



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL CASE NO. 18 OF 2018 (MURDER)

REPUBLIC.....RESPONDENT

VERSU

LEWIS MUNENE GITONGA.....APPLICANT/ACCUSED

R U L I N G

1. This is an application dated 4/10/2018 seeking for orders for bail pending hearing and determination of this case. The accused faces a charge of murder contrary to **Section 203 as read with 204 of the Penal Code.**

2. It is alleged that on 16th July at Kambuthi Estate in Embu Township within Embu county, he murdered Martin Ndonga Mwangi. He pleaded not guilty.

3. The grounds supporting the application are that the hearing of the case is likely to take a long time due to the congestion of the court diary thereby prolonging the remand period. The applicant undertakes to abide with all the conditions that this court may impose in his release. He says he has a fixed abode and is not a flight risk.

4. The investigating officer Cpl. Martin Kilimo in his replying affidavit sworn on 3/10/2018 states that he was seized of the investigation of the case. He deposes that the key witness is the girlfriend of the accused person and that if he is released, he is likely to interfere with her. The witness lives with the family of the accused after the accused was arrested and charged with the offence. It is further stated that the accused has no fixed abode and is likely to abscond.

5. Ms. Nzekele who argued the application said that the key witness is the wife of the accused and that they have a child together. For that reason, she is not a compellable witness for the prosecution. The counsel urged the court to disregard the contents of the investigation officer's affidavit and allow the bail application.

6. This application is brought under Article 49(1)(h) of the Constitution which provides: -

(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.

7. The right to bail is under Article 49(1)(h) therefore, a constitutional right but at the discretion of the court in that the prosecution may present compelling reasons why the accused may not be released.

8. I have perused the relevant witness statements. The key witness one Harriet Muthoni described herself as a girlfriend of the accused.

9. She stated: -

I and my boyfriend namely Lewis Munene Gitonga were at my rented house at Sunrise area.

10. This statement dislodges the argument of the defence that the key witness was a wife of the accused at the time the offence was allegedly committed. At the time of offence, the witness states that the accused and herself were in her rented house. I draw a conclusion that if there is any child of the witness, it was born after the arrest of the accused.

11. However, this court is concerned with this bail application and any other issue arising under **Section 127 of the Evidence Act** may be handled at the right time during the trial.

12. The key witness having had a love affair with the accused has reason to fear for her security if the accused is released on bond. It cannot be ruled out that there is a high probability of interference with the key witness should the accused be released at this stage.

13. On the want of a fixed abode, the applicant may have no fixed abode because he did not mention where he lived before he was arrested. However, this is not a good reason for denying the applicant bail because a home inquiry report would address that gap.

14. I am of the considered opinion that the prosecution has established that their key witness' evidence is likely to be interfered with should he be release on bond at this stage. The prosecution has no problem with any other witness.

15. For this reason, I decline to allow the application for bail at this stage. The same may be considered after the key witness has testified.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF NOVEMBER, 2018.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mate for State

Ms. Muriuki for Nzekele for Applicant

Applicant