



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCR NO 119 OF 2017

REPUBLIC PROSECUTION

-VERSUS-

PATRICK MUTUA MUEMA ACCUSED

RULING

1. By Notice of Motion dated 02/12/2018 the Accused/Applicant seeks the orders:-

- 1) **THAT** the instant appearance be certified urgent and heard ex-parte in the first instance.
- 2) **THAT** the Applicant herein be granted bail/bond pending the hearing and determination of the murder case herein.
- 3) **THAT** this Honourable court do make any other order it deems fit in the circumstances.

2. The same is anchored on the provisions of Article 19(3) (a) & 49(i) (h) Constitution of Kenya.

3. The same is based on grounds on the face of the Application:-

- i. The Applicant has been charged with the offence of murder which he has denied and he is currently in custody.
- ii. The Applicant has been a responsible man and citizen and he has a permanent place of abode at Mukuyuni Sub-Location in Kwa Vonza Location within Kitui Sub-county.
- iii. The Applicant is ready and desirous of attending court each and every time he is required until the case is fully heard and determined.

4. The Application is supported by Affidavit of Patrick Mutua Muema sworn on 02/01/2018 which reiterates the same grounds.

5. When Application came for directions the parties were directed to canvass same to file and serve submissions.

6. After the timelines only Applicant complied with directions by filing submissions.

APPLICANT SUBMISSIONS

7. Article 49 (1) of the Constitution states as follows:-

“An arrested person has the right to be released on bond or bail, on reasonable conditions, pending the charge or trial unless there are compelling reasons not to be released.”

8. The Constitution of Kenya 2010 in the above quoted provision avails the right of an accused person to be released on bail/bond pending trial irrespective of the charge facing him. However, this right is not absolute. The Honourable Court is always called upon to exercise its discretion in granting an accused person bail or bond. However, in the exercise of this discretion, the court ought to be guided by set out principles.

9. In the case of **Republic –Vs- Pascal Ochieng Lawrence [2014] eKLR** the learned Judge stated;

“It is to be noted that unlike in the past when an accused person had to demonstrate why he should be released on bail/bond, that duty now properly belongs to the state. The court in exercising its discretion as to whether or not to grant bond is however to be guided by the following parameters:-

- ***The seriousness of the offence although this carried greater weight under the old constitutional dispensation;***
- ***The weight of the evidence so far adduced if the case is partly heard;***
- ***The possibility of the accused interfering with witnesses;***
- ***The safety and protection of the accused once he/she is released on bail/bond;***
- ***Whether the accused will turn up for trial;***
- ***Whether the release of the accused will jeopardize the security of the community.”***

10. The Constitution of Kenya 2010 provides that an accused person is presumed innocent until proven guilty. The accused person herein has been charged with the offence of murder contrary to Section 203 as read together with Section 204 of the Penal Code.

11. Further, it is for this Honourable Court to consider all the evidence available in order to determine whether the accused person is innocent or not. As such the accused person has a right to be released on bail/bond pending hearing and determination of his case.

12. The Applicant has succinctly stated that he has no intention of interfering with the prosecution witness. Besides, it is undisputed that the prosecution has completed its investigations, all the available witnesses have recorded statements and as such the prosecution has at its disposal all the evidence it wishes to rely on in the case.

13. Further, the Applicant stated that he is a family man with parents, siblings, wife and children to fend for. As such being father, he is the one who provides for his immediate family.

14. Besides, the accused person asserts that he has held a clean criminal record as he has never engaged into any crime to warrant his being arraigned before a court of law previously.

15. It is trite law that the paramount consideration besides all the above principles is whether or not the accused person will turn up for trial. The accused person asserts that he has a permanent place of abode at Mukuyuni Sub-Location in Kwa Vonza Location within Kitui County. He also has a very young family; a wife and children.

16. The accused person has also given an undertaking in his Affidavit that he will attend court as and when required. It is his assertion that his own father one Michael Muema Kakuti or any other relative will stand as surety to ensure his attendance to court. All these averments have not been contested or in any way disputed.

17. The state has not given compelling reasons in opposition of the application at hand. The prosecution has a burden to prove their allegations. The prosecution has not availed any evidence in support to counter the Applicant’s assertions.

18. In the case of **Republic –Vs- Eunice Sintama Lesale & 2 Others [2014] eKLR**, this Honourable Court noted that;

“Compelling reasons should not be a matter of conjecture, guesswork or speculation. Being supplied with statements of prosecution witnesses is a matter of right guaranteed by the Constitution under Article 50 (2) (j). The provision for death sentence cannot be used against the Applicants as that would negate the Constitutional guarantee for bail in capital offences.”

19. See also **MKS HCCR No. 3 of 2013, Republic –Vs- Kennedy Muendo Musyoka**. Taking account the foregoing and bearing in mind that the accused has undertaken to abide by any bail/bond terms granted, it is submitted that it is in the interest of justice that the Applicant be granted reasonable bail/bond terms.

20. After going through the Affidavit and the submissions on record, I find the issues are:-

- ***Whether Applicant Application is merited?***
- ***If above is affirmative, what are the terms of the bail?***

21. The accused right to bail are under pinned in the provisions of Article 49(i) Supra. Same are only limited to the extent the state tenders compelling reasons to warrant denial the bail/bond.

22. The state has not tendered any scintilla of evidence in form and shape of compelling reason for the denial of the bail to the accused.

23. The probation officer report dated 25/04/2018 stated that;

“Provisions antecedents: a report obtained from his family and area assistant chief noted that his past behavior and conduct within the family is favourable. He lived well and peaceful life working for his family. There were no previous convictions on record or arrests revealed during the inquiry and neither any case reported before the area administration. Conclusion..... he has a favourable public perception and holds a low risk probability level of breaching the terms of the bond if considered and granted.”

24. The aforesaid report was not rebutted or contradicted by the prosecution.

25. Thus the court finds no reason of denying the accused a bail/bond. Thus court makes the following orders:-

- *The accused is admitted to bond of Kshs. 100,000/= plus one surety alternatively cash bail of Kshs. 70,000/=.*

SIGNED, DATED AND DELIVERED THIS 4TH DAY OF FEBRUARY, 2019 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE