



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 13 OF 2019

REPUBLIC.....STATE

VERSUS

KELVIN MUENDO MUNYAO.....1ST ACCUSED

HARRISON KAUMBULU.....2ND ACCUSED

RULING

1. An application dated 11/07/2019 has been filed by counsel for the accused persons seeking that the accused be released on reasonable bail/bond pending the hearing and determination of the case herein. It is supported by the affidavits of the accused persons sworn on even date as well as grounds on the face thereof and which raise several entreaties *inter alia*: that the offence is bailable; that the applicants are law abiding citizens with no criminal records and have permanent places of abode; that the applicants having pleaded not guilty enjoy the presumption of innocence; that they are parents and they need to be released so as to attend to their children and family; that there are no compelling reasons to deny them the right to bail.

2. There was no response to the application by the prosecution. However learned counsel for the prosecution urged the court to consider the pre-bail report filed by the County Probation Officer.

3. The pre- bail reports filed herein are dated 31/10/2019. As regards the first accused, he is reported to be a very violent man in the area and goes by the nickname “*Taliban*” as he is feared by everyone in the area. Some of his family members are opposed to his release on bond. As regards the second accused, the members of the community took a negative view of him after the incident and in fact they raided his bar premises and looted everything therein and do not want him back in the community.

4. I have considered the pre-bail reports regarding the accused persons. Article 49(1) (h) of the Constitution provides that an accused person is entitled to be released on bond pending a charge or trial unless there are compelling reasons not to be released. The main consideration by the court when dealing with a request for bail is whether the accused will avail himself or herself to the court as and when required. Other relevant factors include nature of the charge, gravity of the punishment upon conviction, likelihood of the accused interfering with witnesses etc. Even though the pre-bail reports appear to suggest that the accused persons are unwanted in their areas, there are relatives who have agreed to post bail for them. It appears that the incident has had the effect of the community turning their backs on the accused persons. That is acceptable in view of the fact that the incident has angered the community so much so that they would not want to have anything to do with the accused persons who in their prisms view them as social misfits in the society and who should be avoided as much as possible. Likewise the bitterness by the deceased’s family members is natural as they have lost one of their own. It is noted that the only information presented to court is through the pre-bail report. Other than the accused’s affidavits in support of the bail application, there is no other rival affidavit filed by the prosecution. There is no affidavit by either the investigating officer or any of the prosecution’s witnesses opposing the release of the accused persons. Once the accused persons denied the charge, then they are presumed to be innocent until their guilt is proved. This right to be presumed innocent is guaranteed under Article 50 of the Constitution and hence the prosecution is under a duty to present compelling reasons to justify denial of bond to the accused persons. In the case of **Republic –v- Danson Ngunya & Another [2010] eKLR** Justice Makhandia (as he then was) held as follows:-

“If the state wants the accused deprived of his right to be released on bond, then it (state) must satisfy the court that it would not be in the interest of justice to make an order granting bond.”

It is my considered view that the prosecution has not discharged the duty of presenting the requisite compelling reasons to warrant a denial of bond. The issues raised in the pre-bail reports do not amount to compelling reasons without a response from the prosecution. There is already indications that there are sureties who are ready and willing to stand in for the accused persons and to ensure that they attend court as and when required. The said proposed sureties have vouched for the accused persons and have indicated that they will ensure that they will attend court without fail. I am therefore satisfied that there are no impediments to the accused persons being released on bond pending trial.

5. In the result the defence applications dated 11/07/2019 is allowed in the following terms:-

(a) Each accused is released on a bond of Kshs.1 million plus one surety of like sum.

(b) The sureties to be approved by the Deputy Registrar.

(c) Upon release the accused persons are ordered not to interfere with prosecution witnesses in any way and to attend court as and when required without fail.

(d) In default to adhere to the conditions the bond shall be cancelled and they together with their sureties called to account.

It is so ordered.

Dated and delivered at **Machakos** this **13th** day of **November, 2019**.

D. K. Kemei

Judge