



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HCCR. CASE NO.62 OF 2007

REPUBLIC.....PROSECUTOR

VERSUS

MWENDWA KAVINYA)
JOSEPH NGULA).....ACCUSED
JUSTUS MUTINDA)
MUSYOKA MALUSI)

RULING

1. In the Information filed on the 7th November, 2007, (1) Mwendwa Kavinya, (2) Joseph Ngula, (3) Justus Mutinda (4) Musyoka Malusi are charged with the offence of murder contrary to sections 203 and 204 of the Penal Code in that on the night of the 25th and the 26th October, 2007 at Ngomano Village in Itoleka Location of the Kitui Central Division in Kitui District, they jointly murdered Katindi Mwoka.
2. On the 2nd March, 2011 and after five (5) prosecution witnesses had given their evidence, the first, second and fourth accused persons (hereinafter referred to as the Applicants) filed a summons under Article 49(1) (h) of the Constitution seeking ordered to be released on bond pending the determination of the criminal proceedings against them. In his supporting affidavit made on the 1st March, 2011, Jacob Mati, Esq. Advocate, learned counsel for the Applicants says that the last of the prosecution witness – the Director and Investigation officer respectively were to testify on the 26th November, 2009 but did not so because they were on leave; that the Applicants with the support of their mothers are very positive that they would always attend court whenever required to do so in the event that they were granted bond; and that the Applicants are well behaved and have not had any problem with law enforcement agencies in the past.
3. The State opposes the application on the grounds and reasons set forth in the replying affidavit of Police constable Japheth Kidiavai sworn on the 20th April, 2011. He says that if released on bond, the Applicants are likely to abscond since they are all young, have no person who depend on them and having nothing to lose. Further, that society is likely to revenge by attacking them for all their neighbours know them as bad people who had murdered the deceased and that in view of the severity of sentence, the temptation to abscond is real for the Applicants.
4. The averments contained in the supporting and replying affidavits were reiterated in the summons made by learned counsel for the Applicants and the State respectively and I have considered the evidence in light of such submissions. This court (in several decisions in the case of **Republic vs. Danson Mgunya and another (Mombasa H.C. Cr. Case No.26 of 2008) [Ibrahim, J.]** has considered and articulated the criteria to be considered in applications of this nature as including the nature of the charges and the gravity of the punishment in the event of conviction as well as detention for the protection of the accused all of which have been advanced by the state in opposition to the application before me. But the paramount consideration in bail application is whether the accused will turn up for his trial – see **Watoro vs. Republic (1991) KLR 220** and the onus is on the State to show that there are compelling reasons why the Applicants should not be released. On the basis of the averments made in the replying affidavit, I am not satisfied that the State has demonstrated that the Applicants are likely to abscond if released on bail or that their persons are in danger. The application must therefore succeed. I have also taken into account the fact that most of the prosecution witness have already given their evidence and that no allegation has been made

that the Applicants may interfere with witnesses or suppress any evidence in addition to their relative young ages and the nature of the substantially circumstantial evidence adduced to date.

5. Accordingly, and for the reasons I have given, the summons dated the 1st March, 2011 is allowed and the following orders made:

(i) Each of them, Mwendwa Kavinya, Joseph Ngula, Justus Mutinda and Musyoka Malusi, be and are hereby granted a personal free bond, together with two (2) sureties for each of them respectively of the value of KShs. Ten Thousand (10,000) each. The sureties each to submit recognizance to be verified by the Deputy Registrar of this court.

(ii) Each of them the Applicants shall report to the Officer-in-charge (OCS) of the Police Station nearest to his home (to be verified in each case by the Deputy Registrar) on every Tuesday in each week of every calendar month.

(iii) Each of them Applicants shall inform the OCS of his intention to travel outside the jurisdiction of the OCS before undertaking any travel and shall also provide the OCS with all the relevant information e.g. such travel should include the mode of travel, next and final destinations and residence and the duration of stay outside the duration of the OCS.

(iv) In event that any of them the Applicants wishing to travel outside Kenya, he shall first seek and obtain an order of the high Court.

(v) In addition to attending court on all mention and hearing dates (records expressly examined by the court), each of them the Applicants shall appear in person before the Deputy Registrar at least once every calendar month, the first of such appearances to be on the 4th August, 2011 at 9.00 a.m.

Orders accordingly.

Dated and delivered at Machakos this 4th day of July, 2011.

**P. Kihara Kariuki,
Judge**