



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 12 OF 2019

REPUBLIC.....PROSECUTOR

VERSUS

JAMES MUTINDA1ST ACCUSED

SAMUEL MUISYO2ND ACCUSED

DANIEL NDEE3RD ACCUSED

RULING

1. Vide a ruling of this court dated 28/05/2019 the Machakos County Probation Officer was directed to prepare pre-bail reports regarding the three (3) accused persons herein. Earlier learned Counsel for the defence had filed an Application dated 29/04/2019 seeking for the release of the accused persons. The state through the investigating officer No.74786 PC. Timothy Sweta filed a replying affidavit in opposition to the said application.

2. The pre-bail reports were duly presented as directed. Learned Counsels for the defence, Prosecution and family of the deceased had an opportunity to peruse the said reports and made brief oral submissions.

3. Learned Counsel Mr. Kimeria for the accused persons submitted that the reports are favourable and hence the accused persons should be granted bond pending trial as their families are ready to avail sureties to stand for them. He further added that the report has also captured the victim impact statement upon interviewing the family members.

4. Mr. Tamata Learned Counsel watching brief for the family of the deceased submitted that the reports are the same in content despite the fact that the accused persons came from different places. Further, it was submitted that the reports have dwelt only on the family members of the accused persons while the family of the deceased have been left out as none was interviewed and therefore the reports being one sided should be rejected.

5. Mr. Machogu Learned Counsel for the prosecution submitted that the reports are not comprehensive in that the reports do not capture the correct place of residences of some of the accused persons for instance the 1st accused in his affidavit in support of the bail application indicates his place as Ngoleni sub-location yet no report from the area assistant chief has been filed in that regard. Learned counsel further submitted that the father to the deceased confirms that he was not interviewed save only for a phone call and that the family of the victim has not been interviewed at all. He finally submitted that the said reports be rejected and that a detailed one be prepared by the County Probation Officer Machakos herself.

6. The Pre-bail reports dated 24/06/2019 are in favour of the accused persons being granted bond on terms deemed by the court. The report further indicates that even though the victim's father still nurses some bitterness with the accused persons, he does not think that the accused are a threat to him as both live far off apart. The report also indicates that there is some enmity between the family of the deceased and their neighbours over land related issues.

7. I have considered the brief submissions of the three learned counsels. I have also considered the pre-bail reports presented on behalf of the accused persons herein. I find the following issues necessary for determination namely:-

i. Whether the pre-bail reports are sufficient for the purpose of determining the application for bond lodged by the accused persons.

ii. Whether the court can grant the bail sought.

8. As regards the first issue, it is noted that the Learned Prosecutor and counsel watching brief insist that the pre-bail reports are not that comprehensive in that the family of the deceased were not interviewed. A perusal of the reports reveal that the family of the deceased had been interviewed as there is a victim statement that indicates the views of the father to the deceased. Again other family members of the deceased were interviewed only that they did not wish to have their names disclosed and who were of the view that the accused persons might not harm the father of the deceased as he lives in Nairobi. The community members have nothing adverse on the accused persons as they relate well with them and further that they are not flight risks or pose any threat to the community or the victim's family. Learned counsel for the Prosecution has submitted that reports from the areas where some of the accused persons such as the 1st accused hail have not been presented. However, I note that the said areas or villages are covered by the senior chief Mitaboni location as well as the Assistant County Commissioner Kathiani Sub-county whose officials were indicated to have been interviewed and their inputs considered in the pre-bail reports. In the premises I am satisfied that the pre-bail reports are comprehensive and sufficient for the purposes of determining the bail application dated 29th April, 2019. I am not certain that a fresh report would reveal something completely different from the present reports which had been prepared by a Probation Officer working under the guidance and supervision of the County Probation Officer Machakos.

9. As regards the second issue, this court had earlier received the rival submissions regarding the defence application for bond pending trial. Indeed Article 49(1) (h) of the Constitution provides that an accused person is entitled to be released on bond pending a charge or trial unless there are compelling reasons not to be released on bond. The state through the investigating officer No.74786 PC Timothy Sweta filed a replying affidavit dated 13/05/2019 wherein he deponed *inter alia*: *that the safety of the eyewitness might not be guaranteed if the accused persons are released on bond before conclusion of the matter; that the 3rd accused person holds a position of influence in the area as an assistant chief; that it might be difficult to arrest another suspect still at large.*

10. Looking at the averments by the investigating officer I find the reasons furnished therein do not amount to compelling reasons warranting a denial of bond for a number of reasons. Firstly, the pre-trial reports are favourable to the accused persons as they have captured all the prevailing circumstance regarding the accused, the victim's family and the community. Secondly, the alleged incident of murder took place in June, 2017 whereas the prosecution only presented the accused persons to court in March, 2019 a whole period of almost two years. There is a letter dated 18/3/2019 from the office of the DPP Machakos directing the OCS Kathiani police station to proceed and arrest the three accused persons and another who is still at large and charge them with the present offence. It would appear therefore that the accused persons had been at their homes and places of work since the alleged incident until the time of their arrest and arraignment. There is no evidence that during that time they were a threat to any of the family members of the deceased or community members. It is only after they were arrested and charged that the prosecution is now opposed to their being released on bond. I am not convinced that compelling reasons have been furnished to justify denial of bond to the accused persons. The pre-bail reports are favourable and confirm that there are sureties who will stand for the accused persons. The main consideration when dealing with a request for bond is whether the accused will avail himself or herself to the court as and when required. Other relevant factors include nature of the charge, gravity of the punishment upon conviction, likelihood of the accused interfering with witnesses etc. According to the investigating officer herein, the accused persons will interfere with the witnesses whose safety will be endangered if the accused are released on bond. However, the issue of security of witnesses and members of the community lies squarely upon the shoulders of the state to provide. The issue of the accused persons being a danger to the witnesses and members of the community did not at all arise from the time of the incident two years ago and has now been raised after their arrest and arraignment. This leads me to come to the conclusion that the issues raised by the investigating officer are mere allegations which cannot be taken to amount to compelling reasons. In the case of: **Republic = Vs = Danson Mbinya & anon [2010] eKLR** Justice Makhandia (as he then was) held as follows:-

“If the state wants the accused deprived of his rights to be released on bond, then it (state) must satisfy the court that it would not be in the interest of justice to make an order granting bail/bond.”

11. As no compelling reasons have been furnished by the prosecution, I am satisfied that there are no impediments to the accused persons being released on bond. In any event the pre-bail reports filed herein are favourable and support the release of accused persons on bond. Consequently, I allow the defence application dated 29th April, 2019 in the following terms:-

- a. Each accused is released on bond of Kshs.1 million plus one surety of a similar sum.**
- b. The sureties to be approved by the Deputy Registrar of this court.**
- c. Each of the accused persons upon release must attend court during mention and hearing dates without fail until the final determination of the case or until further orders.**
- d. In default to observe these conditions, the bond shall stand cancelled and the accused plus his surety shall be called to account.**

It is so ordered.

Dated, signed and delivered at Machakos this 8th day of July 2019.

D. K. KEMEI

JUDGE