



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL CASE NO. 19 OF 2017

MUUNDA KITAVI.....1ST ACCUSED/APPLICANT

GEDION KITAVI.....2ND ACCUSED/APPLICANT

DAVID KIMWELE KITAVI.....3RD ACCUSED/APPLICANT

SAMSON WAMBUA KILONZI.....4TH ACCUSED/APPLICANT

VERSUS

REPUBLIC.....PROSECUTOR/RESPONDENT

RULING

1. By way of Notice of Motion, the Applicants, Accused persons herein seek to be released on bail pending trial. The application is premised on grounds that the Applicants were arrested on the 1st day of **October, 2017** and charged in Court on the **17th May, 2018** when they entered a plea of not guilty; and that they are Kenyan citizens and entitled to bail terms subject to the discretion of the Court.

2. **Muunda Kitavi**, the 1st Applicant swore an affidavit in support of the application where he deposed that he was arrested and accused of murdering **Priscilla Nzisi Kitavi** whom he had no reason to kill; his continued incarceration is a violation of his constitutional rights having not committed any offence; he has been in custody for eight (8) months and has considerably suffered; he will not abscond from the jurisdiction of the Court; he will not frustrate the police investigations and it is in the interest of justice that he be released on reasonable bail terms.

3. **Gedion Kitavi**, the 2nd Applicant deposed an affidavit reiterating what was stated by the 1st Applicant and undertook to abide with bail terms to be set.

4. In response, **Mr. Mamba Vincent**, the learned Prosecuting Counsel filed a Replying Affidavit where he deposed that the Applicants were difficult to locate and are likely to abscond. That they were arrested in different locations and at different times since they were trying to hide from the police who were looking for them. Further, that they are likely to interfere with the Prosecution witnesses in event that bail/bond is granted.

5. The application was canvassed by way of oral submissions. **Mr. Mutunga** Counsel for the Applicants relied upon the grounds on the face of the application and what was averred by the Applicants. He emphasized the fact that the Applicants will neither abscond nor interfere with the Prosecution witnesses.

6. In reply, the Prosecuting Counsel opposed the application. He urged that the Applicants were difficult to locate having escaped to a neighbouring country at one point and having kept changing sim cards. He stated that the 2nd and 3rd Applicants escaped and were arrested in Garissa. He alluded to the case of one **Beatrice Mwendu** an alleged mother of the 1st Applicant who was yet to be produced in Court. He went on to state that the Applicants had no fixed abode and were likely to interfere with witnesses as the Deceased is their relative. That the Deceased was a co-wife of the 1st Applicant and there is bitter rivalry and acrimony over a piece of land according to a letter written to him by the **S.C.C.I.O., Mwingi Central**.

7. In reply, Counsel for the Applicants argued that the Prosecution has not told the Court that the Applicants were in Garissa because that is their place of work. With regard to the 1st Accused, no evidence has been given that she will harm any family member and that the general principle to be applied is that an Accused person is innocent until proven guilty.

8. I have considered averments of both the Applicants and Respondent (State). Principles of granting bail pending trial are enunciated in **Article 49(1)(h)** of the **Constitution of Kenya, 2010** that provides as follows:

“(1) An arrested person has the right—

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.”

The duty is upon the Prosecution to prove the existence of a compelling reason that calls for the necessity of having the Applicants incarcerated during trial.

9. To persuade the Court to deny an Accused person bail the Prosecution is duty bound to prove existence of compelling reasons. This must not be as a result of allegations. Cogent evidence must be provided.

10. Compelling reasons have been stated to include; the nature of the offence, the seriousness of the sentence to be imposed, the character and antecedents of the Accused, the likelihood that the Accused will fail to turn up for trial, the likelihood of interfering with witnesses, the requirement to protect the victim of crime and the Accused person himself, the relationship between the Accused and potential witnesses, the age of the Accused, public order and security imperatives (**See Alhaji Mujahid Dukubo – Asarin vs. Federal Republic of Nigeria S.C. 20A/2006**).

11. It is contended that the offence herein is serious, Applicants were difficult to locate, they are likely to abscond and are likely to interfere with Prosecution witnesses.

12. The offence herein is grave as it attracts upto a death sentence if convicted.

13. It has, however, been stated that the seriousness of the offence perse is not a sufficient ground to deny an Accused person bail. (**See Republic vs. Salim Said Nassoro & 2 Others (Nbi Misc. Criminal Application No. 351 of 2016)**)

14. The question to be addressed is whether there is a likelihood of the Accused absconding. The learned State Counsel swore an eight paragraph affidavit where he deposed *inter alia* thus:

“4. That I have read the supporting affidavits of all the applicants.

5. That the Court should consider the seriousness of the offence and be minded to note that all the applicants were difficult to locate and are likely to abscond in the event this honourable court is persuaded by Article 49(1)(h) of the constitution.

6. That both applicants were arrested in different location and at different time since they were trying to hide from the police who were looking for them.

7. That the applicants are likely to interfere with prosecution’s witnesses in the event bail/bond is granted by the Honourable Court.

8. That the matters deposed to hereinabove are true to the best of my knowledge, belief and information the sources and grounds whereof I have disclosed.”

15. The affidavit is so sketchy such that it does not demonstrate how the Applicants were difficult to locate and what suggests that they are likely to abscond. Other allegations that were brought up at the hearing should have been supported by evidence that was lacking. It was alleged that the Deceased was a co-wife of the 1st Accused such that there is bitter rivalry and acrimony over a piece of land. It is surprising that no affidavit evidence to confirm the allegation was tendered.

16. It is alleged that the Applicants are likely to interfere with witnesses but the relationship between the witnesses and the Applicants has not been disclosed to enable the Court tell if indeed there is a likelihood of the alleged witnesses being interfered with.

17. In the premises the allegations by the Prosecution do not dislodge the position of the law that the Accused persons are innocent until proven guilty. In the circumstances I make orders thus:

i. Each Accused shall be released on bond of **Kshs. 5 Million** with two (2) sureties in similar sums.

ii. Upon release on bail they will be required to be reporting to the **D.C.I.O. Mwingi** every **5th day of each month** until crucial witnesses testify in the matter.

18. It is so ordered.

Dated, signed and delivered at Kitui this 22nd day of November, 2018.

L. N. MUTENDE

JUDGE