



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL CASE NO. 34 OF 2018**

**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**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**ALPHONCE MUTHINI.....ACCUSED**

**RULING**

1. By chamber summons dated 9<sup>th</sup> April, 2019 indicated as being brought under Article 21(1), 49(1)(h) of the Constitution learned counsel P.M. Mutuku and Co. Advocates for the applicant sought to move the court to grant the applicant bail pending the hearing of this matter. The applicant requests that the Honorable Court to grant him bail pending the hearing and determination of the case because he has a constitutional right to be released on bond/bail; that he undertakes to avail himself 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 he believes no compelling reasons which would work against his release on bail or bond have been laid by the prosecution because investigations have already been completed.

2. The State opposed the application vide a replying affidavit that was deponed on 9<sup>th</sup> May, 2019 by No. 72450, Cpl Kennedy Cheramboss. The deponent averred that the accused person was arrested in Taita Taveta and yet the offence was committed in Machakos. Therefore the accused's person's conduct after the commission of the offence creates an apprehensiveness that he may abscond from the jurisdiction of the court if granted bond. The deponent averred that the safety of the accused in his community may not be guaranteed because the community members are still bitter with him and further that the accused is likely to interfere with the key witnesses. He averred that the grant of bail is a matter of discretion that is subject to compelling reasons and is subject to compelling reasons adduced by the prosecution.

3. The counsel for the applicants orally submitted in support of the application that there is no report by any village elder that the life of the accused may be in danger. 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 elicited on the replying affidavit and emphasized that there is likelihood of interference with the investigations and urged the court to reject the application.

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

5. According to the charge sheet, the applicant was 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 he is entitled to bail pending trial and Article 49(1)(h) of the Constitution safeguards this right to bond or bail pending trial.

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. In this regard, 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. The said report was availed to the court.

8. In the said report, the Probation Officer found that the accused studied up to class six due to family conflicts. According to the report, accused assaulted his father and left him with injuries and he now moves with a wheelchair. The family members are unable to secure bond for the accused as they do not have ready title deeds and have no one to secure bond for him.

9. According to the report the family members live in fear that they may be harmed upon his release.

10. The report indicated that the community is hostile and the family of the deceased fear that he may jump bond and that the community members blamed his family members for his actions and thus the family members had to seek refuge elsewhere.

11. According to the report, the community members burned down his house and are baying for his blood and view that he is a threat to the community and to the witnesses who live a short distance from him.

12. I have considered the circumstances in which the offence was committed and the effect on the family and the community over the same. I have also considered the Probation Officer's report as well as the oral submission made before me as well as the position adopted by **Mr. Machogu**, the learned prosecution counsel.

13. **In Kenny's outlines of Criminal Law, 19<sup>th</sup> Edition at Page 586 Note 708** the learned author advised Courts in exercising the discretion to admit a remand Prisoner to bail to consider what likelihood there is of his failing to appear for trial.

14. In the instant case I have considered the following factors:-

*a) The need to give the applicant's quest for bail the full benefit of his constitutional rights and freedoms.*

*b) The apprehension that the applicant may cause lawlessness to society if released on bail.*

*c) The apprehension that there is a risk of the Applicant absconding.*

*d) The apprehension that the Applicant has any likelihood of interfering with the course of Justice.*

*e) The seriousness of the charges against the Applicant.*

*f) The apprehension that the Applicant is likely to commit other offences while on bail.*

*g) The indication that the Applicant is violent or is likely to threaten violence against witnesses and community members.*

*h) The indication that the Applicant is likely to interfere with the prosecution's witnesses.*

*i) The status of the case that the offence was as per the charge sheet allegedly committed on 22<sup>nd</sup> September, 2018, that is not more than a year old.*

*j) The Constitutional requirement that the Applicant must be presumed to be innocent until he is proved guilty or until he pleads guilty.*

*k) The caution that bail should not be refused as a form of punishment for the Applicant.*

*l) The absence of sureties within the jurisdiction of this Court who are ready to undertake that the Applicant shall comply with the conditions of his bail.*

*m) The fact that the Applicant is unmarried and has no children and leads an unsettled existence, with no fixed place of abode within the Jurisdiction of this Court now that his premises have been torched by irate members of public.*

*n) Absence of any information from the Respondent that there are other charges pending against the Applicant.*

15. Taking into account all the circumstances of this case, I see there are compelling reasons to deny the accused person bail/bond and decline to allow the application.

16. The applicant is free to move the court to review the matter once there is evidence of compelling circumstances.

It is so ordered.

Dated and delivered at Machakos this 14<sup>th</sup> day of October, 2019.

D. K. Kemei

Judge