



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 16 OF 2019

CONSOLIDATED WITH

CRIMINAL CASE NO.19 OF 2019

REPUBLIC.....STATE

VERSUS

JOSEPH MAKAU MUSYOKO.....1ST ACCUSED

MOSES MULI MUSAU.....2ND ACCUSED

RULING

1. **Joseph Makau Musyoko** and **Moses Muli Musau** are 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 6th day of April, 2019 at Kailulini village, Matuu location within Yatta Sub- County in Machakos County they jointly murdered **Daniel Mwangangi Musyoko**.

2. Both accused denied the charge thus warranting a trial. However, the trial is yet to commence. The defence have made a request that the accused persons be released on bond pending trial. The state is opposed to the release of both accused on bond and has filed affidavits sworn by the investigating officer, wife to the deceased and mother to the 1st accused. The investigating officer No.76697 Corporal Lawrence Mwenje deponed that some of the witnesses are family members and neighbours to the accused persons and there is apprehension that they may interfere with witnesses if released on bond. Naomi Kathini Mwangangi is the wife of the deceased and that she averred that the release of accused will put her life in danger since prior to the death of her husband the accused had been issuing death threats to her family. Martha Mukulu Musyoka is the mother to 1st accused herein and who averred that the life of her amputee husband and remaining son will be in great danger if the accused are released on bond. She further confirmed that there has been a long standing land dispute between the accused and deceased over sub-divisions of the family land. Muthusi Musyoka filed an affidavit dated 22/05/2019 in which he deponed that he is a brother to the 1st accused and deceased. He further averred that the accused persons had been issuing threats over some long standing land disputes and therefore he is apprehensive that his life and that of his family will be in danger if the accused are released on bond. The 1st accused swore a replying affidavit dated 24/07/2019 in which he vehemently opposed the assertions by the investigating officer and the family members and maintained that none of the alleged threats have been made known to the police for action. The 2nd accused adopted and sought to rely on the said replying affidavit.

3. It was agreed that submissions be filed. However, it is only Counsel for the 1st accused who filed submissions. The counsel for the 2nd accused sought to adopt the said submissions. Learned counsel for the prosecution relied on the affidavits filed in opposition to the bail/bond request. It was submitted that the bail and bond policy guidelines that the primary consideration by the court is whether the accused person will appear for trial and which should be weighed against the compelling reasons advanced by the prosecution. It was also submitted that the prosecution has not shown that the accused person has control and influence over the witnesses. It was finally submitted that the accused persons are innocent until proved guilty and that they are willing to abide by the terms set by the court in granting bond or bail.

4. I have considered the application presented on behalf of the accused persons and the rival affidavits as well as the submissions. I have also considered the pre-bail reports. The only issue for determination is whether the court may grant the order sought. Under Article 49(1)(h) of the Constitution an accused person is 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 to the court for consideration. The import of article 49(1)(h) of the Constitution is hinged on the presumption of innocence until one is proved guilty. Both the accused persons have denied the charges and as such they are deemed innocent until the contrary is proved. Some of the frequent compelling reasons as pointed out in the case of **Republic -v- Ngunya & Another [2011] eKLR** which include the following:-

- (a) *The nature of the charge.*
- (b) *The strength of evidence which supports the charge.*
- (c) *The gravity of the punishment in the event of conviction.*
- (d) *The previous criminal record of the accused if any.*
- (e) *The probability that the accused might not surrender himself for trial.*
- (f) *The likelihood of the accused interfering with the witnesses or he may suppress any evidence as incriminating him.*
- (g) *The probability of a finding of guilt.*
- (h) *Detention for the protection of the accused.*
- (i) *The character, antecedents associations and community ties of the accused.*

The four affidavits filed by the investigating officer, wife of the deceased, mother and brother of the 1st accused raise apprehension on the part of the witnesses who are relatives of the 1st accused. They all aver that the 1st accused is known to be a violent person who has threatened them in the past over a long standing land dispute and that his release on bond will endanger their lives. None other than the mother to the 1st accused has raised fears for her life and those of her husband and children. The pre-bail reports paint a negative picture of the 1st accused and the report is not favourable for his release on bond. The wife of the deceased who is actually the 1st accused's sister in-law has indicated that she would flee from her matrimonial home if the 1st accused is released on bond and further claimed that her children are living in fear. What emerged from the affidavits and the pre-bail reports is that the 1st accused is known for being violent and who always walks with a panga and issuing threats to kill the family members. The family members are reported to have sought help from the local administration to no avail though the said administration confirm that indeed the 1st accused is a violent person and a threat to the family members and the public and that they are opposed to his release for his own safety and security of the larger family. The pre-bail reports appear to indicate that the 2nd accused is not a threat to the community and thus there is no opposition to his being released on bond.

5. Going by the affidavits filed on behalf of the prosecution, what emerges is that there is apprehension that the 1st accused is likely to interfere with the witnesses most of whom are family members. It has been indicated that the 1st accused is a terror to the family who used to live in fear even prior to the incident and that the situation after the incident is now quite dire. They appear to fathom the ramifications if the 1st accused if released on bond. It is not in doubt that the witnesses being family members of the 1st accused will feel intimidated going by the past relationship prior to the incident. I find it would be prudent to decline the bond request by the 1st accused which can be renewed after the vulnerable key witnesses have tendered their testimonies. I am satisfied that the interference with the witnesses is a real possibility. In the case of **Republic –v- Gerald Mutuku Nyalita [2015] eKLR** Muriithi J had this to say:-

“In considering the likelihood of interference with witnesses as a compelling ground to refuse bail in terms of Article 49(1)(h) of the Constitution of Kenya, the Prosecution must, in my view demonstrate a more than whimsical probability of interference. It must be shown that the accused persons are in such close family filial or other relationship which creates an environment of control and influence of the witness by the accused person such as to interfere with the ability of the witness to give evidence before court in a free and truthful manner thereby affecting either the credibility of the witness in his or her testimony before the court or the very ability of the witness to attend court.....”

The present circumstances appear to agree with the holding of the learned Judge. The witnesses herein are close family members and who have sworn affidavits expressing their real fears toward the 1st accused if released on bond. The averments disclose the fact that prior to the incident the witnesses had been going through tough times as far as the 1st accused is concerned as he had been a pain in the neck to them. They indicated that despite the land dispute being resolved by the local administration the 1st accused would uproot the beacons and threaten them with dire consequences if they dared work on the farm. I find the fear expressed by the witnesses who comprise family members to be real and that the same raises a compelling reason to deny the 1st accused's quest to be released on bond. Even through the responsibility to provide security to citizens rests with the state, I am convinced that releasing the 1st accused before reception of evidence from the vulnerable witnesses would not be appropriate in the circumstances.

6. In the result it is my finding that the prosecution has presented compelling reasons for denial of the 1st accused from being released on bond until the family members who are witnesses have testified and thereafter he may be at liberty to renew his request for release on bond. As regards the 2nd accused I order that he be released on bond of Kshs.500,000/= plus one surety of like sum and upon release he is ordered to attend court on all dates until the final determination of the case and further ordered not to interfere with any of the witnesses failing which the bond shall stand cancelled.

Orders accordingly.

Dated and delivered in open court at Machakos this 13th day of November, 2019.

D. K. Kemei

Judge