



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL CASE NO. 14 OF 2019

IN THE MATTER OF ARTICLE 49 AND ARTICLE 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 123 OF THE CRIMINAL PROCEDURE CODE

THE STATE.....PROSECUTOR

VERSUS

PAULINE KANINI PAUL ALIAS KATITU.....1ST ACCUSED

BEATRICE KIAMBI KALII.....2ND ACCUSED

TIMOTHY DAUDI MULI.....3RD ACCUSED

MBUVI KILUNDO alias PAPA.....4TH ACCUSED

RULING

1. By chamber summons dated 16th May, 2019 indicated as being brought under Article 49(1)(h) of the Constitution, counsel for the applicants sought to move the court to grant the applicants bail pending the hearing and determination of this matter. The applicants requests that the Honorable Court grant them bail pending the hearing and determination of the case because the 2nd and 3rd accused are husband and wife with five children who are minors and require their parents and they have two aged parents who depend on them; and that the 1st accused is a single mother who has three children and she is not a flight risk. That they undertake to avail themselves to court as and when required, to abide by the conditions as set by the court for grant of bond/bail pending the hearing of the matter and they seek that the application be allowed.

2. The State opposed the application vide a replying affidavit that was sworn on 27th May, 2019 by No. 63424, Pc Isaac Tunoi. The deponent averred that after the commission of the offence, the members of the public wanted to lynch the 1st accused who took off in her vehicle to an unknown location and after her arrest her property was destroyed and she is an influential business person who is likely to interfere with some of the other eye witnesses. The deponent averred that the grant of bail is a matter of discretion that is subject to compelling reasons adduced by the prosecution.

3. The counsel for the 1st accused orally submitted in support of the application that denial of bond will make the 1st accused suffer as a single parent. Counsel for the 2nd and 3rd accused submitted that the replying affidavit relates to the 1st accused hence the 2nd and 3rd accused ought to be released on bond. Counsel for the state in opposition to the application submitted that there are compelling reasons why the accused persons ought not to be released on bail as indicated by the fact that the accused persons property was destroyed hence an indication of anger by the community and emphasized that there is need for a probation report so that the ruling in respect of the application be subject to the same.

4. The issue for determination is whether the court can grant the orders sought.

5. According to the charge sheet, the applicants were jointly charged with one count of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The applicants' case is that they are entitled to bond for the reasons stated in the respective affidavits.

6. It is important to point out that grant of bail and bond is an exercise of discretion by a trial court. The Bail and Bond Policy guidelines of the Judiciary at page 25 to 26 has proposed that the court may request for a bail report where it considers that it does not have sufficient

information to make a fair and appropriate bail decision, including the following instances:

- a. Where there is doubt on the information on the accused person relating to the grant of bail; or*
- b. Where the prosecution objects to bail, with plausible reasons; or*
- c. Where the accused person has been granted bail but fails to meet bail terms and seeks review of those terms; or*
- d. Where the victim of the crime contests the grant of bail or applies for review of bail conditions; or,*
- e. On the court's own motion where it deems necessary.*

7. The Guidelines recommend that officers of the probation and aftercare service should prepare reports as soon as practicable but not later than two weeks from request. The argument has been that there is need to balance the grant of bail with the needs of the victims.

8. In this regard, this court had due regard to the replying affidavits on record that raised apprehensiveness of the prosecution towards the grant of bail to the 1st accused person and the reasons advanced by the 2nd and 3rd accused who are said to be husband and wife and there is no plausible evidence of the same and therefore the circumstances raised therein necessitate the court to make an informed decision as to whether or not it is fair to grant or to refuse bail.

9. In the circumstances foregoing, having considered the application, it was the considered opinion of this court that officers of the probation and aftercare service should prepare reports in respect of the accused person to enable the court make an informed decision. Accordingly, this court hereby stays the decision until the said report is availed to the court. To this end, the following orders are hereby made:

- a. The Machakos County Probation officer is directed to prepare a pre-bail report on the accused persons and file the same in court.*
- b. The matter shall be mentioned in two weeks for further orders.*

It is so ordered.

Dated and delivered at Machakos this 11th day of July, 2019.

D.K.KEMEI

JUDGE