



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HC.CR.C. NO.34 OF 2010

REPUBLIC.....APPLICANT

VERSUS

1. THOMAS MUMO MUASYA
2. ZACHARY MUOKI MWANZA.
3. JOHANNES MUTISYA MULUILA.....ACCUSED
4. JOHN NGUNGI NGUMBI

RULING

(1) In the information filed on the 31<sup>st</sup> May, 2010, (1) Thomas Mumo Muasya, (2) Zachary Muoki Mwanza, (3) Johannes Mutisya Muluila and (4) John Ngungi Ngumbi (“the accused persons/Applicants”) the court is informed that the accused persons are charged on two counts of the offence of murder contrary to the provisions of the Penal Code. The accused persons therefore took out a Notice of Motion on the 9<sup>th</sup> February, 2011 seeking orders to be released on bail. The application is brought under Article 49(1) of the Constitution and is supported by the affidavit of Fred Mutua Esq. Advocate on record for the accused persons sworn on the 8<sup>th</sup> February, 2011. Learned Counsel says that the accused persons are not a flight risk residing primarily within Muambani village where the offences are alleged to have been committed, wherein they carry out their farming and business activities. The accused persons pose no danger and Mr. Mutua believes that they will faithfully attend court if granted bail.

(2) The State opposes the application on the basis of the replying affidavit of Sgt. Francis Njuguna (the Investigating Officer) made on the 2<sup>nd</sup> March, 2011. He summarizes the investigations leading to the arrest of the accused persons. He says that as the accused persons would face the death sentence if convicted, the accused persons are likely to abscond if granted bail. They are also prominent people within Makueni District and would either inflict fear or compromise the prosecution witnesses who reside in the same locality.

(3) In his submissions, Mr. Mutua contended that the accused persons after being charged should have been released because at their first appearance the prosecution did not apply for their detention and no reasons were offered for keeping them detained. Learned counsel cited the decisions in Republic –vs- Danson Mgunya and Another [2010] eKLR and urged that the application be allowed.

In reply, Gitonga Muriuki, Esq. learned State Counsel in reiterating that the averments in the Replying Affidavit contended that when the accused persons were first brought before the court on the 3<sup>rd</sup> June, 2010, the offence with which they are charged was not bailable under the law. On the persuasive authority of this court in Republic vs. Joseph Wambua Mutiga and three others Mr. Gitonga urged that the application be denied.

(4) There can be no doubt that the accused persons have a constitutional right under Article 49(1)(h) of the Constitution to be

released on bond or bail, unless there are compelling reasons not to be released. The accused persons in this application so concede. The principles the court must consider in deciding whether or not to grant bail include the likelihood of the accused persons attending trial; the risk that if they are released on bail they may interfere with the prosecution witnesses or tamper with evidence and the likelihood of the accused persons committing another offence. Needless to say, the court may also take into account the gravity of the offence and the punishment likely to be imposed on conviction.

(5) The State has urged that the accused persons who face the death sentence if convicted are likely to abscond if granted bail. It is also evident from the prosecution witness statements annexed to the supporting affidavits that the accused persons know the identities of the witnesses and the nature of their evidence. In these circumstances, it is not unreasonable for the state to express the fear that the accused persons who are prominent people within Makueni District should inflict fear or compromise the prosecution witnesses who reside in the same locality.

(6) In the result, I find there are compelling reasons for denying the application for bail pending trial, at this stage of the proceedings. The application in the Notice of Motion filed on the 9<sup>th</sup> February, 2011 accordingly fails and is dismissed. So ordered.

Dated and delivered at Machakos this 23<sup>rd</sup> day of May, 2011.

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