



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 23 OF 2017

ONESMUS MUSYOKA MULI.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

1. **Onesmus Musyoka Muli** faces a charge of **Murder** contrary to **Section 203** as read with **204** of the **Penal Code**. On the **22nd** day of **February, 2018** he approached this Court by way of Notice of Motion seeking to be released on bail pending hearing and determination of the case.

2. The application is premised on the ground that the Applicant who has been in custody since the date of his arrest has the constitutional right of being released on bail pending trial. He reiterated the same averments in the affidavit in support of the application.

3. In response, **Mr. Mamba Vincent**, Counsel for the Respondent/State opposed the application on the grounds that the Applicant is likely to interfere with the Prosecution witnesses and that he is likely to abscond given the seriousness of the charges that he faces.

4. At the hearing, **Mr. Ndungu**, learned Counsel for the Applicant reiterated the fact that bail is a constitutional right. Regarding the allegation that he may abscond he stated that the names of witnesses he is likely to interfere with were not given and that there was no indication as to what the fear of the Prosecution is founded.

5. **Mr. Mamba** on the other hand argued that the Applicant/Accused had not demonstrated that he would be attending Court and being a member of the community where witnesses come from he may interfere with witnesses.

6. Circumstances which a Court must consider whether or not to grant bail were set out in the case of **Alhaji Mujahid Dukubo – Asari vs. Federal Republic of Nigeria SC 20A/2006** thus:

“- The nature of the offence.

- The strength of evidence which supports the charge.

- The gravity of the punishment in the event of conviction.

- The previous criminal record of the accused if any.

- The probability that the accused may not surrender himself for trial.

- The likelihood of the accused interfering with witnesses or may suppress any evidence that may incriminate him.

- Detention and protection of the accused.....” (Also see Republic vs. Danson Ngunyu & Another HCR.C No. 26 of 2008 – MSA).

7. A charge of murder is a serious one as it attracts upto a sentence of death. The Court however has the discretion to consider each case according to its circumstances. It is argued by the Prosecution that the Accused has not demonstrated that he will avail himself for trial. According to **Article 49(1)(h)** of the Constitution it is the Accused person’s constitutional right to be released on bail unless there are compelling reasons necessitating his incarceration. It is therefore the duty of the State to demonstrate that compelling reasons exist which call for denial of the Accused’s release on bail.

8. It is alleged that the Applicant/Accused may interfere with witnesses if released. It has been stated that it is not enough to allege that an Accused/Applicant will interfere with witnesses. Evidence should be adduced in favour of the State to support the allegations as a Court should not rely on flimsy allegations. (See **Republic vs. Jackton Mayende & 3 Others (2012) eKLR**; **Republic vs. Kokonya Mulisin (2013) eKLR**; and **Daniel Njuguna Mwicigi vs. Republic (2014) eKLR**).

9. In **paragraph 5** of the affidavit in reply the Prosecuting Counsel depones thus:

“That the application for bond/bail as envisaged in article 49(1)(h) as prayed in paragraph 6 of the applicant supporting affidavit is opposed on the ground that the applicant is likely to interfere with our witnesses who are yet to testify in this case.”

10. It was important for the officer to demonstrate if indeed the Applicant was likely to interfere with the witnesses and the basis of the apprehension. The allegation of the likelihood to abscond is also not supported by any evidence. In the circumstances I am not persuaded that there exists any compelling reasons that require the Applicant being denied bail. In the result, the application is allowed. The Applicant/Accused is hereby released on bond of **Kshs. 2,000,000/=** with a surety on a similar sum.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 17th day of May, 2018.

L. N. MUTENDE

JUDGE