



**REPUBLIC OF KENYA**

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

**CRIMINAL CASE NO. 28 OF 2018**

**REPUBLIC**

**VERSUS**

**1. JOHN MUSYIMI MAKAU )**

**2. ANTHONY MAKAU MUSYIMI )**

**3. MAURICE MUSYOKI MAKAU ).....ACCUSED/APPLICANTS**

**RULING**

1. The three accused persons herein **John Musyimi Makau, Anthony Makau Musyimi** and **Maurice Musyoki Makau** have been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the night of 18<sup>th</sup> and 19<sup>th</sup> September, 2018 at Ngonda area of Matungulu Sub-County within Machakos County jointly with others not before court murdered **Peter Ndunda Masyuko**.

2. All the three accused persons denied the offence thus necessitating a trial. The said trial is yet to commence in earnest. An application has been lodged by Learned Counsel for the accused persons seeking that they be admitted to bail/bond pending the hearing and determination of the matter. The grounds in support of the application are that the Applicants are law abiding citizens with permanent places of abode, that there are no compelling reasons warranting a denial of bond and finally that they are ready to abide by the conditions to be imposed by the Honourable court.

3. The state filed replying affidavits through the investigating officer and a relative of the deceased. The investigating officer No.77258 Pc. Peter Orwa swore an affidavit dated 16/05/2019 in which he deponed *inter alia*; that the 1<sup>st</sup> accused had been an employee of the deceased prior to the incident; that the 1<sup>st</sup> and 2<sup>nd</sup> accused are brothers while the 3<sup>rd</sup> accused is their father; that the 1<sup>st</sup> accused has made attempts to contact a daughter of the deceased over the case and as a result she is fearing for her life; that the release of the accused persons will lead to interference of the key witnesses some of whom had been close to the suspects prior to the incident and that the accused might inflict fear and intimidate them.

Ann Wavinya Ndunda a daughter of the deceased herein swore an affidavit dated 19/11/2018 in which she deponed that she received two phone calls and text messages from the suspects and a fellow convict requesting her to visit them in remand prison to discuss the criminal case; that as a result she is worried about her safety and that of her family members although a report has already been booked with the police.

4. Learned Counsels agreed to file written submissions. However it is only counsel for the defence who filed submissions. Miss Wata for the defence submitted that under Article 49(1)(h) of the Constitution the accused persons are entitled to be released on bond pending trial since the accused are presumed innocent until proved guilty. Counsel pointed out that the affidavit by the daughter of the deceased should not be relied upon as she is not a witness and further has not been admitted as a victim and further the alleged phone calls made to her by suspects have not been authenticated. Counsel further submitted that the key witnesses have not sworn affidavits confirming their fears.

5. Mr. Machogu Learned Counsel for the Prosecution did not file submissions but indicated that he is not opposed to the release of the 2<sup>nd</sup> accused. However he is opposed to the release of the 1<sup>st</sup> and 3<sup>rd</sup> accused persons based on the averments by the investigating officer and daughter of the deceased.

6. This court called for pre-bail reports on the accused persons. They were duly availed and are all dated 25/07/2019. The reports reveal that all the accused persons are members of one family in that the 1<sup>st</sup> and 3<sup>rd</sup> accused are brothers while the 2<sup>nd</sup> accused is their father. The reports further reveal that the community members and local administration confirm that the accused persons are not a threat to them and they could be considered for release on bond. The family of the deceased are said to be bitter over the loss of their family member and are apprehensive of their safety if accused are released on bond and they have further pointed fingers at the 1<sup>st</sup> and 3<sup>rd</sup> accused persons for

trying to contact a family member over this case. However the deceased's family seem not to have any objection towards the release of the 2<sup>nd</sup> accused who appears not to pose any threat to them in any way.

7. I have considered the application by the defence and the rival affidavits as well as the pre-bail reports. Following the promulgation of the Constitution in 2010 bail is now a right of every accused person under Article 49(1)(h) and that they are entitled to be released on bond pending a charge or trial unless there are compelling reasons not to be released. It is upon the prosecution to present such reasons before the court for consideration. Some of the frequent compelling reasons as pointed out in the case of **Republic =Vs= Ngunya & Another [2011] eKLR** include the following:-

*(i) The nature of the charge.*

*(ii) The strength of the evidence which supports the charge.*

*(iii) The gravity of the punishment in the event of conviction.*

*(iv) The previous criminal record of the accused if any.*

*(v) The probability that the accused might not surrender himself for trial.*

*(vi) The likelihood of the accused interfering with witnesses or he may suppress any such evidence as incriminating him.*

*(vii) The probability of a finding of guilt.*

*(viii) Detention for the protection of the accused.*

*(ix) The character, antecedents, associations and community ties of the accused.*

8. From the replying affidavits of the investigating officer and daughter of the deceased, there is fear that the 1<sup>st</sup> and 3<sup>rd</sup> accused persons are likely to interfere with witnesses as it had been alleged that they had tried to contact the daughter of the deceased concerning the case herein. I note that no evidence in the form of phone transcripts or short message service (sms) were availed to back the said assertion. Generally the pre-bail reports appear favourable for an order of release on bond as the accused persons are said not to pose any threat to the community and further they have their fixed place of abode within the community. The responsibility to provide security for all citizens rests with the state which is adequately equipped with the requisite security apparatus to handle issue of security. The state does not oppose the release of the 2<sup>nd</sup> accused who is the father to both 1<sup>st</sup> and 3<sup>rd</sup> accused. All the three accused persons are members of one family and it would be unfair to let go of one and leave the others in remand. The bond terms or conditions to be imposed should be sufficient to keep a leash on the accused and their sureties. I am not satisfied that compelling reasons have been given by the prosecution to warrant a denial of bond pending trial.

9. In the result, I find merit in the application by the three accused persons to be released on bond pending trial. Consequently I proceed to make the following orders:-

*(a) Each accused is ordered released on bond of Kshs.1,000,000/= plus one surety like sum.*

*(b) The Deputy Registrar of this court to approve the sureties.*

*(c) Each accused is ordered not to interfere with the witnesses or even make any contact whatsoever during the pendency of this matter.*

*(d) The accused persons shall attend court at all times during mention or hearing dates without fail until the final determination of the case or until further orders.*

*(e) In default to adhere to the terms of bond, the bond shall stand cancelled and the accused plus their sureties called to account.*

Orders accordingly.

Dated and delivered at Machakos this 3<sup>rd</sup> day of October, 2019.

D.K. Kemei

Judge