



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL CASE NO. 53 OF 2010

REPUBLIC.....PROSECUTOR

VERSUS

ELIJAH KANGUNGU MATHENGE.....1ST APPLICANT/ACCUSED
CHARLES MWANIKI NGATIA.....2ND APPLICANT/ACCUSED

RULING

CHARLES KANGUNGU MATHENGE and **CHARLES MWANIKI NGATIA** were charged with two counts of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. They were arraigned before this court on 8/6/2010. They have filed a Notice of Motion dated 21/12/2011 seeking to be admitted to bail pending the hearing and determination of their case.

The grounds upon which the application is made are found on the face of the application and affidavits of Rachael Wanjiru Mwaniki the grandmother of the 2nd accused who confirms that she will ensure that the applicant attends court when required and is ready to provide security for his release. The other affidavit is sworn by Alfred Ngatia Mwaniki who depones that he is the father of the 2nd accused person and ready to stand surety for him and will ensure that he attends court when required to do so. A further affidavit is sworn by the 2nd accused in which he promises to abide by the conditions that the court will impose, that he lives with his wife and one child and has built a house where he resides; that he runs a butchery and motorcycle business prior to his arrest.

In respect of the 1st accused, Kagunyi Njuguna an advocate of the High Court swore an affidavit in support of the application to which was annexed statements made by the accused to police under inquiry and a further affidavit sworn by the 1st accused in which he claims to be a farmer and businessman in Kabage Trading Centre. Most of the statements made therein are not relevant to this application because they amount to his defence. The only facts that are relevant are that he is a married man with a family, has old parents and is willing to abide by any conditions that the court will impose.

Mr. Omutelema, the learned Principal Estate counsel, opposed the application. He urged that this being an offence of murder which carries a death sentence is a flight risk and that applicants are likely to interfere with witnesses. Counsel urged this court to consider the public perception of justice and that justice must be seen to be done. He further submitted that the old Constitution provided that murder suspects remain in remand and not all persons accused of murder can be released on bail. The applicants' counsel in reply submitted that there was no affidavit filed in opposing the application. This application is brought pursuant to **Art. 49(1) & 2** of the **New Constitution**. The **Old Constitution** only allowed bond for non capital offences. **Art. 49(1) & 2** reads as follows:-

“49(1) An arrested person has the 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 released.

.....

(2) A person shall not be remanded in custody for an offence if the offence is punishable by a fine only or by imprisonment for not more than six months.”

Subsection 2 gives the court discretion to grant bail to offences punishable by fine or where a person is liable to be imprisoned for 6 months. However, under **subsection 1(h)** the right to bail is not absolute. It can only be granted if there are no compelling reasons to deny bail. So far there is no legislation providing for what the compelling reasons are. The High Court has considered the criteria that some jurisdictions have considered in granting or denying bail. One such case was considered by J. Ibrahim in **REP V DANSON V MGUNYA (MSA) Cr. 26/08**. In that case, the court considered the Nigerian case of **ALHAJI MUJAHID DUKUBO ASARI V FEDERAL REPUBLIC OF NIGERIA**, Supreme Court of Nigeria SC 208/06 which set out some of the criteria whether or not to grant bail. The criteria include:-

- (i) The nature of the charges;**
- (ii) The strength of the evidence which supports the charge.**
- (iii) The gravity of the punishment in the event of conviction;**
- (iv) The previous criminal record of the applicant;**
- (v) The probability that the criminal may not present or surrender himself for trial;**
- (vi) The likelihood of further charges being brought against accused;**
- (vii) The likelihood of accused interfering with witnesses or may suppress any evidence that may incriminate him;**
- (viii) The probability of finding the applicant guilty as charged;**
- (ix) The detention for the protection of the accused;**
- (x) The necessity to preserve medical or social report pending final disposal of the case.**

The Nigerian case was an appeal and therefore some would not apply to this case. In this case, the offence which the applicants face is a serious one that carries a death sentence upon conviction.

In the MAUNYA case decision, Mohamed J was of the view that the most important consideration on whether or not to grant bail is whether the accused will attend court for trial. J. Emukule in **REP V KABULIT NKU HCR 115/08** was of the view that the most important condition is the public policy and public interest. I think that even as the court looks at all the criteria set out in decided cases, it can not lose sight of the most important factor which is how will the release of an accused charged with murder, impact the public at large, is there likelihood of revenge and therefore danger to accused's life. The offence that the applicants face is serious indeed but there has been no evidence adduced to show that the applicants are a flight risk or that they are likely to interfere with witnesses. That could only have been confirmed by evidence contained in an affidavit. There is no such affidavit. There is also no evidence that the applicants' lives will be in danger if released. The murder happened in May 2010 and it is possible tempers have cooled down. The applicants' relatives have sworn to being able to stand surety for the applicants and being able to avail them in court when required.

Taking all these factors into consideration this court will exercise its discretion and release the applicants on bond. The applicant will execute a bond of Kshs.600,000/- plus 2 sureties of like sum. Each applicant is required to report to this court every 14 days till further orders of this court. The applicants are warned not to interfere with the witnesses or do any act that may prejudice the fair hearing of this case, in default their bonds will be cancelled.

DATED and DELIVERED this 13th day of April 2011.

R.P.V. WENDOH

JUDGE

PRESENT:

Mr. Kagunyi for the applicants/accused persons.

Mr. Nyakundi for the State.

Kennedy – Court Clerk.