



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CRIMINAL CASE NO. 17 OF 2019**

**REPUBLIC.....PROSECUTOR**

**VERSUS**

**JOSHUA MUEKE MUTUNGA ALIAS MOSES MUTUNGA .....1<sup>ST</sup> ACCUSED**

**JOHN KITUMBI MUNYOKI.....2<sup>ND</sup> ACCUSED**

**MUTUA MUASYA.....3<sup>RD</sup> ACCUSED**

**KOKI KIMANZI.....4<sup>TH</sup> ACCUSED**

**RULING**

**1. Joshua Mueke Mutunga alias Moses Mutunga** (1st Accused) is charged with the offence of **Murder**. He seeks to be released on bail pending trial.

2. The application is premised on grounds that he is an employee of the Kitui County Referral Hospital with a fixed abode; he is ready to be reporting to the Investigating Officer should bond terms require; the community where he hails is not against his release on bail therefore there is no threat to his life; he is ready and willing to participate in the trial till the end; and that he was out on bond during investigations and did not breach bail terms that had been set by the Subordinate Court. The Applicant swore an affidavit in support of the application.

3. The State/Respondent through **No. 93767 PC Ohuru Wycliff Onsando** deposed an affidavit in reply where he deposed that if released, the Applicant (Accused) will interfere with witnesses as some of the witnesses to be called to testify are his wife and girlfriend respectively, who were involved in a love triangle that resulted into the death of the Deceased. That some of the witnesses are casual employees who work under his supervision and he is likely to influence them. That after the act the Applicant facilitated his Co-Accused to flee from local limits of the jurisdiction where the offence was alleged to have been committed and he has continued to threaten the 2<sup>nd</sup> Accused with death following the confession that he made to the police. That following the 2<sup>nd</sup> Accused's confession before a Magistrate of threats to kill him, the state is apprehensive that he will threaten his wife and the wife of the Deceased who is suspected to be his girlfriend.

**4. Florence Mutheki Munyalo** swore an affidavit where she averred that she was apprehensive following the brutal murder of her son. She feared for her life and those of her relatives who had assisted in ensuring justice took its course.

5. In a rejoinder, the Applicant dismissed the allegations as mere emotions that could not be a basis of taking away the presumption of innocence.

6. The application was canvassed by way of written submissions. **Mr. Mwalimu**, learned Counsel for the Applicant urged that there were no threats to the Applicant's life if released on bond. That reasons given for the Applicant to be denied bail were not cogent. That the alleged witnesses who are alleged to be subordinate to the Applicant were not disclosed. That it is alleged the Applicant attempted to cause his Co-Accused to flee but at the time nobody had been charged. And no other Accused has filed an affidavit raising the allegations in the statement made under inquiry as opposed to being a confession.

7. Further, he argued that the defence had been supplied with statements recorded by the wife of the Applicant and of the Deceased and neither of them incriminated the Applicant. That no material has been placed before Court to curtail the Applicant from being released. And, to the contrary the Applicant has demonstrated the prejudice he will suffer if not released on bail. He called upon the Court to be persuaded by the case of **Republic vs. Richard David Alden (2016) eKLR** where a foreign national was granted bail.

8. In response, **Mr. Mamba**, learned Counsel for the State urged that in as far as the Applicant has a right to bail, it is not absolute. That serious allegations deposed amounted to compelling reasons.

9. **Mr. Kimuli**, learned Counsel representing a victim (mother of Deceased) of the offence argued that the application for bail was not merited following investigations conducted and emphasized what was stated by one of the Accused persons, an allegation that is still under investigation is an allegation to kill a person. That the mother of the Deceased does not have to provide empirical evidence of a threat to her life for she has legitimate fear.

10. Bail is a constitutional right. The purpose of bail is to ensure the Accused person turns up for trial. Ideally, the paramount reason as to why bail should be denied is if a person is a flight risk. The reason being that an Accused person is innocent until proven guilty. This was well put by **Farris C. J. in Rex vs. Hawken (1944) 2 DLR 116** when it was stated that:

**“The question of bail is sometimes misunderstood. When a man is accused he is nevertheless still presumed to be innocent and the object of keeping him in custody prior to trial is not on the theory that he is guilty but on the necessity of having him available for trial. It is proper that bail should be granted when the Judge is satisfied that the bail will ensure the Accused’s appearing at trial.”**

11. However, there may be situations that call for denial of bail and circumstances of each case differ. All factors must be weighed. Courts have alluded to various factors that may call for denial of bail that include: the character and antecedents of the Accused person; failure of the Accused to observe bail terms imposed on previous occasions; the strength of the evidence to be presented by the Prosecution is so strong such that it would make the person be tempted to abscond.

12. But, of relevance to this case is the likelihood of the Accused to interfere with witnesses, the relationship between the Accused person and potential witnesses and the need to protect the victims of the crime.

13. The Applicant relied on the case of **Republic vs. Dwight Sagaray & Others HCR.C No. 61 of 2012, Milimani** where it was stated that:

**“For the Prosecution to succeed in persuading the Court on this criteria (of interference), it must place material before the Court which demonstrate actual or perceived interference. It must show the Court for example the existence of a threat or threats to witnesses; direct or indirect incriminating communication between the Accused and close familial relationship between the Accused and witnesses among others ..., at least facts must be placed before the Court otherwise it is asking the Court to speculate.”**

14. It has been demonstrated by the State and admitted by the Applicant that some of the potential witnesses herein are his wife and the wife of the Deceased who is alleged to have been his girlfriend. Although it is argued that the statements recorded that have been availed to the defence do not incriminate the Accused person, ordinarily a witness giving evidence in chief is subjected to cross examination. Whatever evidence will be tendered can only be left to conjecture. Therefore, these are witnesses who are in a position that can easily be influenced. Therefore, the apprehension on the part of the Prosecution is logical.

15. It is contended that the Applicant may not only be a threat to the two (2) potential witnesses aforementioned but may also be a threat to his Co-Accused and the public including the victims of the offence.

16. It is also alleged that the Applicant may not only obstruct the course of justice by being a threat to potential witnesses but his Co-Accused. The fact that the Applicant was previously arrested and released on bail may suggest that he may not be suspected to commit the same offence but his is a case where the 2<sup>nd</sup> Accused herein came up with an allegation and complained to the police whereafter he recorded a statement with the police raising serious allegations regarding his fears. Investigations are underway as the Applicant is the suspect. And following the allegations the 2<sup>nd</sup> Accused had to be remanded at a different prison from where the Applicant is remanded.

17. It is the duty of this Court to ensure by releasing the Applicant on bail he does not find himself in a situation where there will be allegations of another offence having been committed.

18. With that in mind, and considering that the Applicant is innocent until proven otherwise, I do appreciate that the Applicant has demonstrated that he is in gainful employment which would call for the entitlement to be out on bail. The pre-bail report shows that he has a fixed abode where he resides with his wife and child. If this Court were to be persuaded to release him on bail following allegation made it would have to attach conditions for instance deterring him from communicating and/or residing with one of the potential witnesses. But what is apparent is that he would go back to their matrimonial home.

19. It is therefore imperative for this Court to defer the question of bail until the wife of the Accused and the wife of the Deceased testify. In the result, the State is directed to avail the witnesses to testify on a nearer date which I set as **5<sup>th</sup> December, 2019**.

20. It is so ordered.

**Dated, Signed and Delivered at Kitui this 19<sup>th</sup> day of November, 2019.**

**L. N. MUTENDE**

**JUDGE**