



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL CASE NO. 56 OF 2018**

**HAMISI KATANA KOI.....ACCUSED**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING ON BAIL PENDING TRIAL**

1. The accused, Hamisi Katana Koi, was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars of the charge are that on the 31<sup>st</sup> day of July, 2018 at Matolani village, Viragoni sub-location in Kaloelni location within Kilifi County, murdered Katana Koi Mwayele. He denied the charge.
2. Mr. Ajigo, Learned Counsel for the accused applied for the release of his client on bond/bail pending trial. He submitted that it was the right of the accused to be released on bond/bail pending trial unless compelling reasons exist.
3. He made reference to the affidavit filed on 20<sup>th</sup> February, 2019 by the Investigating Officer, to oppose the application for the accused to be admitted to bond/bail pending trial. In the said affidavit, it is deposed that he is a security threat to his step-mother but the pre-bail report does not indicate so.
4. It was submitted that the accused has a fixed abode at Kaloleni and this court can give conditions as to his release on bond/bail. It was further submitted that the accused was under obligation to avail a surety who would ensure his attendance in court.
5. Ms Ogwen, Principal Prosecution Counsel, relied fully on the affidavit filed on 20th February, 2019 to oppose the release of the accused person on bond/bail.

**ANALYSIS AND DETERMINATION**

6. The affidavit of the Investigating Officer No. 60315 PC Robert Ochola of DCI Kaloleni, was sworn on 20<sup>th</sup> February, 2019. It is to the effect that after the accused herein allegedly killed the deceased, who was his father, he ran away from their home in Matolani village Kaloleni to Taveta border where he switched off his phone. He changed his cell phone line from 0719xxxxxx to 0739xxxxxx which rendered the police unable to apprehend him for 6 months.
7. The Investigating Officer avers in paragraphs 6 and 7 of his affidavit that the accused used to live in a rental house in Mishomoroni, Mombasa but none of his family members knew what he was doing for a living or the exact location of his house since he never divulged such information to them. They are therefore apprehensive that if he is admitted to bond/bail, he is likely to abscond trial because he does not have a fixed abode.
8. In paragraph 8 of the affidavit, the Investigating Officer deposed that there is apprehension among witnesses, particularly an eye witness by the name of Shida Kahingu Kiboni, who is the accused person's step-mother, that her security will no longer be guaranteed if the accused is admitted to bond/bail.
9. Pursuant to a court order for a pre-bail assessment to be undertaken on the accused, the Probation Officer Mr. Mutisya Kioko, filed a report on 11<sup>th</sup> June, 2019.
10. He was of the view that the accused has a fixed abode in Kaloleni sub-county. In so far as the Community attitude is concerned, the report indicated that his family members felt that the accused was likely to go into hiding if admitted to bond/bail. They termed him as swift, with no strong links with other members of the family/community especially after relocating to Mombasa in search of a job.

11. The report further stated that since he left home, he had not been in touch with his family members and rarely traveled home to check on them but had lived a closed and solitary life. His family members were aware that he could easily jump bail and disappear without their knowledge. They were also aware that he had vanished for nearly 6 months after the offence was committed.

12. In concluding the pre-bail report, the Probation Officer was of the opinion that the accused was likely to disappear and fail to comply with court orders as put forth by his family members. It was reported that there was a social gap between the accused and his close family members and that if he was to jump bail, it would not be easy for them to locate him and it would lead to delay in having the case heard or to this case collapsing altogether.

13. Under the provisions of Article 49(1)(h) of the Constitution, an accused person is entitled to being admitted to bond/bail pending trial unless compelling reasons exist.

14. Section 123 of the Criminal Procedure Code makes provisions for the release of accused persons on bond/bail in certain instances. Section 123A (1) provides that -

***"In making a consideration on whether to release an accused person bond/bail the court has to take into account –***

***(i) The nature and seriousness of the offence;***

***(ii) The character, antecedents, associations and community ties of the accused person;***

***(iii) The defendant's record in respect of fulfillment of obligations under previous grants of bail; and***

***(iv) The strength of the evidence of his having committed the offence."***

15. Section 123(A)(2) of the Criminal Procedure Code provides that:-

***"A person who is arrested or charged with any offence shall be granted bail unless, the court is satisfied that the person-***

***(a) has previously been granted bail and has failed to surrender to custody and that if he is released on bail (whether or not subject to conditions) it is likely that he would fail to surrender to custody;***

***(b) should be kept in custody for his own protection."***

16. Two things are found in common in the pre-bail report and the affidavit sworn by the Investigation Officer. The first one is that the accused person has no strong ties to his family in Kaloleni. When he came to Mombasa in search of work, none of his family members knew what he was doing for a living. He never showed them the place he was residing. According to his family members he rarely went home.

17. Secondly, the Investigating Officer and the accused person's family members said in unison that after the accused person allegedly committed the offence, he went underground for almost six months. That was from 31<sup>st</sup> July, 2018 when the offence was alleged to have been committed to the month of December, 2018 when he was arrested and arraigned before this court.

18. The accused went to the extent of changing his cell phone line which made tracking him difficult. Police Officers however eventually got hold of him. The foregoing is evidence of a man who can easily take flight and vanish into thin air and be a fugitive to justice if he is released on bond/bail pending trial.

19. The character, antecedents and community ties of the accused person come to the fore. The information availed by his family members and the Investigating Officer have persuaded me to conclude that the accused person is not a right candidate for being released on bond/bail pending trial. The likelihood of him taking flight are real.

20. It is my finding that compelling reasons do exist for this court not to admit the accused to bond/bail pending trial. He shall remain in custody at Shimo- la-Tewa Prison pending the hearing and determination of this case.

It is so ordered.

**DELIVERED, DATED and SIGNED at MOMBASA on this 19<sup>th</sup> day of July, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

The accused person

Ms Ogwen for the DPP

