



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CRIMINAL CASE NO. 8 OF 2018

CONSOLIDATED WITH CRIMINAL CASE NO. 32 OF 2018

REPUBLIC.....STATE

VERSUS

MARTIN MUTUNGA NDINDA.....1ST ACCUSED

JOSEPH WAMBUA MANYOLE.....2ND ACCUSED

JAMES NZAU KITAVI *alias* KITOKO.....3RD ACCUSED

RULING

1. The three (3) accused persons herein **Martin Mutunga Ndinda, Joseph Wambua Manyole and James Nzau Kitavi *alias* Kitoko** face a charge of murder contrary to section 203 as read with section 204 of the Penal Code. The particulars are that on the night of 12th and 13th day of February, 2018 at Kituluni Trading Centre in Matungulu Sub-County within Machakos County jointly with others not before court murdered Nicholas Mwendwa Muteti.

2. The accused persons have sought to be released on bond pending the trial.

3. The state opposed the application vide a replying affidavit of No.72450 Corporal Kennedy Cheramboss who averred that the accused persons are flight risks and if released they might jeopardize attempts to apprehend another suspect who is still at large. It was further contended that the accused are likely to interfere with witnesses who hail from the same village as the accused persons.

4. This court called for pre-bail reports on the accused persons. The same were availed and are dated 14/10/2019. The summary of the reports is that they are not a threat to the family of the deceased. The only point of departure is that the local administration seem to view them as social misfits who are a threat to the community and that their release will pose problems of security to the community as well as the accused's own safety.

5. Learned counsels filed their written submissions.

6. I have considered the defence application and the rival affidavits as well as the pre-bail reports. I have also considered the submissions. Under Article 49(i) (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. The compelling reasons are to be presented by the prosecution. Some of the frequent compelling reasons advanced by the prosecution included 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) ***Previous criminal record of the accused if any.***
- (v) ***Probability that the accused might not surrender himself for trial.***

(vi) The likelihood of interference with witnesses.

(vii) Detention for the protection of the accused.

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

The investigating officer has pointed out the fact that the accused are flight risks and that they might interfere with witnesses and further jeopardize attempts to apprehend another suspect still at large. One limb of the pre-bail reports indicate that the local administration has a negative view about the accused persons as they are viewed as social misfits while the other limb is favourable for their release on bond as the family of the deceased do not find them as a threat at all and in fact are not hostile as they relate well with them.

7. The pre-bail reports appear to take care of the prosecution's concerns leaving only the questions as to whether the accused persons will attend the trial for the charge facing them. This thus is the crux and which must now be the compelling reason relied upon by the prosecution. The investigating officer has averred that the accused persons are flight risks and likely to abscond. As this is the main consideration when considering an application for release on bond it is now my duty to scrutinize the reasons that have been advanced by the prosecution. According to Corporal Kennedy Cheramboss the accused persons are likely to abscond and thus interrupt the proceedings and delay justice to the kith and kin of the deceased. He also averred that they will interfere with witnesses namely Boniface Nthenga and Georgina Mbinya Kioko who reside in the same village. It is noted that none of the two witnesses has sworn affidavits alluding to the likely interference. The pre-bail reports indicate that the family of the deceased do not have any objection to the accused persons being released on bond. Again the family of the accused are ready to secure sureties for them. The contents of the affidavit by the investigating officer vide paragraph 9 thereof seems to suggest that the accused persons had been deeply involved in the murder of the deceased as they are the executioners of the crime and are likely to target or interfere with the witnesses. The accused persons upon denying the charges are deemed to be innocent until proved guilty and thus any allusion to their character as a bar to being released on bond must be handled with circumspection. It is obvious that once such an alleged incident takes place the alleged suspects are always seen with a different prism by members of the society who view them as guilty even though the courts are yet to establish their guilt. The averments of the investigating officer appears to mirror such a reflection from the villagers at Katulye village in Kyanzavi location of Matungulu Sub-County. As the family of the deceased are not opposed to the release of the accused on bond, I find that the reasons advanced by the investigating officer are not compelling by any standards and do not meet the threshold provided under Article 49 (1) (h) of the Constitution as they are mere allegations at best. For instance the claim that there is another suspect still at large who is likely to be kept away from the hands of the police if the accused are released is not convincing since the state has the requisite apparatus to track down the said suspect even if the accused are to be released on bond. In any event the bond terms to be imposed should be sufficient to keep a leash on the accused and their sureties and in the event of breach, punitive sanctions will ensue. There is therefore no likelihood that the accused will interfere with witnesses or even the runaway suspect. The pre-bail reports clearly indicate that the family of the accused are ready to provide sureties and to ensure their attendance in court. As the issue of the accused's attendance in court has been adequately addressed, I do not see any reason as to why they should not be released on bond pending trial.

8. In the result, I find the application by the defence has merit. The same is allowed in the following terms:-

(a) Each accused herein is released on a bond of Kshs. One million (1,000,000/-) plus one surety of like sum.

(b) The sureties shall be approved by the Deputy Registrar of this court.

(c) Upon release the accused shall attend court without fail during the hearing and mention dates until the final determination of the case or until further orders.

(d) The accused shall not in any way interfere with any of the witnesses for the prosecution.

(e) In default to adhere to these conditions, the bond terms shall stand cancelled and they together with their sureties called to account.

Orders accordingly.

Dated and delivered at **Machakos** this **9th** day of **December, 2019**.

D.K. Kemei

Judge