



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KIAMBU**

**CRIMINAL CASE NO. 38 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOHN KAMAU.....1<sup>ST</sup> ACCUSED**

**DANIEL NJUGUNA.....2<sup>ND</sup> ACCUSED**

**KELVIN NJENGA.....3<sup>RD</sup> ACCUSED**

**MOSES MUTUMA.....4<sup>TH</sup> ACCUSED**

**RULING**

1. JOHN KAMAU, DANIEL NJUGUNA, KELVIN NJENGA and MOSES MUTUMA are charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code**. The particulars of which are that on diverse dates between 31<sup>st</sup> July, 2019 and 1<sup>st</sup> August, 2019 at Mwalimu Farm in Gatong’ora Location within Ruiru Sub-County in Kiambu County murdered JOSEPH KILONZO PETER.

2. They pleaded not guilty to the said charges. The prosecution only opposed bond in respect of the 1<sup>st</sup> accused person only. Subsequently, Miss Ngania, counsel for the 1st accused person made an oral application seeking bail in respect of the 1st accused person. She stated that the prosecution has not discharged its burden as mere assertions in opposing bail cannot stand. She urged the court to grant bail to the 1<sup>st</sup> Accused on reasonable terms.

3. NO. 82274 CPL ZABLON ATUBWA filed his affidavit in opposition to bond. He deposed that he was not opposed to bond as against the 2nd, 3rd and 4th accused persons but only in respect to the 1st accused persons. He contended that the accused persons are entitled to bail and/or bond unless there exists compelling reasons to warrant a denial and that such is the case with the 1st accused person as he does not have a fixed abode hence he is a flight risk. The DPP reiterated these matters in opposing the bail application.

4. The court directed that a pre-bail report be availed in respect of the 1<sup>st</sup> Accused person. The same was filed on 14<sup>th</sup> November, 2019. The accused is the second born in a family of four siblings. His mother, Nancy Waitira is a single mother. The report shows that the 1<sup>st</sup> accused person was born in the year 1991 and was never enrolled to any school and upon becoming of age, he started herding family cows and that currently, he was working as a herds boy in Juja Farm until his arrest. When interviewed, the 1<sup>st</sup> accused prayed for bond though he was not sure his mother would accept to bond him using the title deed for the land where the family resides. The victims’ sentiments were that though they were still grieving, they are not opposed to bond as long as justice prevails. In conclusion, the Probation Officer stated that during the interview the 1<sup>st</sup> accused person was concealing information, that the accused person’s mother did not commit to bond the accused as she said that the accused is not easily controlled and she fears that he might fail to obey the bond terms. The community was also said to be in opposition to the accused being granted bond. The accused was said to be a “mysterious and strange person” and he was considered to be a flight risk.

5. The Court has considered the pre-bail report, the affidavit material and arguments by respective parties which, by and large rested upon the said material. Article 49(1) (h) of the Constitution provides that an accused person is entitled to be released on bail or bond on reasonable conditions unless there be shown compelling reasons militating against such release. The primary consideration in granting bail is whether the Accused person will attend his trial. See **Job Kenyanya Musoni v R [2012] e KLR**. Even so, other factors are relevant, including the nature of the charges; strength of the evidence supporting the charge; gravity of the punishment prescribed for the offence; previous criminal record; likelihood of interfering with witnesses; likelihood of further charges and public safety or the Accused person’s own safety. See **R v Danson Mgunya & Another (2008) e KLR**. The duty lies with the DPP to present cogent evidence why bail should be declined. Moreover, the Accused person is presumed innocent until proven guilty.

6. The DPP asserts that the 1<sup>st</sup> Accused is a flight risk as he has no fixed abode. Although from the prebail report the Accused's family resides at Kamae, and the said Accused was previously employed and residing at Juja farm, he is unlikely to be accommodated there following his arrest and it does not seem that he has an independent home of his own or family. His mother and the Accused himself when interviewed appeared to have an untrusting relationship, the mother appearing unwilling to take any responsibility for the Accused's release on bond. Thus, it is not clear where the Accused would reside upon release on bond.

7. As stated in the **Mgunya Case**, the standard of proof of compelling reasons to deny bail is on a balance of probabilities (see also **R v Mohamed Ahmed Omar [2010] e KLR**). It is true that the Accused may furnish a surety other than his mother, but in this case no suggestion of such other willing person has been given. Nor has the Accused's likely abode upon release been disclosed. The court is wary of releasing the Accused on bond in such circumstances. For the reason that he might abscond. More so as his own counsel admitted from the bar that the 1st Accused left his area of abode in the period following the offence. Until the Court is given concrete confirmation of the Accused intended place of abode, upon release, the possibility of absconding appears real. For these reasons, the Court declines his bail application for now and orders that the 1<sup>st</sup> Accused remains in custody. He may renew his bail application at a later stage.

**DELIVERED AND SIGNED AT KIAMBU ON THIS 13<sup>TH</sup> DAY OF FEBRUARY, 2020.**

**C. MEOLI**

**JUDGE**

**In the presence of:-**

Mr. Kasyoka for the DPP

Ms. Muibu holding brief for Ms. Ng'ania for the 1<sup>st</sup> Accused

Court Assistant - Kevin/Nancy