



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**HC. CRIMINAL CASE NO.31 OF 2010**

**ALEX KIOKO KINYINGI.....APPLICANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

(1) An information filed on the 19<sup>th</sup> May, 2010 states that Alex Kioko Kinyingi (“**the accused person/applicant**”) is charged with two (2) counts of the offence of murder in that on the night of the 23<sup>rd</sup> and 24<sup>th</sup> December 1995 at Tulia Market in Kitui District of the Eastern Province, he murdered Peter Mwangi Ndatha and Alexander Mutua Ngalai respectively. The information followed a judgment of the Court of Appeal dated the 7<sup>th</sup> May, 2010 directing that the Applicant be re-tried.

(2) With a view to obtaining an order for his release on bail pending the hearing of the charge preferred against him, the Applicant filed a Notice of Motion under Article 49 of the Constitution on the 1<sup>st</sup> February, 2011. The grounds upon which the application is brought are that the Applicant is suffering from a persistent and incurable disease and his health has seriously deteriorated since 1995 following his arrest and arraignment in court; that he requires close monitoring in a suitable medical facility and that he requires a special diet which is not available in the prison remand home. These grounds and reasons are reiterated in the Applicant’s supporting affidavit made on the 31<sup>st</sup> January, 2011.

(3) The Republic/Respondent opposes the application on the basis of the affidavit sworn by Corporal Rinos Musungu on the 21<sup>st</sup> February, 2011. He says that the Applicant was an Administrative Police Officer prior to his arrest and that it was alleged that he used the firearm issued to him for official duty to commit the offence. The respondent states further that the ballistic expert matched the applicant’s firearm to the recovered empty cartridges recovered at the shooting incident scene; that the Applicant was found with the gun believed to be the murder weapon; and that this case being a retrial, the Applicant is well aware of the evidence that will be adduced against him and the witnesses who will testify against him.

(4) In paragraphs 10, 11, 12 and 15 of his affidavit, Corporal Musungu states as follows:-

**“10. THAT all the Prosecution witnesses Reside from known localities and there is a high possibility of the witnesses being inflicted fear when they come into contract with the applicant who was an officer working within the same area and knows the kind of evidence they will tender against him, through his close allies there will be likelihood of inflicting fear on the key prosecution’s witnesses.**

**11. THAT indeed one of the key prosecution witness John Mulewa Kimwele had been threatened with death by the accused and had to remain indoors until the arrest of the applicant. Attached herewith and marked RM1 is a copy of the said witness statement.**

**12. THAT the accused person if convicted upon trial would suffer the sentence of Death and in view of the severity of sentence, it is my humble view, that the temptation to abscond if released on bail pending the hearing is real.**

**15. THAT the applicant has been taken to Kenyatta National Hospital for his clinics every time they fall due and this shows that his condition is and will continue to be properly managed at Kenyatta National Hospital, a recognized referral hospital.”**

5. In submission, Dixon Konya, Esq., learned counsel for the Applicant, contended that the Respondent had failed to establish that there are compelling reasons why the Applicant should not be granted bail and released – see **Republic – vs- Danson Mgunya and Another** (Mombasa H. Criminal Case No.26 of 2008). In her response, and in opposing the application, Mrs. Christine Gakobo, learned Senior State Counsel, argued that should the Applicant be released, and as he is already fully aware of the prosecution witnesses and the nature of the evidence they will be adducing it is more than likely that the Applicant will inflict fear on the witnesses and compromise their evidence.

(5) In the celebrated decision of Porter, J., in **Watoro –vs- Republic** [1991] KLR 281, and with which I respectfully agree, the learned Judge stated on authority that the paramount consideration in bail applications is whether the accused person will turn up for his trial. Other than stating that he is prepared to abide by any order and/or conditions that the court may impose, the Applicant has not tendered any evidence whatsoever to show that he will turn up for his trial if released. The Applicant was a law enforcement officer and Corporal Musungu has produced evidence that John Mulewa Kimwele who was PW.2 in the previous proceedings against the Applicant in the High Court was advised by the Police to remain indoors until the Applicant was arrested as he was looking for him. In light thereof, and given that the prosecution witnesses are from the same locality as the Applicant, I would agree with the Respondent’s submission that these circumstances must be taken into account in considering the application for there is a strong likelihood of the Applicant coming into contact with such witnesses and compromising their evidence.

(6) The other factors I have considered is the seriousness of the offence with which the Applicant is charged and the mandatory death sentence that would follow if he is convicted. The Applicant knows the evidence he is to meet and also that he had been convicted in his earlier trial, which trial was nullified by the Court of Appeal only because the trial court had proceeded without assessors. The Respondent contends that these circumstances are enough incentive for the Applicant to abscond and not attend his trial and also to interfere with the prosecution witnesses. While it is also paramount to remember the presumption of the Applicant’s innocence, these factors and the incidence they bear on the Applicant’s mind cannot be ignored.

(7) The Applicant has also asked the court to take into account that he is suffering from a persistent and incurable disease. The evidence he has produced by way of medical records from the Kenyatta National Hospital shows that he has been availed adequate medical treatment as and when necessary.

(9) In the result, and while the Applicant has a constitutional right to be released on bond or bail, the Respondent has established that there are compelling reasons why he should not be released. Accordingly, the application in the Notice of Motion dated the 31<sup>st</sup> January, 2011 fails and it is dismissed.

So ordered.

Dated and delivered at Machakos this 31<sup>st</sup> day of May, 2011.

**P. Kihara Kariuki**  
**Judge**