

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL CASE NO. 51 OF 2017

REPUBLIC.....PROSECUTOR

VERSUS

ANTHONY MUSAU NZIOKA.....ACCUSED

RULING

Anthony Musau Nzioka is charged with murder contrary to section 203 as read with section 204 of the Penal Code. The particulars of the offence are that on the night of 6th and 7th February 2017 at Spring Valley, Kayole in Njiru Sub-County within Nairobi County jointly with others not before the court murdered John Muli Mutua. The accused denied committing this offence. Hearing of this case has been scheduled for 24th, 25th and 26th September 2018.

The accused has filed a Notice of Motion dated 20th December 2017 and filed on 21st December 2017. He is seeking to be admitted to bail pending the hearing and determination of this case. The grounds in support of his application are found on the face of it and in his supporting affidavit sworn on 20th December 2017 to the effect that the accused has unqualified right to be presumed innocent until the contrary is proved; that he is ready and willing to cooperate with the authorities during the course of this trial; that he is a young man of 30 years and the only child of his single mother, is married and a father of two; that he does not hold a passport, comes from a very humble background and is not a flight risk; that the offence is bailable and that he will not interfere with witnesses. He urged this court to allow the application.

The application is opposed. In support of the opposition is a Replying Affidavit sworn by Police Constable Douglas Kahi to the effect that the right to bail under Article 49 (1) (h) of the Constitution is not absolute; that the prosecution has a strong case against the accused supported by key witnesses who may be interfered with by the accused; that the accused relocated after the commission of the offence to evade arrest until after six months when he was arrested; that there are other suspects who are at large; that the offence is serious and the accused may abscond; that most witnesses are known to the accused and he may intimidate them and that the accused has no fixed abode and may abscond the jurisdiction of this court.

In response, counsel for the accused submitted that the accused left Nairobi to his rural home after the incident giving rise to this offence because he was threatened by some people who claimed that he had killed one of their own. Counsel submitted that the accused had reported this threat to the police who advised him to leave the area.

I have considered this application. I am guided by the paramount consideration in bail applications being that the accused will turn up for his trial (see **Watoro v. Republic [1991] eKLR**). The main grounds in opposition of this application are that the accused might intimidate or interfere with witnesses who are known to him; that murder is a serious offence and the prosecution has strong irrefutable evidence and that the accused has no fixed abode and that he relocated from his residence after this incident. I have considered these grounds. Murder is a serious crime but despite this the law allows suspects for murder to be released on bail. The issue of strong and irrefutable evidence can only be ascertained after the said evidence is tested through cross-examination. On the issue of intimidation of witnesses, I take the view that the police brought the accused to face these charges because investigations are complete and that all statements from potential witnesses have been recorded. In my view the prosecution is expressing fears that are not backed by evidence.

On the issue that the accused went into hiding after this incident, the accused has explained that he relocated from Nairobi to his rural home because of threats to him by some people. He has not attached the OB extract of the report he allegedly made to the police to back that story up. I have noted from the statement of PC Douglas Kahi that the accused disappeared from Nairobi after the death of the deceased. Efforts to trace him through his cell number were unsuccessful until the night of 4th and 5th November 2017 when the accused was arrested in Mlolongo through the help of police officers from Kinyui Police Post. This puts the statement by the accused that he left Nairobi to his rural home at in Katheka in Machakos County for fear of his life after he was threatened to doubt. In my view the accused was fleeing for fear of arrest by the police. I find that on this issue alone, this court is persuaded that the availability of the accused for his trial is put to question if he were to be released on bond. I find there exists compelling reasons to deny the accused bond/bail. Consequently, the application dated 20th December 2017 is hereby declined. The accused shall remain in custody until this matter is heard and determined. It is so ordered.

Delivered, dated and signed this 8th February 2018.

S. N. Mutuku

Judge