



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL CASE NO. 48 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

SAMUEL PAUL MOKUNA.....1ST ACCUSED

ANTHONY NJUGUNA GITOTO.....2ND ACCUSED

RULING

1. Samuel Paul Mokuna and Anthony Njuguna Gitoto 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 the night between 24th and 25th of September, 2018, at Tushauriane Area, Gatuanyaga Location in Thika East Sub-County within Kiambu County murdered Evans Mwangangi Mwendwa.

2. They both pleaded not guilty to the said charges and filed their bail application by way of Notice of Motion on 10th December, 2018 and 5th October, 2018 respectively. Their main prayer was that they be admitted to bail pending the hearing and determination of the case. Samuel Paul Mokuna in his supporting affidavit, deponed that his application to be released on bond/bail is premised on clear provisions of the law. He contended that there are no compelling reasons why he should not be released on bail pending trial. He deponed that he is a Kenyan citizen and promised not to interfere with investigations and at the same time abide by the terms set by the court. Anthony Njuguna Gitoto in his supporting affidavit, deponed that his family was suffering due to his incarceration. He deponed that he has a constitutional right to be granted bail and that there is no risk that he will abscond and he does not pose any security risk to the witnesses.

3. In opposition to the said application, NO. 104435 P.C. MULLER KING'OO of DCI THIKA EAST filed his replying affidavit in regard to the accused persons' application for bail. He deponed that he is opposed to the accused persons being released on bond as they are likely to interfere with witnesses among them David Njoroge Kiminja who is their close friend. He further stated that both of the accused persons were facing charges of Robbery with violence at Thika Law Courts.

4. On 19th December, 2018, the court ordered that pre-bail report be availed in court in preparation for the bail application hearing. A Prebail report was filed on behalf of the 1st accused, Samuel Paul Mokuna in which it was stated that the accused is the third born in a family of five and survives on casual jobs. He was said to have a history of chewing miraa and consuming alcohol. When the parents were contacted in regard to the issue of bond, they said that it would be of no use as he faces another serious case at Thika Law Courts and as such, even if he was to be bailed out in this one, the other case is still pending. Further, they stated that his freedom would not even last for long because he has a drug problem and has joined dangerous gangs and is involved in a series of criminal activities.

5. When the deceased's mother was contacted, she was hostile and bitter. To her the gap left by her son's gruesome murder can never be filled. She promised to seek traditional intervention. In regard to the 2nd accused person, Anthony Njuguna Gitoto, he is the 3rd born in a family of six. He is married and has one child. He was working as a driving instructor as at the time of his arrest. His parents stated that the accused has never presented any drug-related problems. His family portrays him as a hardworking man as he has two jobs so as to provide for his family. In regard to bond, his family is willing to support him out if granted reasonable terms and promises to ensure he avails himself in court. It was stated that he has no known criminal record.

6. Subsequently, when the application came up for hearing, Mr. Kamau for the accused persons, argued that the accused persons may only be denied bail on compelling grounds. He stated that the replying affidavit by the DPP only revolved on the fact that the accused persons were facing other charges. He quoted the case of **R v Robert Zipporah** where Odunga J stated that the question of existence of another case is neither here nor there. He contended that the complainant and the witnesses are not known to the accused persons and in any case, investigations are complete. It was stated that there is no evidence on record showing that the accused persons will abscond. The court was urged to give reasonable bond terms as the accused persons are from humble backgrounds.

7. Miss Ndombi for the prosecution relied on the replying affidavit in opposition to the said application. She focused on the relationship between the accused persons and one witness David Kiminja whom it was feared the accused may interfere with and the fact that they are also charged with Robbery with violence in Thika Law Courts. She also stated that the likelihood of the accused persons absconding is high.

8. The court has considered the material canvassed in respect of the bail applications. Under Article 49 of the Constitution bail may only be denied where the prosecution furnishes compelling reasons. A compelling reason is one that is weighty enough to militate against the release of the accused on bail.

9. In the present case, the DPP has opposed bail on grounds *inter alia* that the accused persons are likely to interfere with a key witness who also happens to be their close friend. This assertion is not controverted. Moreover this court is entitled to consider the antecedents of the accused in this case as emerging from the pre-bail reports, in determining the question of their release on bail.

10. In my considered view, it does seem prudent at this stage, to suspend the release of the Accused persons on bail until the witness **David Njoroge Kiminja** has testified. Thereafter the question of bail will be revisited. It is so ordered.

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF MARCH 2019.

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C. MEOLI

JUDGE

In the Presence of:-

Miss Ndombi for DPP

Mr. Kamau holding brief for Mr. Ndungu for 1st Accused

Mr. Kamau for the 2nd Accused

1st Accused – Present

2nd Accused – Present

Court Clerk – Nancy/Kevin