, the applicants may be more inclined to escape from trial. Again it is pure speculation that applicants are likely to interfere with witnesses. Even if that assertion was true, the court can still impose terms when granting bail as will make it practically impossible for the applicants to do so.

Accordingly, I allow the application on the following terms:-

- Each applicant is released on a personal bond of Ksh. 500,000/= plus one surety in the same amount to be approved by the Deputy Registrar of this court.

- Each applicant shall be reporting to the officer incharge (OCS) of the Police Station that originated the information every Tuesday of every week until the case is heard and determined.

- Each applicant shall attend the mention of this case every after 30 days until the case is heard and determined. The first of such mention will be on **29th October, 2012.**

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **28TH** dayof **SEPTEMBER 2012.**

ASIKE MAKHANDIA
JUDGE