



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

**Criminal Case 55 of 2011**

**REPUBLIC**

**VERSUS**

**1. STEPHEN NYAMAI MBALU**

**2. CHARLES MUISYO MWOLOLO**

**3. ALEX TAMA MUANGE**

**4. PETER MUANGE MUANTHI ..... ACCUSED/APPLICANTS**

**R U L I N G**

On 15<sup>th</sup> December 2011, I made a ruling declining to grant bail pending trial to all the four (4) accused/applicants herein. The ruling was given following an oral application for bail pending trial made by learned counsel for the accused Mr Mung'ata. The State Counsel Mr Mukofu, did not oppose the application for bail. In his view, there were no compelling reasons to make him object to the request for bail.

Following my above ruling, a formal application by way of Notice of Motion dated 26<sup>th</sup> March 2012, was filed by the same four applicants under Article 49 (H) of the Constitution. The prayers are two as follows:-

- a. THAT this Honourable court be pleased to grant the applicants bail.**
- b. THAT costs of the application be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are that the applicants are in employment and law abiding citizens; that they have a permanent place of abode; that they have good antecedents and are of high moral standing; that they needed the liberty to adequately prepare for the defence; that they have pleaded not guilty; and that there were no compelling reasons not to grant them bail.

The application was filed with supporting affidavits sworn on 26<sup>th</sup> March 2012 by each of the applicants. Each of them stated in the respective affidavits that, prior to the arrest, they were employed as casual workers. Each one was married. That they did not live near the victims. That they did not intend to interfere with witnesses.

Learned counsel for the applicants Mr Mung'ata made oral submissions in support of the application.

Counsel emphasized that the situation on the ground was not volatile, and that the deceased died after being assaulted at a market place. Counsel emphasized that the previous oral application might not have been allowed because there was no affidavit filed to explain the circumstances, and also give an indication as to where the applicants came from.

Learned State Counsel Mr Mwenda, did not oppose the application herein for bail. He asked for stringent bail terms.

This application was brought under Article 49(1) (h) of the Constitution, which provides:-

**49 (1) An arrested person has a right-**

**(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be so released.**

As stated earlier in this ruling, I have already dismissed an oral application for bail pending trial in the same matter involving the same accused. Now the applicants have come back for the same orders, in a formal application. They do not state what law grants jurisdiction to this court to consider and determine a fresh application for bail pending trial after a previous application, though informal, was dismissed. The Constitution does not make provision for making a fresh formal application, after another application has been dismissed.

I have perused the provisions of the Criminal Procedure Code (Cap 75 of the Laws of Kenya) with regard to bail. There is provision for revision of bail terms granted by the same court which has granted bail where there is insufficient security, under section 127. The section provides:-

**127. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if afterwards become insufficient the court may issue a warrant of arrest directing that a person released on bail be brought before it, and may order him to find sufficient sureties, and on failing so to do may commit him to prison.**

The above section does not apply to situations where bail has been denied. It only applies in situations where bail has been granted. In our present case, bail has been denied. Therefore the above provisions of the law are not of any assistance.

Section 131 of the Criminal Procedure Code provides for appeals and reviews of bail terms. It provides:-

**132. All orders passed under section 137 by a magistrate shall be appealable to and may be revised by the High Court.**

As the above provisions of the law clearly state, the High Court has both appellate and revision jurisdiction from the decisions of the magistrates' court with regard to bail. This however, does not apply to decisions of the High Court. The High Court cannot act as an appellate court, nor does it have powers to revise its decisions on refusal to grant bail.

Having considered the provisions of the Constitution and the law, I am of the view that though the present application is well intentioned, it cannot stand on the basis of the law and the Constitution. In my humble view, the avenue open to the applicants after this court declined to grant bail, was to appeal to the Court of Appeal. Otherwise this court does not have jurisdiction to hear a fresh application for bail, after dismissing an earlier application for bail. I find that the application is incompetent, and I strike out the same. For the above reasons, I strike out the application.

It is so ordered.

Dated and delivered at Machakos this 25<sup>th</sup> day of September 2012.

**George Dulu**

**Judge**

**In presence of:-**

Mr Mwenda for State

Mr Mung'ata for Accused

Nyalo – Court clerk