



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CRIMINAL CASE NO. 57 OF 2018

REPUBLIC.....PROSECUTOR

VERSUS

BENARD MWENDWA.....1ST ACCUSED

PETER MUEMA.....2ND ACCUSED

NZIOKA NDEKE.....3RD ACCUSED

KENNEDY MUSEMBI4TH ACCUSED

RULING

1. The accused persons pleaded not guilty to a charge of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** and in exercise of their rights to bond under **Article 49 (1) (h)**, the court directed the prosecution to file affidavits in support of compelling reasons if any and further directed the probation officer to prepare and submit to court in compliance with the Bail and Bond Policy Guidelines Pre-bail report which have now been filed.

2. When the matter came up for hearing before me, Mr. Naulikha for the prosecution stated that they did not have any compelling reasons and sought that the accused be admitted to bond on terms which includes two sureties to secure their attendance. He further stated that the court should take note of the Pre-bail report. Mr. Oduor for the accused persons on the other hand submitted that the investigating officer knew where the accused persons were residing and that allegation contained in the Pre-bail report were only mere allegations not supported by evidence.

PRE-BAIL REPORT

3. **BENARD MWENDWA MITAU (1ST ACCUSED):-** At the time of his arrest, was living in rented room at Mukuru Kwa Reuben. He is a widower with one child aged two years who lives with his mother in Kitui. On the Victim Impact Statement, it was stated that after the murder of the deceased, his brother was severely beaten by unknown people forcing them to move out of Mukuru Kwa Reuben. In conclusion it was stated that *Nyumba Kumi* elders at Mukuru Kwa Reuben depicted the accused persons as threat to peace and peaceful co-existence.

4. **PETER MUEMA KAMUTI (2ND ACCUSED):-** Was also residing at Mukuru Kwa Reuben and was working as a scrap metal collector at the time of arrest and single. His mother and bother lives in Machakos.

5. **NZIOKA NDEKE (3RD ACCUSED):-** First born in a family of seven, single and was engaged in construction sites as a casual labourer.

6. **KENNEDY MUSEMBI (4TH ACCUSED):-** Was doing casual work in Mechanics in Kitui and had only visited Nairobi on 27th October 2018 when he was arrested in his cousin's house.

7. The law on Bail and Bond in Kenya is now settled. It is a constitutional right of every accused person which can only be limited where there are are compelling reasons with the sole purpose of grant being securing the attendance of the accused person in court. Justice Odunga in **REPUBLIC v ROBERT ZIPPOR NZILU [2018] eKLR** stated as follows:-

“(8). Article 49(1)(h) of the Constitution provides that:-

An accused person has the right ...

(h) to be released on bond or bail, on reasonable conditions pending a charge or trial, unless there are compelling reasons not to be released.

(9). It follows that the right to bail is not absolute and where there are compelling reasons the said right may be restricted. Nevertheless, since the Constitution expressly confers the said right, it is upon the prosecution to show that there exist compelling reasons to deny an accused person bail. What the compelling reasons are, however, depend on the circumstances of each case and these circumstances are to be considered cumulatively and not in isolation. The mere fact therefore that the offence with which an accused is charged carries a serious sentence is not necessarily a reason for denial of bail. The real question that the court must keep in mind is whether or not the accused will be able to attend the trial. The imposition of terms of the bail if necessary must similarly be for the purposes of ensuring the attendance of the accused at the trial and ought not to be based solely on the sentence that the accused stands to serve if convicted. It is therefore my view that the discretion to grant bail and determine the amount rests with the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release.”

8. Bail and Bond Policy Guidelines at **Section 4.9** sets out the following considerations in a non-exhaustive manner:-

- a) The nature of the charge or offence and the seriousness of the punishment to be meted if the accused person is found guilty.*
- b) The strength of the prosecution case.*
- c) The character and antecedents of the accused person.*
- d) The failure of the accused person to observe bail or bond terms.*
- e) The likelihood of interfering with witnesses.*
- f) The need to protect the victim or victims of the crime.*
- g) The relationship between the accused person and the potential witnesses.*
- h) The best interest of child offenders.*
- i) Whether the accused person is a flight risk.*
- j) Whether the accused person is gainfully employed.*
- k) Public order, peace and security.*
- l) Protection of the accused persons.*

9. Whereas the prosecution did not submit any compelling reasons, a clear reading of the Pre-bail report shows that if released the accused persons based on their character and antecedence are likely to compromise public order, peace and security. I have noted that the conditions prevailing at Mukuru Kwa Reuben is not conducive for the release of the accused persons on bond at this stage. I have further taken into account the fact that a brother of the deceased was attacked by unknown persons soon after the attack and death of his brother and therefore the safety of the intended prosecution witnesses must be taken into account. It is clear to my mind that if released at this stage, the presence of the accused persons is likely to cause fear upon the prosecution witnesses who have expressed concern about their safety.

10. In this, I find support in the Indian High Court Kerala Case of **STATE v P. SUGATHAN 1988 CriLJ 1036** where it was stated that:-

“Ensuring security and order is a permissible non-punitive objective, which can be achieved by pre-trial detention, where overwhelming considerations in the nature aforesaid requires denial of bail, it has to be denied.”

11. I am therefore satisfied that there exists strong compelling reasons as stated herein to enable me deny the accused persons the enjoyment of their constitutional right to bail at this stage. The accused persons shall therefore remain in custody pending the determination of this case and it is so ordered.

Dated, delivered and signed at Nairobi this 16th day of May, 2019.

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Naulikha for the State

Mr. Oduor for the 1st and 2nd accused

Mrs. Omungala for the 3rd and 4th accused

Accused 1 - 4 present

Court Assistant: Karwitha